# In the Supreme Court of South Carolina

**IN THE ORIGINAL JURISDICTION**
**OF THE SUPREME COURT**

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**League of Women Voters of South Carolina**..........................................Plaintiff/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 .....................................................................Defendants/Respondents

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## PETITION FOR ORIGINAL JURISDICTION

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## INTRODUCTION

This case asks a novel and important question: does South Carolina's congressional redistricting plan—a plan that Respondents have repeatedly insisted is a partisan gerrymander—violate the South Carolina Constitution? Based on our State Constitution's text, purpose, and history, the answer is a resounding yes.

After the 2020 Census, South Carolina lawmakers reconfigured the State's congressional districts. According to those lawmakers, "one of the most important factors" of the congressional redistricting process was to "pull the [F]irst [Congressional District] red."[1] As Respondents amplified in the U.S. Supreme Court, the South Carolina Senate refused to pass any plan unless it had "*at least* a 53.5% Republican vote share in District 1."[2] To hit that "political target," Senators instructed their chief cartographer to excise heavily Democratic voting precincts from the First Congressional District (CD1) and move those voters into the Sixth Congressional District (CD6).[3] To quote Respondents' own legal brief: "it was about packing Democratic voters into District 6 to make District 1 more electable . . . with Trump numbers."[4] By manipulating electoral boundaries to move tens of thousands of Democratic voters from CD1 to CD6, lawmakers were able to nullify the influence of those voters and ensure that CD1—which had produced competitive elections in 2018 and 2020—would reliably produce a Republican winner for the next decade.

By the end of this process, the results were staggering. Almost 200,000 voters were moved back and forth between CD1 and CD6, more than twice as many as was necessary to balance their populations. Rather than adopting one of several alternative plans that split fewer counties and

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[1] Senator "Chip" Campsen testified under oath in *S.C. NAACP v. Alexander*, 3:21-cv-03302-MGL-TJH-RMG (D.S.C.), that partisan advantage was the "primary goal" of congressional redistricting. In the same trial, Representative "Jay" Jordan testified that the goal was to "pull the first red."

[2] Br. of Appellants at *14–15, *Alexander v. S.C. NAACP*, 2023 WL 4497083 (U.S. 2023) (No. 22-807) (emphasis added).

[3] *Id.*

[4] *Id.* (internal marks omitted).

showed greater fidelity to neutral criteria like compactness, contiguity, and respect for communities of interest, the General Assembly imposed needless and dramatic changes to CD1 that a unanimous panel of three federal judges found "made a mockery" of traditional redistricting principles.[5] As a result of those changes, CD1 is no longer anchored in Charleston (where it had been for a century) and no longer contiguous by land. But what the U.S. Supreme Court called a "political gerrymander"[6] was undoubtedly effective: the Republican incumbent—who narrowly won her seat in 2020—was easily reelected in CD1 by 14 points, and Republicans, despite comprising only about 55% of South Carolina voters, have an unassailable advantage in 86% of the State's congressional seats.

Respondents' partisan gerrymander violates the South Carolina Constitution four times over. To start, the text of the South Carolina Constitution guarantees "free and open" elections where every qualified elector "shall have an equal right to elect officers." S.C. Const. art. I, §§ 1, 5. More than protecting the right to cast a ballot, the State must also ensure that "every elector" is "granted *equal influence* with that of every other elector."[7] The Equal Protection Clause contains a similar guarantee. As this Court has held, "the right to vote is a cornerstone of our constitutional republic,"[8] and under the Equal Protection Clause the "dilution of the weight of a citizen's vote" is just "as nefarious as an outright prohibition on voting."[9] Given those guarantees, the South Carolina congressional redistricting plan—legislation that intentionally and effectively dilutes the influence of certain voters—is unconstitutional and must be invalidated.

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[5] *S.C. NAACP v. Alexander*, 649 F. Supp. 3d 177, 190 (D.S.C. 2023), *overruled on other grounds by Alexander v. S.C. NAACP*, 144 S. Ct. 1221 (2024).

[6] *Alexander*, 144 S. Ct. at 1242.

[7] *Cothran v. W. Dunklin Pub. Sch. Dist. No. 1-C*, 189 S.C. 85, 200 S.E. 95, 97 (1938) (interpreting Article I, Section 10) (emphasis added).

[8] *Bailey v. S.C. Election Comm'n*, 430 S.C. 268, 271, 844 S.E.2d 390, 391 (2020).

[9] *Burriss v. Anderson Cnty. Bd. of Educ.*, 369 S.C. 443, 451, 633 S.E.2d 482, 486 (2006) (citation omitted).

The congressional redistricting plan also violates the rights of voters to be free from viewpoint discrimination. Selectively diluting the influence of voters because of "their voting history, their association with a political party, or their expression of political views,"[10] is anathema to the principles of free speech, expression, and assembly enshrined in Article I, Section 2 of the South Carolina Constitution. Respondents admit that they instructed their mapdrawer to identify voters who voted for Joe Biden in the 2020 Presidential election and move those voters to a different district so that their vote would matter less. That is viewpoint retaliation, pure and simple. Because voting is core political speech that triggers strict scrutiny and Respondents have *no* compelling interest in subverting representational democracy, the congressional redistricting plan should be struck down under Article I, Section 2.

Last, the congressional redistricting plan tramples on the South Carolina Constitution's command to, wherever possible, keep counties whole. Article VII, Section 13 states that "[t]he General Assembly may at any time arrange the various Counties into . . . Congressional Districts." Courts have construed this clause as reflecting "a substantial state policy favoring drawing congressional districts along county boundaries,"[11] and ruled that "preserving county lines should enjoy a *preeminent role* in South Carolina's redistricting process."[12] But rather than enacting a congressional redistricting plan that healed county splits in Charleston, Richland, and Sumter Counties, Respondents passed a plan that *deepened* those splits and further fractured the communities that those county boundaries enclose and that our State Constitution protects.

In sum: Respondents distorted democracy by intentionally and admittedly diluting the electoral influence of Democratic voters, and it is this Court's duty to intervene. The Petitioner,

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[10] *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).

[11] *S.C. NAACP v. Riley*, 533 F. Supp. 1178, 1180 (D.S.C. 1982), *aff'd sub nom. Stevenson v. S.C. State Conf. of NAACP*, 459 U.S. 1025 (1982).

[12] *Burton on Behalf of Republican Party v. Sheheen*, 793 F. Supp. 1329, 1341 (D.S.C. 1992) (emphasis added), *vacated sub nom. Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968 (1993), and *vacated sub nom. Campbell v. Theodore*, 508 U.S. 968 (1993).

League of Women Voters of South Carolina (LWVSC), represents members who were selectively moved out of CD1 and whose electoral influence in CD1 was nullified to achieve the artificial partisan bias sought by Respondents. On behalf of itself and those affected members, Petitioner LWVSC asks the Court to: (1) accept this novel and important case in its original jurisdiction, *see* Rule 245, SCACR; (2) rule that the South Carolina Constitution prohibits extreme partisan gerrymandering; (3) enjoin South Carolina's congressional redistricting plan under the Free and Open Elections, Equal Protection, and Freedom of Speech, and County Preservation Clauses of the State Constitution; and (4) order that the General Assembly draw a new congressional redistricting plan that respects the Constitution's guarantees of popular sovereignty, free and open elections, equal influence over elections, freedom from viewpoint-based discrimination, and regard for county boundaries.

## I
## BACKGROUND

Partisan gerrymandering produces a cascade of anti-democratic consequences that undermine the promises of the State Constitution. Petitioner's Complaint, which details the factual basis for their allegations about the congressional redistricting plan, is attached hereto.

### (A)
### Partisan Gerrymandering and Its Effects

Partisan gerrymandering refers to the manipulation of electoral district boundaries to create undue advantage for a particular political party. It is a form of anti-democratic political corruption that entrenches the influence of one party by "packing" disfavored voters (*i.e.*, voters not in that party) into as few districts as possible or by "cracking" disfavored voters across as many districts as possible. With either method, the goal is to dilute the electoral influence of specific, disfavored voters. In essence, partisan gerrymandering turns democracy on its head—rather than voters using their ballots to choose their representatives, representatives use the redistricting process to choose their voters. Because redistricting happens only once every ten

years, partisan gerrymandering allows politicians to create durable advantages that insulate their outsized influence from demographic or sociopolitical changes.

In an extreme partisan gerrymander, as exists in South Carolina, strategic manipulations of district boundaries make the results of general elections inevitable. Thus, partisan gerrymandering not only distorts the influence of certain voters, but it also suppresses competition and reduces the viable choices available to all voters. In noncompetitive districts, races are decided between primary candidates who then often run unopposed in the general election.

This has several consequences. To start, primary elections draw less than half as many voters. In South Carolina, for example, the last seven statewide primary elections have averaged only 16% voter turnout.[13] That means that far fewer members of the public have a say in the composition of a democratic body. By elevating the influence of sparsely attended primaries and degrading the importance of general elections, partisan gerrymandering also erodes political accountability and the responsiveness of elected officials. As the U.S. Supreme Court has explained, "a central feature of democracy" is that "candidates who are elected can be expected to be responsive to [the] concerns [of the voters]." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014). "Representatives are not to follow constituent orders but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials." *Id.* at 227. But by creating inevitable election results and artificially suppressing competition, partisan gerrymandering neutralizes any incentive politicians have for abiding by the will of their constituents. Political scientist Dr. Kosuke Imai described the relationship between partisan gerrymandering and political responsiveness in this

[13] *Voter Turnout in American Elections Since 2000*, States United Democracy (July 15, 2024), https://statesuniteddemocracy.org/resources/voter-turnout-since-2000/#Methodology (16% calculated as average primary election turnout, as percentage of voting age population, across 7 elections between 2010 and 2022).

way: “if many lawmakers are in safe seats, guaranteed to win by a relatively comfortable margin, there’s less incentive to respond to what voters want.”[14] [15]

By destroying political accountability, partisan gerrymandering also erodes a bedrock legal doctrine: the presumptive constitutionality of statutes. Judicial deference to the legislative branch rests on the observation that “the will of the people is expressed in the policy judgments of their elected representatives.” *See Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 296 n.72, 882 S.E.2d 770, 828 n.72 (2023) (“*Planned Parenthood I*”) (Kittredge, J., dissenting) (“we must never lose sight of this bedrock principle” (citing S.C. Const. art. I, § 1)). But by artificially manipulating and distorting one party’s political power, while simultaneously insulating representatives from electoral accountability, extreme partisan gerrymandering dangerously alienates elected officials from the voters. As a result, policy judgments no longer reflect the will of the people; rather, they reflect the self-serving will of politicians.

Voters overwhelmingly disfavor political gerrymandering. In fact, a 2021 AP-NORC poll found that two thirds of all respondents felt that “drawing legislative districts that intentionally favor one political party” is a “*major* problem.”[16] An additional 26% felt that it is a “minor problem,” with only 5% responding that it is “not a problem.” Negative views towards partisan gerrymandering are also cross-ideological, with polls showing that Republicans, Democrats, and independent voters share nearly equal disdain for this form of political corruption. Despite widespread disdain amongst voters, gerrymandering reform requires lawmakers to legislate against their own political interests—a rare and unlikely occurrence. This is especially true in states like South Carolina that lack avenues of direct democracy for constituents to bypass the

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[14] Christy DeSmith, *Biggest problem with gerrymandering*, The Harvard Gazette (July 5, 2023), https://news.harvard.edu/gazette/story/2023/07/biggest-problem-with-gerrymandering/.

[15] *See, e.g.*, Christopher T. Kenny, et al., *Widespread partisan gerrymandering mostly cancels out nationally, but reduces electoral competition*, 120 PNAS 15 (June 13, 2023).

[16] *Public supportive of many voting reforms*, AP-NORC (Apr. 2, 2021), https://apnorc.org/projects/public-supportive-of-many-voting-reforms/?doing_wp_cron=1721954633.5319540500640869140625.

self-interest of entrenched political actors. *See Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 642, 528 S.E.2d 647, 651 (1999).

From at least 1962 until 2019, federal courts "consistently adjudicated" partisan gerrymandering claims under the Equal Protection Clause of the Fourteenth Amendment. *Davis v. Bandemer*, 478 U.S. 109, 118 (1986) (dating this practice at least to *Baker v. Carr*, 369 U.S. 186 (1962)). To state a claim, plaintiffs were required to show that "a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power,'" and "that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 867–68 (M.D.N.C. 2018) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)), *vacated by Rucho v. Common Cause*, 588 U.S. 684 (2019). If a plaintiff satisfied the *prima facie* showing of partisan vote dilution, the burden shifted to the defendants to prove that the discriminatory effects are "attributable to a legitimate state interest or other neutral explanation." *Id.* at 868.

But in 2019, despite admitting the distortive anti-democratic effects of partisan gerrymandering, the U.S. Supreme Court changed course. It concluded that partisan gerrymandering claims are nonjusticiable under the "political question" doctrine that applies to federal courts. *Rucho*, 588 U.S. at 705–06. Writing for the Court, Chief Justice Roberts explained that the text of the Fourteenth Amendments did not supply sufficiently workable standards for federal courts to police the role partisanship plays in redistricting. Though *Rucho* foreclosed partisan gerrymandering claims under *federal* law, it did not purport to limit the reach of state statutes or state constitutions. In fact, the *Rucho* Court observed that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 719.

*Rucho* turned greater attention to state law as a source of substantive protections from partisan gerrymandering. Some state constitutions explicitly prohibit partisan gerrymandering.

*See, e.g.*, Fla. Const. art. III, § 21 ("No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent[.]"); Ohio Const. art. XIX, § 1(C)(3)(a) (prohibiting redistricting plans that "unduly favor[] or disfavor[] a political party or its incumbents"). But even in states without explicit protections, several state high courts—including those in Kentucky, New Mexico, and Pennsylvania—have held that broader voter-protective provisions of their state constitutions, which are similar to South Carolina's Free and Open Elections Clause, prohibit extreme partisan gerrymandering. *See, e.g.*, *Grisham v. Van Soelen*, 2023-NMSC-027, 539 P.3d 272, 289 (N.M. 2023) ("We find it inconceivable that the framers of our constitution would consider an election in which the entrenched [political] party effectively predetermined the result to be an election that is 'free and open.'" (citing New Mexico's Popular Sovereignty and Free and Open Elections Clauses)).

Because either of the two major political parties can affect a partisan gerrymander, recent case outcomes do not break on ideological grounds. *Compare Grisham*, 539 P.3d 272 (challenge to Democratic gerrymander) *with Graham v. Adams*, 684 S.W.3d 663 (Ky. 2023) (challenge to Republican gerrymander). Rather, outcomes turn on whether claims under individual state constitutional provisions are justiciable. *Compare League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 795 (2018) ("[T]he Pennsylvania Constitution contains no such limitation with regard to interpreting the constitutionality of partisan congressional redistricting."), *with Brown v. State*, 176 N.H. 319, 329, 313 A.3d 760, 768 (2023) ("[T]he New Hampshire Constitution contains no judicially discernible and manageable standards for adjudicating claims of extreme partisan gerrymandering.").

In these decisions, courts have also split on whether claims brought under implicit prohibitions on partisan gerrymandering are justiciable. Generally, claims grounded exclusively in state constitutional provisions that mirror the U.S. Constitution have proved inadequate to establish independent and justiciable state-law protections against partisan gerrymandering. *See, e.g.*, *Rivera v. Schwab*, 315 Kan. 877, 891–92, 512 P.3d 168, 179–80 (2022) (finding claims nonjusticiable where, "[a]t bottom, . . . the sole mechanism relied on for judicial enforcement of

those rights is the constitutional guarantee of equal protection”). By contrast, state constitutions like South Carolina’s that have provisions that promise “free and open” or “free and equal” elections—which have no analogue in the U.S. Constitution—have generally been interpreted as containing justiciable prohibitions on extreme partisan gerrymandering. *See, e.g.*, *Graham*, 684 S.W.3d 663.

(B)

Partisan Gerrymandering in South Carolina

In 2021, following the decennial census, the South Carolina General Assembly redrew its House, Senate, and congressional districts. It was the first redistricting cycle without federal preclearance under Section 5 of the Voting Rights Act—before the U.S. Supreme Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), states in covered jurisdictions (i.e., those with a history of racially discriminatory voting restrictions, including South Carolina) were required to “pre-clear” their voting laws with the federal government for advance review to ensure the laws did not discriminate against voters of color. It was also the first redistricting cycle following the U.S. Supreme Court’s holding that partisan gerrymandering claims are nonjusticiable in federal court, *see Rucho*, 588 U.S. 684. After politicians failed to timely pass maps, voters filed “impasse litigation” (asserting that the failure to pass new maps violated their voting rights) in October of 2021, and the General Assembly eventually passed reapportionment plans. The plans were signed into law by Governor McMaster on January 26, 2022.

i.

*South Carolina NAACP v. Alexander*

Following their enactment, South Carolina’s state House and congressional redistricting plans were challenged in federal court under the Fourteenth and Fifteenth Amendments. Plaintiffs in that case asserted that those redistricting plans were unlawful racial gerrymanders, *see Shaw v. Reno*, 509 U.S. 630 (1993), and the product of intentional racial vote dilution, *see Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). The claims against the House

redistricting plan settled and provoked the passage of a new House map. *See* [Settlement Plan Act]. But the claims against the congressional plan proceeded to trial, where Defendants (largely the same Defendants as here) argued that the movement of voters between districts was not motivated by race, but by a desire to entrench a 6-1 Republican supermajority in the South Carolina congressional delegation. *See S.C. NAACP v. Alexander*, 649 F. Supp. 3d 177, 188–89 (D.S.C. 2023), *overruled by Alexander v. S.C. NAACP*, 144 S. Ct. 1221 (2024).

At trial, much of the testimony presented focused on CD1, which, because of demographic changes along the coast, produced competitive elections in 2018 and 2020. Senator Shane Massey, for example, testified at trial that partisanship was "one of the most important factors" for the reconfiguration of CD1. Senator Chip Campsen, lead sponsor of the enacted congressional redistricting plan, testified that after competitive elections in 2018 and 2020, Senate Republicans would *never* have passed a plan without ensuring it cemented Republican advantage in CD1. When asked at trial if he focused on the "partisan lean" of the district in drawing CD1, Will Roberts, the lead cartographer for Senate Republicans and principal creator of the congressional redistricting plan, said he "one hundred percent" did. And as Respondents later emphasized in the U.S. Supreme Court, text messages showed that Senate Republicans set a "political target" of "at least a 53.5% Republican vote share in District 1." *Alexander*, Br. of Appellants, 2023 WL 4497083, at *15.

After a two-week trial, a three-judge panel unanimously held that CD1 was an unconstitutional racial gerrymander. The panel found that Defendants made "a mockery" of traditional redistricting principles in CD1 and that the movement of more than 30,000 Black voters in Charleston County showed that Defendants used race as a proxy for partisanship in violation of the Fourteenth Amendment. *S.C. NAACP*, 649 F. Supp. 3d at 190, 193.

Defendants appealed the ruling to the U.S. Supreme Court, where they again insisted that they reconfigured CD1 to entrench Republican political power and protect it against demographic shifts along South Carolina's coast. *See, e.g.*, Jurisdictional Statement, at 4 ("the Enacted Plan follows partisan patterns to move heavily Democratic areas of Charleston County out of District

1”), 27 (“the Enacted Plan is the only plan that keeps District 1 majority-Republican and maintains the 6-1 partisan composition in the congressional delegation”). By the time the case reached oral argument, “[e]verybody seem[ed] to take as a given that the legislature [sought] . . . a partisan gerrymander.” *Alexander v. S.C. NAACP*, 2023 WL 9375559 (U.S.), 107 (U.S. Oral. Arg., 2023) (JUSTICE GORSUCH: “We start with that as a given.”).

Defendants’ “partisan-gerrymandering defense” prevailed at the U.S. Supreme Court and resulted in a reversal of the three-judge panel’s decision. Indeed, the Supreme Court majority’s conclusion that the challenged congressional map was “a political gerrymander” was key to its decision. *Alexander*, 144 S. Ct. at 1241–42. Throughout the opinion, the Supreme Court rejected each of the trial court’s findings that redistricting choices were made on account of race, concluding instead that they were made with partisan intent. *Id.* Assessing the record, the Supreme Court flatly concluded that “[t]he fact of the matter is that politics pervaded the highly visible mapmaking process from start to finish.” *Id.* at 1244. These conclusions led to a reversal of the trial court decision as to plaintiffs’ federal racial gerrymandering claim, but the Court made clear that the state’s “political gerrymander,” *id.* at 1241–42, is only permissible “as far as the *Federal* Constitution is concerned,” *id.* at 1233 (emphasis added).

ii.

*The Congressional Redistricting Plan Is an Extreme Partisan Gerrymander*

Consistent with Defendants’ repeated claims, and the U.S. Supreme Court’s affirmation, the congressional redistricting plan does in fact artificially suppress competition, waste votes, and create extreme and disproportionate electoral advantage for South Carolina Republicans.

**(a)**

**Partisan Gerrymandering Metrics**

Partisan gerrymandering analyses show that South Carolina’s congressional redistricting plan is extremely skewed in favor of Republicans. According to analyses published by

Planscore.org, a website maintained in partnership with the Harvard Election Law Clinic,[17] South Carolina's congressional redistricting plan is a national outlier under each of its four measures of bias: efficiency gap, partisan symmetry, mean-median, and declination. Those metrics are "broadly accepted by political scientists to measure partisan bias," *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St. 3d 255, 290, 192 N.E.3d 379, 411 (2022), and are regularly relied upon by courts to evaluate the same. *See, e.g.*, *Carter v. Chapman*, 270 A.3d 444, 470–477 (Pa. 2022) ("[W]e deem it appropriate to evaluate proposed plans through the use of partisan fairness metrics to ensure that all voters have 'an equal opportunity to translate their votes into representation.'" (quoting *League of Women Voters of Pa.*, 645 Pa. at 117, 178 A.3d at 814)). Of those metrics, the congressional plan is especially egregious when it comes to packing and cracking Democratic voters—a phenomenon captured by the "efficiency gap" metric. The efficiency gap metric is designed to evaluate the number of "wasted votes" assigned to each party. If a redistricting plan packs and cracks voters of a one party at a much higher rate, the efficiency gap will depict that result as a high negative number (biased in favor of Democrats) or high positive number (biased in favor of Republicans). The congressional redistricting plan produces an efficiency gap score of 14%—making it one of the most egregious gerrymanders in the country.[18]

Expert analyses done by Jonathan Mattingly and Greg Herschlag, two mathematicians at Duke University, further establish that the congressional redistricting plan is exceedingly biased. Dr. Mattingly produced four ensembles (sets) of computer-generated congressional redistricting plans. Every ensemble contained thousands of sample plans that each obeyed the state's public redistricting criteria, including contiguity, equipopulation, county preservation, compactness, and

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[17] *What is PlanScore?*, PlanScore (last visited July 18, 2024), https://planscore.org/about/.

[18] Darla Cameron, *Here's how the Supreme Court could decide whether your vote will count*, The Wash. Post (Oct. 4, 2017) https://www.washingtonpost.com/graphics/2017/politics/courts-law/gerrymander/ (explaining how the efficiency gap metric works and quoting the metric's creator as saying that "[t]here aren't many plans that are equivalently egregious as the Wisconsin map" that scored between 10% and 13%).

adherence to the Voting Rights Act. *See* Complaint, ¶¶ 39–61 (discussing the House and Senate's redistricting criteria). All plans that split more counties than the enacted plan were excluded from the ensemble. By generating simulated redistricting plans based on South Carolina's actual voting precincts, this analysis supplements other metrics (like partisan symmetry, efficiency gap, etc.) by additionally accounting for the existing distribution of Republican and Democrat voters across the state.

Compared to Dr. Mattingly's computer-generated ensembles, the enacted congressional redistricting plan leaps out as an intentional partisan gerrymander. The overwhelming majority of ensemble plans produce 5 Republican districts, 1 Democratic district, and 1 competitive or slightly Democratic-leaning district. By contrast, it is only through the contortions in the enacted congressional redistricting plan that lawmakers managed to draw 6 strongly Republican districts. Using Trump/Biden vote share from the 2020 Presidential Election (which is what Respondents used to create the enacted plan), the enacted plan is more favorable for Republicans than *any* of the more than 5,000 sample plans produced by Dr. Mattingly's first ensemble. That eliminates any argument that the enacted plan happened by chance—it is the result of deliberate and extreme partisan gerrymandering.

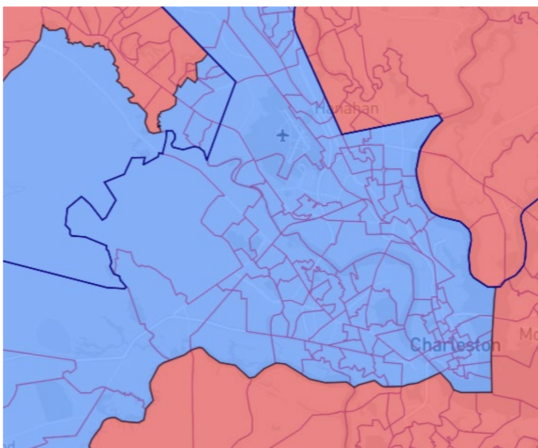
**(b)**

**Disregard for Traditional Redistricting Principles**

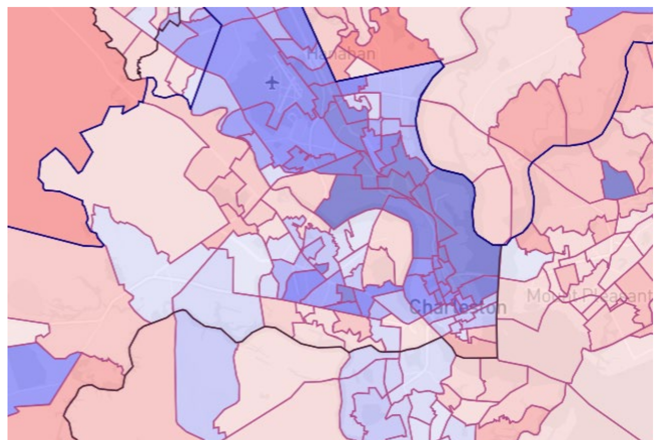
Beyond the statewide bias created by Defendants, specific district boundaries within the congressional redistricting plan also show that traditional redistricting principles were disregarded to facilitate the packing and cracking of Democratic voters. The needless splitting of Charleston, Richland, and Sumter Counties offers a textbook example of subordinating traditional redistricting principles to partisan goals. *See Burton*, 793 F. Supp. at 1341 ("preserving county lines should enjoy a preeminent role in South Carolina's redistricting process") (citing S.C. Const. art. VII, § 13); *see also League of Women Voters of Pa.*, 645 Pa. at 118, 121–22, 178 A.3d at 817 (unconstitutional partisan gerrymander arises where neutral redistricting principles are

"subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage").

The most glaring example is Defendants' movement of voters between CD1 and CD6. Unlike the "least change" approach that Defendants claimed to follow across most of the state (*i.e.*, their purported attempt to change the previous decade's maps as little as possible), Defendants dramatically reconfigured CD1 to fit their partisan goals. Despite strong community pressure to reunite Charleston County into CD1, Defendants *deepened* the split of Charleston County to shuttle more Democrats into CD6. In a move that is intolerable under traditional principles, the enacted congressional redistricting plan now puts the entire Charleston Peninsula into the same congressional district as downtown Columbia. For the first time in a century, Charleston is no longer the anchor of CD1; instead, it is a moat that divides voters in Mount Pleasant and Berkley County from the rest of CD1 which reaches down the coast to the south. Even the Charleston Port Authority, one of the longstanding economic engines of Charleston, is cleaved into two districts by the enacted congressional redistricting plan.



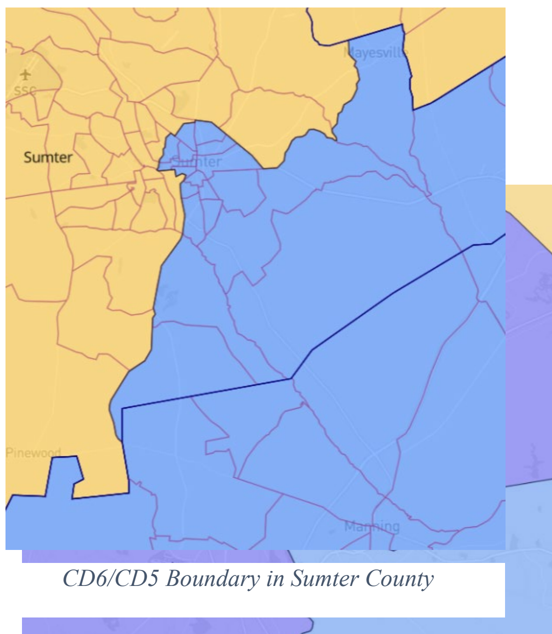
*CD1/CD6 Border in Charleston*



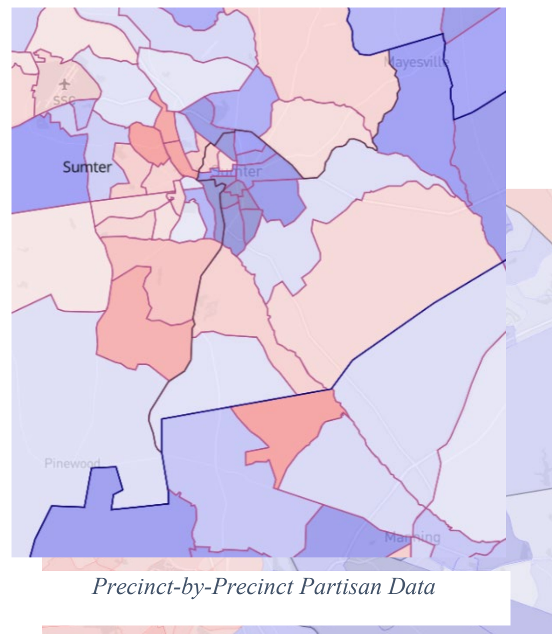
*Precinct-by-Precinct Partisan Data*

But CD1 is not the only part of the state that displays the funny shapes that are emblematic of gerrymanders. The “hook” in Richland County needlessly splits the City of Columbia and clearly follows partisan lines.

CD6 also reaches in and grabs Democratic voters in the heart of Sumter to pack those voters into a district where their influence is suppressed.



*CD6/CD5 Boundary in Sumter County*



*Precinct-by-Precinct Partisan Data*

*Precinct-by-Precinct Partisan Data*

## II

## ORIGINAL JURISDICTION IS APPROPRIATE IN THIS CASE

The Court should resolve this challenge to extreme partisan gerrymandering (*i.e.*, anti-democratic corruption) under the South Carolina Constitution in its original jurisdiction. South Carolina Appellate Rule 245 authorizes original jurisdiction “[i]f the public interest is involved, or if special grounds of emergency or other good reasons exist.” Rule 245, SCACR. Ordinarily,

these factors are satisfied when a case raises a "legitimate constitutional issue." *Doe v. State*, 421 S.C. 490, 497 n.5, 808 S.E.2d 807, 810 n.5 (2017) (compiling cases). In essence, "Rule 245 is concerned with whether a case should be resolved by this Court in the first instance because of the public interest involved and the need for prompt resolution." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014).

(A)

This Case Presents Novel and Important Constitutional Issues

This case warrants the Court's original jurisdiction. This Court has called voting the "cornerstone of our constitutional republic," *Bailey*, 430 S.C. at 271, 844 S.E.2d at 391, and "a matter of great public importance," *Anderson v. S.C. Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 706 (2012). As the U.S. Supreme Court explained, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (striking down Georgia statute that "debas[ed] the weight of appellants' votes" and thus "abridged the right to vote for members of Congress").

Under the Court's precedent, this case is undoubtedly "important" enough to justify original jurisdiction. *See* Rule 245, SCACR; *see also City of Abbeville v. Aiken Elec. Co-op., Inc.*, 287 S.C. 361, 370, 338 S.E.2d 831, 836 (1985) ("We accepted . . . original jurisdiction because of [the case's] manifest and patent public importance."). The Court routinely accepts voting- and election-related cases in its original jurisdiction. *See, e.g.*, *Mitchell v. Spartanburg Cnty. Legis. Del.*, 385 S.C. 621, 622, 685 S.E.2d 812, 813 (2009); *Anderson*, 397 S.C. at 559, 725 S.E.2d at 708; *Bailey*, 430 S.C. at 271, 844 S.E.2d at 391. Furthermore, the case asks a novel question of constitutional interpretation. Although several state supreme courts have now examined whether their constitutions prohibit partisan gerrymandering, this Court has not. Because this Court would ultimately review such a question *de novo*, there is no benefit to proceeding first in the lower courts.

(B)

Factfinding Does Not Preclude Original Jurisdiction

Redistricting challenges are ordinarily intensely fact-bound cases. But here, Petitioner's factual allegations are not in dispute. As recited above, Respondents swore in open court—including the U.S. Supreme Court—that the enacted congressional redistricting plan was a partisan gerrymander. But even if the Court determines that additional factfinding is necessary to adjudicate Petitioner's claims (or to adjudicate any remedial map drawing process), mechanisms exist for the Court to retain its original jurisdiction while also resolve lingering factual disputes. *See* S.C. Code § 14-3-340; *see also Pascoe v. Wilson*, 416 S.C. 628, 649 n.21, 788 S.E.2d 686, 697 n.21 (2016) (Few, J., dissenting) ("We have authority to find facts in our original jurisdiction.") (collecting cases).

## III
## THE CONGRESSIONAL REDISTRICTING PLAN VIOLATES THE SOUTH CAROLINA CONSTITUTION

The South Carolina Constitution is no mere adjunct to the federal Constitution—it contains the unique and enforceable promises of a separate sovereign. *See, e.g.*, Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 16–21 (2018) ("State courts have authority to construe their own constitutional provisions however they wish."). This Court has final and exclusive responsibility for interpreting our State Constitution and ensuring that its mandates and prohibitions are enforced. *See, e.g.*, *Murdock v. City of Memphis*, 87 U.S. 590, 611 (1874); *S.C. Pub. Interest Found. v. Jud. Merit Selection Comm'n*, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006) ("[T]his Court [is the] ultimate interpreter of the Constitution.").

As summarized in Part I.B, *supra*, and detailed in Plaintiffs' attached Complaint, South Carolina's congressional redistricting plan deliberately manipulates district lines, devaluing the voting power of disfavored voters and aggrandizing others' in order to achieve election outcomes that favor the state's entrenched political party. As other courts have held, "[i]n such a scenario, the will of the people would come second to the will of the entrenched party, and the fundamental

right to vote in a free and open election . . . [is] transformed into a meaningless exercise." *Grisham*, 539 P.3d at 284. In South Carolina, this is evident in both a statewide and district-specific context.

The extreme partisan gerrymander that the Defendants crafted and enacted violates the South Carolina Constitution in four distinct ways. First, the congressional redistricting plan violates the Free and Open Elections Clause, which this Court has interpreted as requiring "every elector" be "granted equal influence with that of every other elector." *Cothran*, 189 S.C. 85, 200 S.E. at 97 (interpreting S.C. Const. art. I, § 5). Second, the congressional redistricting plan violates South Carolina's Equal Protection Clause and its mandate that "all persons be treated alike under like circumstances and conditions." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C.*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) (interpreting S.C. Const. art. I, § 3). Third, the congressional redistricting plan violates voters' freedoms of speech and assembly by diluting the electoral power of certain voters because of the political viewpoint expressed by their ballot. *See City of Rock Hill v. Henry*, 244 S.C. 74, 76, 135 S.E.2d 718, 719 (1963). Fourth and finally, by needlessly splitting counties to serve base partisan goals, the congressional redistricting plan violates Article VII, Section 13 of the South Carolina Constitution and its "substantial state policy favoring drawing congressional districts along county boundaries." *Riley*, 533 F. Supp. at 1180 (citing S.C. Const. art. VII, § 13). Though each argument provides a separate basis for relief, the sum of these arguments shows that extreme partisan gerrymandering is anathema to the foundational promises and core structure of South Carolina's constitutional republic.

(A)

Free and Open Elections

The text, history, precedent, and purpose of Article I, Section 5 of the South Carolina's "Declaration of Rights" all resoundingly condemn partisan gerrymandering. Moreover, other courts have fashioned appropriate and administrable tests for this Court to evaluate Petitioner's claim under Article I, Section 5.

i.

*S.C. Const. art. I, § 5 Prohibits Partisan Gerrymandering*

South Carolina was not founded as a democracy, but an aristocracy.[19] Even after the American Revolution, voting remained limited to white men who owned property or who paid fifty pounds in taxes.[20] It was not until Reconstruction that South Carolina was forced, as a condition of reentry to the Union, to embrace a more pluralistic approach to representational democracy.[21]

In January of 1868, Black and white delegates from across South Carolina gathered in Charleston to draft a new state constitution. The resulting document extended the franchise "without distinction of race, color, or former condition," S.C. Const. of 1868, art. VIII, § 2, and permitted any eligible voter to hold public office. The Constitution of 1868 was the first in South Carolina history "organized on the great acknowledged principles of Democratic Republicanism,"[22] the first intended to "secure to every man . . . an equal share of political rights,"[23] and the first to be ratified by the voters—a majority of whom were Black.

The Constitution of 1868 was the first in state history to require elections be "free and open." By adding the Free and Open Elections Clause, the Constitutional Convention of 1868 adopted specific pro-democracy language long used in other state constitutions. *See* S.C. Const. of 1868, art. I, § 31; *see also* Brett Graham, *"Free and Equal": James Wilson's Elections Clause and its Implications for Fighting Partisan Gerrymandering in State Courts*, 85 Alb. L. Rev. 799,

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[19] *See* Laughlin McDonald, *An Aristocracy of Voters: The Disenfranchisement of Blacks in South Carolina*, 37 S.C. L. Rev. 557 (1986).

[20] W. Lewis Burke, *Killing, Cheating, Legislating, and Lying: A history of voting rights in South Carolina after the Civil War*, 57 S.C. L. Rev. 859 (2006).

[21] *Id.* at 861–62; *see also* An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, 428 (1867).

[22] Opening Remarks of Convention President A.G. Mackey, *Proceedings of the Constitutional Convention of South Carolina*, 17 (Jan. 15, 1868), *available at* https://archive.org/details/proceedingsofcon00sout.

[23] *Id.* at 18.

801–02 (2022) (tracing the shared philosophical roots of "free and open" and "free and equal" elections clauses); *id.* at 818–19 (collecting cases). Because the clause was added in response to the anti-democratic impulses of the Antebellum South,[24] it must be construed as maximally protective of pluralistic democracy; that is, it must be given an effect that "suppress[es] the mischief at which it was aimed." *Duncan v. Rec. Pub. Co.*, 145 S.C. 196, 143 S.E. 31, 69 (1927) (applying the "familiar general principal of interpretation of Constitutions" that "a provision should be construed 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" (quoting *Kirkland v. Allendale Cnty.*, 128 S.C. 541, 123 S.E. 648, 650 (1924))). In full, South Carolina's new Free and Open Elections Clause provided:

> 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. of 1868, art. I, § 31.

Now found in Article I, Section 5, this Court has interpreted South Carolina's Free and Open Elections Clause to contain three distinct guarantees. First, it requires "free and open" elections; that is, elections that are "public and open to all qualified electors alike." *Cothran*, 189 S.C. 85, 200 S.E. at 97.[25] Second, it clarifies that the qualifications "to elect" and "be elected" are coextensive; that is, that "every qualified voter is eligible 'to any office which now is, or hereafter shall be, elective by the people . . .' unless he labors under some one of the disabilities mentioned

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[24] *See id.* at 16 ("In the call for the five South Carolina Conventions which have preceded it, and which were held in 1776, 1777, 1790, in 1860, and in 1865, . . . the noble doctrine that governments were constituted for the good of the whole, was substituted that anti-republican one, that they were intended only for the benefit of one class at the expense of another.").

[25] Some states construe the promise of "free and open" or "free and equal" elections as independently mandating that every "vote, when cast, shall have the same influence as that of any other voter." *Grisham*, 539 P.3d at 282 (quoting *Preisler v. Calcaterra*, 362 Mo. 662, 243 S.W.2d 62, 64 (Mo. 1951)); *see also Graham*, 684 S.W.3d at 684 (holding that Kentucky's "free and equal" clause requires that each vote "have the same influence as that of any other voter").

in the constitution." *State v. Williams*, 20 S.C. 12, 16 (1883). And third, it demands that each qualified voter has an "equal right to elect officers"; that is that, "the vote of *every elector must be granted equal influence* with that of every other elector." *Cothran*, 189 S.C. 85, 200 S.E. at 97 (emphasis added).

These guarantees are "mandatory and prohibitory." S.C. Const. art. I, § 23. They are also enforceable in court. *See* S.C. Const. art. I, § 9 (Remedy Clause); *see also Cent. R.R. & Banking Co. v. Ga. Constr. & Inv. Co.*, 32 S.C. 319, 11 S.E. 192, 203 (1890) (holding that "the object of" the Remedy Clause is "to secure to the inhabitants of the state, for which the constitution was made, access to the courts for redress of any injury which they may have received"); *Doe v. Am. Nat'l Red Cross*, 790 F. Supp. 590, 594 (D.S.C. 1992) (conceptualizing the Remedy Clause as a "constitutional right of access to the courts of South Carolina for [an] alleged wrong").

Partisan gerrymandering violates the unambiguous text of South Carolina's Free and Open Elections Clause.[26] Unlike other states' free and open elections clauses, the text of Article I, Section 5 goes beyond requiring "free and open" access to the franchise; it also mandates that eligible voters have an "equal right to elect officers"—that is, that voters have equal influence over electoral outcomes. Under the enacted congressional redistricting plan, Plaintiffs do not have an "equal right to elect officers." Rather, the enacted plan deliberately ensures that Republican voters are assigned disproportionate influence over electoral outcomes.

The Court's precedent lends further support. In a series of cases in the 1930s, the Court repeatedly invoked State Constitutional provisions, including the Free and Open Elections Clause,

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[26] Section 5 need not mention 'redistricting' for its guarantee of an "equal right to elect" to apply with full force. Unlike statutes, constitutional provisions do not enumerate every mandate and prohibition. *Ansel v. Means*, 171 S.C. 432, 172 S.E. 434, 436 (1934) ("It would not be practicable, if possible, in a written constitution to specify in detail all of its objects and purposes."). To the contrary, "constitutional powers are often granted or restrained in general terms from which implied powers or restraints necessarily arise." *Id.* Here, partisan gerrymandering is incompatible with Section 5's requirement that "every qualified voter" be given "an equal right to elect officers." That the clause lacks explicit reference to redistricting is of no consequence. In the words of this Court, "the legislature may be restrained from the exercise of power as well by implication . . . as by express prohibition." *Id.*

to hold that party affiliation (or lack thereof) cannot abridge political influence. *See, e.g.*, *Cothran*, 189 S.C. 85, 200 S.E. at 97; *State v. Huntley*, 167 S.C. 476, 166 S.E. 637, 639–40 (1932); *Gardner v. Blackwell*, 167 S.C. 313, 166 S.E. 338, 342 (1932). Taken together, these cases teach that our State's Constitution prevents egregious manipulation that would curb voters' right to an equal say in their government based on partisan grounds.

First was *Gardner v. Blackwell*, 167 S.C. 313, 166 S.E. 338 (1932). There, Republican candidates for federal office challenged the "custom and practice" of providing voters with two different general election ballots—one with Republican candidates for office and the other with Democratic candidates. Though the Court rejected many elements of the petitioners' claims, it agreed that partisan ballots were unconstitutional because they denied eligible voters "who are not members of the Democratic or Republican Parties" the "free exercise of the right of suffrage." *Id.* at 342 (citing S.C. Const. art. II, § 15).

In *State v. Huntley*, 167 S.C. 476, 166 S.E. 637 (1932), the Court then evaluated a state law that allowed the election of school board members "according to the rules applicable to primary elections." *Id.* at 639. The Court struck down the law under the Free and Open Elections Clause, explaining that the use of primary election rules—which impose additional qualifications beyond those contained in the State Constitution—would unconstitutionally deny politically unaffiliated voters the "equal right to elect officers." *Id.* at 639–40. Put another way, the act would have "deprive[d] all those citizens . . . who do not have their names [on] the club roll of some political party" of "the right to vote in such [an] election . . . although they possess the qualifications of suffrage." *Id.* Following *Gardner*, the Court continued to strike down decisions made by means of primary-election mechanisms, finding that they violate the constitutional rights of qualified voters to meaningfully participate in the democratic process. *See, e.g.*, *Ansel v. Means*, 171 S.C. 432, 172 S.E. 434 (1934) (striking down law permitting issuance of bonds "if a majority of the voters . . . [in] the Democratic primary were in favor of it").

In *Cothran v. W. Dunklin Pub. Sch. Dist. No. 1-C*, 189 S.C. 85, 200 S.E. 95 (1938), the Court again addressed a similar issue. There, petitioners challenged a state law allowing the

issuance of school bonds upon a majority vote of "such electors as return real or personal property for taxation and who exhibit their tax receipts and registration certificate." *Id.* at 95. The Court sustained the challenge, noting that "[t]he Constitution does not . . . anywhere provide" that a voter "must be the owner of property, real or personal." *Id.* at 96. Citing the Free and Open Elections Clause, the Court explained:

> Under such a guaranty the right to vote, as the words expressly state, must be maintained absolutely free, and <u>the vote of every elector must be granted equal influence with that of every other elector</u>. To be free means that the voter shall be left in the untrammeled exercise, whether by civil or military authority, of his right or privilege; that is to say, no impediment or restraint of any character shall be imposed upon him either directly or indirectly whereby he shall be hindered or prevented from participation at the polls. As otherwise expressed, an 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*, 189 S.C. at 97 (quoting 9 R.C.L., § 8, at 984) (emphasis added). Applying those "established principles of law," the Court struck down the Act, holding that because the Act "adds to the law" regarding eligibility for voting, it "deprives voters . . . of their constitutional rights of suffrage." *Id.* at 97.

Together, the 1930s elections cases announce constitutional principles that are irreconcilable with partisan gerrymandering. By deliberately drawing political districts to create specific partisan outcomes, Defendants have devised a more sophisticated method of restricting electoral influence to one particular political party. But worse than the partisan ballots rejected in *Gardner*, which denied the rights of "Socialists, Prohibitionists, Farm Laborites, and independent voters," modern gerrymandering forces voters to a choice between candidates within a *single* political party. 167 S.C. 313, 166 S.E. at 342. A legislative map enacted by means of partisan gerrymandering thereby operates much like the act challenged in *Huntley*. There, a state law allowed election administrators to exclude certain voters because of their political affiliation.

Here, Defendants do the same thing by drawing legislative districts in a manner designed to suppress inter-party competition and ensure a single partisan outcome. In a no less absolute sense, Defendants are denying voters of all but a single party "an equal vote in the election of officers." *Huntley*, 167 S.C. 476, 166 S.E. at 639.

In sum, the text, history, and precedent surrounding South Carolina's Free and Open Elections Clause collectively demonstrate that the clause prohibits partisan gerrymandering. Every state high court that has interpreted a "free and open" or "free and equal" elections clause has held that it contains enforceable protections against extreme partisan gerrymandering. *E.g.*, *League of Women Voters of Pa.*, 645 Pa. 1, 178 A.3d at 814 ("[A]nalysis of the Free and Equal Elections Clause . . . leads us to conclude that the Clause should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so."); *Graham*, 684 S.W.3d at 683 ("A claim that an apportionment plan is unconstitutionally partisan may be considered by the judiciary without violating the political question doctrine[.]"); *Grisham*, 539 P.3d at 289 ("We find it inconceivable that the framers of our constitution would consider an election in which the entrenched party effectively predetermined the result to be an election that is 'free and open.'" (citing N.M. Const. art. II, § 8)). And here, our text goes even beyond "free and open" elections and explicitly commands an "equal right to elect officers." S.C. Const. art. I, § 5. That, plus this Court's guidance that "equal right to elect" means that each elector must have "equal influence," *Cothran*, 189 S.C. 85, 200 S.E. at 97, can yield but one result: Article I, Section 5 prohibits partisan gerrymandering.

ii.

*Enforceable Standards Exist Under S.C. Const. art. I, § 5*

To protect "free and open" elections and enforce the "equal right to elect officers," S.C. Const. art. I, § 5, the Court must fashion a test for determining whether a redistricting plan violates voters' right to exercise "equal influence" over elections. Fortunately, the Court need not

invent a test from scratch—it may easily look to what other state courts have already done. Indeed, relying on analogue "free elections" provisions, other courts have asserted a robust and adaptable role for the judiciary as a bulwark against undue partisan gerrymandering.

For example, in fashioning a test under its "Free and Equal Elections Clause," the Pennsylvania Supreme Court started with the observation that neutral redistricting criteria like compactness, contiguity, and preserving county, city, and municipal boundaries "have, as a general matter, been traditionally utilized to guide the formation of . . . legislative districts." *League of Women Voters of Pa.*, 645 Pa. at 118, 178 A.3d at 814. The court further reasoned that because those factors are "fundamentally impartial in nature, their utilization reduces the likelihood of the creation of congressional districts which confer on any voter an unequal advantage . . . as prohibited by Article I, Section 5." *Id.* at 120, 816. As a result, the court held that compliance with "these neutral benchmarks" "substantially reduces the risk that a voter in a particular congressional district will unfairly suffer the [vote] dilution," and thus forms a "particularly suitable . . . measure [for] assessing whether a congressional districting plan dilutes the potency of an individual's ability to select the congressional representative of his or her choice." *Id.*; *see also id.* at 122, 817 ("[N]eutral criteria provide a 'floor' of protection . . . against [vote] dilution [in redistricting]."). In conclusion, the court held that where those criteria are "subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates" the State's constitution. *Id.* at 121–22, 816–17.

Noncompliance with neutral criteria is one way to prove partisan gerrymandering, but it "is not the exclusive means by which a violation of [the Free and Equal Elections Clause] may be established." *Id.* at 122, 817. As the Pennsylvania Supreme Court presciently acknowledged, "advances in map drawing technology" may allow mapmakers to follow neutral criteria while nonetheless "unfairly dilut[ing] the power of a particular group's vote." *Id.* In such a case, courts may look to established metrics for quantifying partisan bias "to allow for objective evaluation of proposed districting plans to determine their partisan fairness." *Carter*, 270 A.3d at 470. These

metrics are reasoned, accepted, and well understood. Some, for example, "attempt to ascertain a map's responsiveness to voters, evaluating whether a party with a majority of votes is likely to win a majority of seats, or whether it is likely to produce 'anti-majoritarian' results, without focus on [] proportionality of representation." *Id.* Others "measure whether and to what extent a map favors one party." *Id.* What they have in common is that they have aided courts (like Pennsylvania's,[27] Kentucky's,[28] Ohio's,[29] and New York's[30]) to ascertain whether (or not) a redistricting plan slips the bounds of fairness that constitutional provisions like South Carolina's Free and Open Elections Clause impose.

As with Pennsylvania's Free and Equal Elections Clause, "the overarching objective" of South Carolina's Free and Open Elections Clause "is to prevent dilution of an individual's vote by mandating that the power of his or her vote . . . be equalized to the greatest degree possible with all other [] citizens." *Id.* at 122. That is, after all, the meaning of "equal influence." *Cothran*, 189 S.C. 85, 200 S.E. at 97. Given the analogous constitutional provision and well-reasoned test announced in *League of Women Voters of Pa.* and its progeny, this Court should apply a similarly robust test here and rule that the congressional redistricting plan—which "made a mockery" of

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[27] *Carter*, 270 A.3d at 470 ("[W]e deem it appropriate to evaluate proposed plans through the use of partisan fairness metrics to ensure that all voters have an equal opportunity to translate their votes into representation.").

[28] *Graham*, 684 S.W.3d at 683–84 (relying on simulation analysis to conclude that Kentucky's congressional redistricting plan is *not* unconstitutionally partisan); *see also id.* at 687 (comparing evidence that Republicans would with 60/100 seats in a hypothetical 50-50 election with evidence of "the realities of Kentucky's political geography").

[29] *League of Women Voters of Ohio*, 167 Ohio St.3d at 292, 192 N.E.3d at 413 ("Although respondents have presented evidence showing that Ohio's political geography and the map-drawing requirements of Article XI, Sections 3 and 4 may naturally lead to a district map's favoring the Republican candidates, the evidence shows that these factors did not dictate as heavy a partisan skew as there is in the adopted plan").

[30] *Harkenrider v. Hochul*, 204 A.D.3d 1366, 1371, 167 N.Y.S.3d 659, 665 (N.Y. App. Div. 2022), *aff'd as modified*, 38 N.Y.3d 494 (2022) (relying on "a computer simulation accepted in other jurisdictions and data-driven metrics in order to conclude that the enacted 2022 congressional map was drawn to disfavor competition and favor democrats").

neutral redistricting criteria, *S.C. NAACP*, 649 F. Supp. 3d at 190, intentionally entrenches an artificial Republican advantage, and disproportionately wastes the votes of thousands of Democratic voters in South Carolina—violates the South Carolina Free and Open Elections Clause and its command that every voter wield "equal influence" in elections.

(B)

Equal Protection

The South Carolina State Constitution guarantees equal protection under the law. S.C. Const. art. I, § 3. It provides that "[t]he privileges and immunities of citizens . . . shall not be abridged . . . nor shall any person be denied the equal protection of the laws." *Id.* Interpreting that guarantee, this Court has explained that its terms mean that "the right to vote is [] fundamental," and "protected by heightened scrutiny." *Sojourner v. Town of St. George*, 383 S.C. 171, 176, 679 S.E.2d 182, 185 (2009). Accordingly, "[r]estrictions on the right to vote on grounds other than residence, age, and citizenship generally violate the Equal Protection Clause and cannot stand unless [they] promote a compelling state interest." *Id.*

Under these equal protection guarantees, the General Assembly cannot heavily put its thumb on the scales to benefit one group of voters over another. Doing so would deny "'the right of suffrage . . . by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the . . . franchise.'" *Burriss v. Anderson Cnty. Bd. of Educ.*, 369 S.C. 443, 451 (2006) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). And such "dilution," this Court has recognized, "is as nefarious as an outright prohibition on voting." *Id*. at 451 (quotations omitted).

In South Carolina, as elsewhere, the Equal Protection Clause depends on the rights and privileges created elsewhere in state law. The interdependence of the Equal Protection Clause is well illustrated in *Grisham v. Van Soelen*, 539 P.3d 272, where the New Mexico Supreme Court evaluated whether extreme partisan gerrymandering violated its own Equal Protection Clause. *Id*. at 281–84. In distinguishing its Equal Protection Clause from the analogous federal right at issue

in *Rucho*, the court explained that its Equal Protection Clause must be "read . . . together with" New Mexico's Popular Sovereignty Clause, Right of Self-Government Clause, and Freedom of Elections Clause. *Id.* at 283; *see also id.* at 289 ("[O]ur Constitution contains provisions that *Rucho* did not consider, provisions with no federal counterpart."). Rather than treating those rights as standalone causes of action, the court routed those protections through the State Equal Protection Clause, applied intermediate scrutiny, and adopted a three-part test for adjudicating partisan gerrymandering claims. *Id.* at 289 (rooting its holding in the Equal Protection Clause but explaining that "[w]e find it inconceivable that the framers of our constitution would consider an election in which the entrenched party effectively predetermined the result to be an election that is 'free and open.'" (citing N.M. Const. art. II, § 8)). The court explained its test, which it borrowed from Justice Kagan's dissent in *Rucho*, in this way:

> In an egregious partisan gerrymandering claim, evidence of disparate treatment sufficient to establish a violation of the New Mexico Equal Protection Clause must prove under intermediate scrutiny that [1] the predominant purpose underlying a challenged map was to entrench the redistricting political party in power through vote dilution of a rival party; [2] that individual plaintiffs' rival-party votes were in fact substantially diluted by the challenged map; and, [3] upon those showings, that the State cannot demonstrate a legitimate, nonpartisan justification for the challenged map.

*Id*. at 293 (enumeration added).

The South Carolina Constitution, like New Mexico's, manifests a deep commitment to voting and representative democracy. Like New Mexico's, the South Carolina Constitution creates mandatory and enforceable rights to Popular Sovereignty and Free and Open Elections. S.C. Const. art. I, § 1 ("All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government"), *id.* § 5 ("All elections shall be free and open, and every inhabitant of this State . . . shall have an equal right to elect officers"). But the South Carolina Constitution doesn't stop there—it also protects "the free exercise of the right of suffrage," S.C. Const. art. II, § 2, and mandates that the right of suffrage be protected from "all undue influence from power, bribery, tumult, or improper conduct," *id*. at § 1. And just as the New Mexico Equal Protection Clause must be "read . . . together with" its

substantive commitments to representative democracy, *Grisham*, 539 P.3d at 283, so must the South Carolina Equal Protection Clause be construed in light of South Carolina's independent constitutional commitments to achieving representational democracy, S.C. Const. art. I, § 1, through free and open elections, *id.* § 5, in which every voter has an "equal right to elect officers," *id.*, and no vote is swayed or diluted by official state power, improper conduct, or influence, S.C. Const. art. II, §§ 1, 2. *See, e.g.*, *Riley v. Charleston Union Station Co.*, 71 S.C. 457, 51 S.E. 485, 488 (1905) ("[T]he fundamental principle . . . is that a Constitution must be considered as a whole."); *Gaud v. Walker*, 214 S.C. 451, 476, 53 S.E.2d 316, 327 (1949) ("All sections of the Constitution must be considered together.").

Given our constitution's explicit pro-democracy guarantees, this Court should rule that extreme partisan gerrymandering violates voters' right to "equal protection of the laws," S.C. Const. art. I, § 3, and adopt the three-part test used elsewhere to police partisan gerrymandering, *see, e.g.*, *Grisham*, 539 P.3d at 293; *see also Rucho*, 588 U.S. at 722 (Kagan, J., dissenting) ("[C]ourts across the country . . . have coalesced around manageable judicial standards to resolve partisan gerrymandering claims."). As demonstrated here, this test provides manageable standards for evaluating redistricting plans. Far from requiring unmoored policy determinations, this test asks the Court to evaluate Petitioner's evidence that the legislature *intended* to gerrymander the congressional redistricting plan in favor of their political party (they did) and then consider whether the plan *actually* creates extreme partisan bias and disparate electoral influence (it does).[31] Because the evidence shows that Petitioner carries its burden, the congressional redistricting plan must be struck down under S.C. Const. art. I, § 3.

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[31] Although myriad tools and metrics exist for quantifying redistricting bias, *see* Part I.B.ii(a), the Court need not develop *per se* rules for determining how much bias or disparate influence is permissible under the Equal Protection Clause. As discussed *infra*, the law is replete with flexible yet administrable tests. *See, e.g.*, *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (2016) (evaluating the reasonableness of a *Terry* stop under the "totality of

(C)

Freedom of Speech & Assembly

Article I, Section 2 of the South Carolina Constitution prohibits any 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." Observing that the language of First Amendment of the U.S. Constitution and the language of Article I, Section 2 "are, for all intents and purposes, the same," *Hunt v. McNair*, 258 S.C. 97, 103, 187 S.E.2d 645, 658 (1973), this Court has generally treated Article I, Section 2 as coextensive with the First Amendment, *see, e.g.*, *Charleston Joint Venture v. McPherson*, 308 S.C. 145, 151 n.7, 417 S.E.2d 544, 548 n.7 (1992).[32]

Casting a ballot is unmistakably expressive and communicative and is thus protected by Article I, Section 2. Until the Supreme Court ruled in *Rucho* that partisan gerrymandering claims are not justiciable in federal court, it was well understood that partisan gerrymandering implicates the "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J.,

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circumstances"). Indeed, most states have declined to adopt specific thresholds for unconstitutional bias. *See, e.g.*, *Graham*, 684 S.W.3d at 683–84 ("While partisan redistricting resulting in a more significant disparate outcome might rise to a level of constitutional infirmity, we need not resolve today precisely what level of disparate result would warrant such a finding [of unconstitutional bias].").

[32] Notably, the Court has only rarely addressed claims brought under Article I, Section 2. *See* 19 S.C. Jur. Constitutional Law § 50 (finding "only 22 . . . cases" where the Court addressed Article I, Section 2). And to counsel's knowledge, the Court has never squarely engaged with whether—in the context of viewpoint discrimination or voting—Article I, Section 2 should be construed as providing greater protections than the First Amendment. To the contrary, the Court's prior decisions conflating Article I, Section 2 with the First Amendment seem to lean on a cursory, 3-paragraph letter from the South Carolina Attorney General in 1977. *See Charleston Joint Venture*, 308 S.C. at 151 n.7, 417 S.E.2d at 548 n.7 (citing 1977 S.C. Op. Atty. Gen. No. 7729).

concurring in the judgment). Put differently, "significant 'First Amendment concerns arise' when a State purposely 'subject[s] a group of voters or their party to disfavored treatment.'" *Gill v. Whitford*, 585 U.S. 48, 80 (2018) (Kagan, J., concurring) (alteration in original) (quoting *Vieth*, 541 U.S. at 314).

> [P]artisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth*, 541 U.S. at 314, 124 S. Ct. 1769 (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative democracy is "unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402, 147 L.Ed.2d 502 (2000). By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. *See Gill*, 585 U.S., at ——, 138 S. Ct., at 1938 (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"). In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of "democracy embodied in the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 357, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (internal quotation marks omitted).

*Rucho*, 588 U.S. at 731–32 (Kagan, J., dissenting).

Although the majority in *Rucho* found all of plaintiffs' partisan gerrymandering claims to be nonjusticiable, it did so without rejecting the core First Amendment analysis. Because *Rucho*'s rejection of partisan gerrymandering claims rests on its view of the limits of the *federal* judiciary to encroach on the inherent authority of states to draw their own redistricting plans—and not on substantive limits on what the First Amendment protects—this Court is free to recognize the claim without altering its substantive freedom of speech analysis under Article I, Section 2. *See infra* Part IV (justiciability).

But even setting *Rucho* aside, there is also no reasoned basis for construing Article I, Section 2 in perfect lockstep with the U.S. Supreme Court's First Amendment jurisprudence. Doing so disregards the "fundamental principle" that "a Constitution must be considered as a whole." *Riley*, 71 S.C. 457, 51 S.E. at 488. And given the South Carolina Constitution's multiple

independent commitments to "free and open" elections that are protected "from all undue influence" and where voters exercise "equal influence" over elections, *see supra* Part III.B, it makes better far sense to construe Article I, Section 2 as establishing especially strong protections against viewpoint discrimination within the context of voting and electoral influence. Reflexively adhering to the U.S. Supreme Court's interpretation of the First Amendment not only disregards this State's unique constitutional commitments, but it also eschews the Court's role within the Nation's cooperative federalist structure.[33]

South Carolina's statewide redistricting plan deliberately amplifies the voting power of Republicans and intentionally suppresses the voting power of Democrats. As a result, Republicans get to vote with a megaphone while Democrats must shout from the bottom of a lake. That is exactly the sort of viewpoint discrimination this Court should rule is condemned by Article I, Section 2.

(D)

Respect for County Boundaries

The South Carolina Constitution provides that "[e]ach County shall constitute one election district," S.C. Const. art. VII, § 9, and that "[t]he General Assembly may at any time arrange the various Counties into . . . Congressional Districts," *id.* § 13. In the redistricting context, federal courts have held that these provisions reflect "a substantial state policy favoring drawing

[33] Jeffrey S. Sutton, *What Does-and Does Not-Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 707 (2011) ("There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same."); *see also* Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1311–13 (2017) ("When state courts depart from federal precedent, it may be because a state's distinct constitutional text or history points to a different result, and state courts should look first to state-specific sources in deciding an issue of state constitutional law. But when there is no state-specific text or history to guide the analysis, it is no embarrassment for a state court to disagree with federal precedent on the basis of constitutional reasoning that transcends state boundaries. This redundancy in interpretive authority—whereby state courts and federal courts independently construe the guarantees that their respective constitutions have in common—is one important way that our system of government channels disagreement in our diverse democracy.").

congressional districts along county boundaries," *Riley*, 533 F. Supp. at 1180, and that "preserving county lines should enjoy a *preeminent role* in South Carolina's redistricting process," *Burton*, 793 F. Supp. at 1341 (emphasis added).

At times, the state constitutional preference for preserving county boundaries must yield to superseding federal law, such as the 1-person-1-vote (1P1V) principle of *Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring congressional districts be approximately equal in population to ensure each person has roughly equal voting power). *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 648–49 (D.S.C. 2002) ("[T]he principle of preserving county lines occupies a subordinate role to the federal directives embodied in the United States Constitution and the Voting Rights Act."); *see also Riley*, 533 F. Supp. at 1180 (noting the unlikelihood that drafters of Section 13 would have foreseen the 1P1V principle). That said, our Constitution's respect for county boundaries does not permit counties to be split "unless there [is] good reason for it." *Id.*

Partisan gain cannot justify the negation of constitutional reapportionment priorities. Again, examples in other states are instructive. Like South Carolina, the Maryland Constitution expresses a preference for keeping counties and other political subdivisions whole. Specifically, Article 3, § 4 of the Maryland Constitution requires that "[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions." And while "due regard" "cannot overcome constitutional considerations," and "will often be the first to yield" among conflicting redistricting mandates, *Legislative Redistricting Cases*, 331 Md. 574, 615, 629 A.2d 646, 667 (1993), it still "acts as a deterrent to the gerrymandering of legislative districts," *In re 2012 Legislative Redistricting*, 436 Md. 121, 152, 80 A.3d 1073, 1091 (2013). As the Court of Appeals of Maryland explained, "if in the exercise of discretion, political considerations and judgments result in a plan . . . with district lines that unnecessarily cross natural or political subdivision boundaries, that plan cannot be sustained." *In re Legis. Districting of State*, 370 Md. 312, 370, 805 A.2d 292, 326 (2002).

Such is the case here, where there was no "good reason" to split 10 counties. Simulations prepared by Dr. Mattingly show that there are thousands of alternative maps that comply with

federal law and neutral redistricting criteria but split fewer counties than the congressional redistricting plan. Indeed, out of the 84,907 plans produced in one of Dr. Mattingly's ensembles, 78,868 (approximately 93%) split fewer counties than the enacted plan. Not only does the congressional redistricting plan needlessly split counties—it does so to accomplish overt partisan ends. During the public input phase of the legislative process, numerous community members from Charleston, Richland, and Sumter Counties told lawmakers that they wanted their counties united into a single congressional district. *See* Complaint, ¶¶ 75–79. Despite receiving publicly submitted plans that split fewer counties overall *and* accommodated those public requests (including the plan submitted by Petitioner LWVSC), lawmakers instead enacted a redistricting plan that needlessly deepened those splits to facilitate their partisan ambitions.

Preservation of county boundaries is not inviolate. Splitting counties is sometimes necessary to ensure equipopulation or to draw districts that comply with Section 2 of the Voting Rights Act (which, as interpreted in *Thornburg v. Gingles*, 478 U.S. 30 (1986), requires jurisdictions which have sufficiently compact minority communities and voting which is polarized along racial lines, grant minorities districts where they have the opportunity to elect the candidates of their choice). But if "preserving county lines" is to "enjoy a *preeminent role* in South Carolina's redistricting process," *Burton*, 793 F. Supp. at 1341, then it cannot be subordinated to anti-democratic goals like partisan gerrymandering. By needlessly severing counties to achieve an artificial partisan advantage, Respondents violated the commands of S.C. Const. art. VII, §§ 9 & 13.

## IV

## PLAINTIFFS' CLAIMS ARE JUSTICIABLE

"It is well settled that the interpretation of the state's constitution is a matter for the courts." *Baddourah v. McMaster*, 433 S.C. 89, 103, 856 S.E.2d 561, 568 (2021). When the Court interprets the Constitution, it does so "to ensure South Carolinians retain the rights it guarantees." *Planned Parenthood I*, 438 S.C. at 232, 882 S.E.2d at 794 (Beatty, C.J., concurring).

Here, the Constitution requires the Court to address whether extreme partisan gerrymandering violates the South Carolina Constitution. *See Segars-Andrews v. Jud. Merit Selection Comm'n*, 387 S.C. 109, 123, 691 S.E.2d 453, 460–61 (2010). Plaintiffs do not ask the Court to try its hand at redistricting (a task constitutionally assigned to the legislature), but to review the constitutionality of the congressional redistricting plan. To do so, the Court need not "scal[e] the walls that separate law making from judging," *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 767, 767 S.E.2d 157, 181 (2014) ("*Abbeville II*") (Kittredge, J., dissenting), or to "create[] rights and duties out of thin air," *id.*; rather, the Court need only engage in core judicial functions: interpret the Constitution, ascertain the scope of its rights and protections, and apply those mandates to the congressional redistricting plan. Because the task is uniquely judicial and does not encroach on "a coequal branch of government," *S.C. Pub. Int. Found.*, 369 S.C. at 142–43, 632 S.E.2d at 278, "this Court is duty bound to [accept] review," *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460–61.

(A)

Judicial review of legislative action is a core function of the judicial branch.

"A Constitution is the permanent will of the people, is the supreme law, and paramount to the power of the Legislature." *Davenport v. Caldwell*, 10 S.C. 317, 327 (1878). As Chief Justice Marshall famously explained, "if the Constitution does not control a legislative Act repugnant to it, then the Legislature may alter the Constitution by an ordinary Act." *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 138 (1803)). For as long as it has stood, this Court has recognized its solemn responsibility to review the constitutionality of legislative actions:

> "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 138, 1 Cranch 137, 2 L.Ed. 60 (1803). This hallowed observation is the bedrock of the judiciary's proper role in determining the constitutionality of laws, and the government's actions pursuant to those laws.

*Abbeville II*, 410 S.C. at 632, 767 S.E.2d at 163–64. As one of its most fundamental and sacred functions, "this Court is duty bound to review the actions of the Legislature when it is alleged in a

properly filed suit that such actions are unconstitutional." *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460–61.

Both the scope and limits of judicial review derive from the Constitution. When a case presents a question of statutory or constitutional interpretation, the Court is duty bound to answer. *Id*. at 123, 460–61. For just as the Constitution prohibits the legislature from both enacting and enforcing legislation, *see Knotts v. S.C. Dep't of Nat. Resources*, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002), it also does not permit the legislature to decide the constitutionality of its own actions. The same constraint applies to the Governor and the executive branch. *Baddourah*, 433 S.C. at 103, 856 S.E.2d at 568 ("[T]he Governor's exercise of his suspension power is a matter left to his sole discretion. However, defining terms used in the state's constitution is not."). Interpreting the State Constitution is a matter reserved for the courts, and the courts alone. *Id.*; *see also State v. Ansel*, 76 S.C. 395, 405, 57 S.E. 185, 189 (1907) ("[E]ach [branch] is supreme as to matters within its own sphere of action."). Indeed, the judiciary's interpretation and enforcement of the Constitution's limits on the executive and legislative branches is a vital aspect of the "checks and balances provided in the Constitution." *Ansel*, 76 S.C. at 405, 57 S.E. at 189. As former Chief Justice Toal wrote of this concept:

> "Checks and balances" is not just an abstract phrase, but describes a set of concrete governmental arrangements allowing each branch of government to discharge its responsibilities without infringing on those of another branch. One of these arrangements is judicial review of certain executive and legislative actions. In determining when it is permissible to conduct such review, it is important to distinguish between matters of policy and matters of law. The courts are not in the business of reviewing the merits of legislative or executive policies; rather, our role is confined to determining whether a particular action is legal.

*Newman v. Richland Cnty. Historic Pres. Comm'n*, 325 S.C. 79, 480 S.E.2d 72, 76 (1997) (Toal, J., dissenting).

Finally, in determining whether a claim is justiciable, the Court considers "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Segars-Andrews*, 387 S.C. at 122, 691

S.E.2d at 460. That said, "difficulty in determining the precise parameters of constitutionally acceptable behavior . . . does not necessarily signify that courts cannot determine when a party's actions . . . fall outside the boundaries of such constitutional parameters." *Abbeville II*, 410 S.C. at 632, 767 S.E.2d at 163 (citing, *e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (explaining that though 'obscenity' "may be indefinable, . . . I know it when I see it")).

(B)

<u>The political question doctrine is a narrow exception to judicial review.</u>

The political question doctrine flows from the Separation of Powers Clause of the South Carolina Constitution. *S.C. Pub. Interest Found.*, 369 S.C. at 142, 632 S.E.2d at 278; *see* S.C. Const. art. I, § 8. At its core, the doctrine prohibits the Court from using judicial review to encroach on matters explicitly reserved to other branches of government. *See Abbeville II*, 410 S.C. at 665, 767 S.E.2d at 181 (Kittredge, J., dissenting) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to [a political branch], can never be made in this court." (quoting *Marbury*, 5 U.S. at 170)). In this Court's words, "[t]he fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *Gantt v. Selph*, 423 S.C. 333, 339, 814 S.E.2d 523, 526 (2018) (quoting *S.C. Pub. Interest Found.*, 369 S.C. at 142–43, 632 S.E.2d at 278). Importantly, the Court has always been careful to distinguish between 'political *cases*,' which are justiciable, and 'political *questions*,' which are not. *Alexander v. Houston*, 403 S.C. 615, 619, 744 S.E.2d 517, 519 (2013) (quoting *Baker*, 369 U.S. at 217); *see also, e.g.*, *Planned Parenthood I*, 438 S.C. at 257–58, 882 S.E.2d at 807–08 (Few, J., concurring) ("[W]e confront purely legal questions . . . [that] are related to—but not the same as—political questions before the 124th General Assembly."); *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 496, 892 S.E.2d 121, 139 (2023) ("*Planned Parenthood II*") (Few, J., concurring) ("[T]he regulation of abortion is in

the first instance a political question. It is a legal question only to the extent that any restriction on abortion may clearly violate a specific constitutional provision.").

This Court rarely declines review under its political question doctrine. To the contrary, its precedent demonstrates a firm commitment to the "critical and necessary judicial functions" of "interpretation of the law" and "evaluat[ing] the government's acts pursuant to that law," even when the text of the law creates "difficulty in determining the precise parameters of constitutionally acceptable behavior." *Abbeville II*, 410 S.C. at 632–33, 767 S.E.2d at 163–64. It is only under the narrowest of circumstances that the Court denies review—for example, when a case requires the Court to engage in conduct explicitly assigned to a different branch of government, *e.g.*, *Stone v. Leatherman*, 343 S.C. 484, 484–85, 541 S.E.2d 241 (2001) (holding that the Senate has exclusive constitutional authority to judge election returns and qualifications of its own members); *S.C. Pub. Interest Found.*, 369 S.C. at 142, 632 S.E.2d at 278 (denying review over qualifications for judicial appointment where "the State Constitution, in unequivocal terms, vests the power to determine the qualifications for judicial candidates in the General Assembly"), or when plaintiffs bring only "implicit argument[s] as to what the law should be," *Bailey*, 430 S.C. at 275, 844 S.E.2d at 394. No such circumstances apply here.

(C)

Partisan gerrymandering is justiciable under the South Carolina Constitution.

There is no redistricting exception to judicial review. The congressional redistricting plan is a legislative act that, like all others, must abide by the mandates and limits of the South Carolina Constitution. *See* S.C. Const. art. I, § 23 ("provisions of the Constitution shall be . . . mandatory and prohibitory"); *Knight v. Hollings*, 242 S.C. 1, 4, 129 S.E.2d 746, 747 (1963) ("[A]ll sections of the Constitution must be considered together[.]"). As with all laws, the congressional redistricting plan is a joint enterprise between the legislative and executive branches. The legislature drafted, debated, and passed bills that reapportioned electoral districts. The Governor signed those bills into law and is responsible, through the State Election

Commission, for enforcing the law.[34] It is now this Court's duty to resolve Plaintiffs' "properly filed suit that such actions are unconstitutional." *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460–61.

i.

To address the elephant in the room: This case is not *Rucho*. In *Rucho*, a divided U.S. Supreme Court held that partisan gerrymandering claims brought under the *federal* Constitution are "beyond the reach of the *federal* courts." 588 U.S. at 718 (emphasis added). Writing for the majority, Chief Justice Roberts explained that the texts of the First and Fourteenth Amendments failed to provide judicially manageable standards for policing partisan gerrymandering. *Id.* 716–17. Lacking any textual basis "to guide the exercise of judicial discretion," the Court ruled that such claims were nonjusticiable. *Id.* But just because the federal courts cannot adjudicate partisan gerrymandering claims, does not mean that such claims are nonjusticiable in *state* courts. To the contrary, the majority in *Rucho* embraced the possibility that "[p]rovisions in state statutes and state constitutions *can* provide standards and guidance for state courts to apply." *Id.* at 719. Such is the case here.

Unlike in *Rucho*, this case does not require the Court to make an "unmoored determination" about what is "fair" in the context of redistricting. *Id*. at 707. To the contrary, Plaintiffs' claims erupt from the State Constitution's promise of "free and open" elections, where every voter has "an equal right *to elect* officers." S.C. Const. art. I, § 5 (emphasis added). As discussed above, the Free and Open Elections Clause (a distinct constitutional provision that has no federal analogue) has been construed by this Court as requiring that "every elector" be

[34] South Carolina treats the redistricting process like ordinary lawmaking, but that is not true of all states. *See* Kniaz & Shields, *Redistricting: The Road to Reform*, Center on the American Governor (May 2021), *available at* https://governors.rutgers.edu/governors-and-the-redistricting-process/. In North Carolina, for example, the legislature passes state and federal maps as regular legislation, but the governor is expressly *denied* veto power over those maps. N.C. Const. Art. II, § 22(5); *Harper v. Hall*, 384 N.C. 292, 331, 886 S.E.2d 393, 419 (2023) ("[B]oth our constitution and the General Statutes expressly insulate the redistricting power from intrusion by the executive and judicial branches.").

"granted *equal influence* with that of every other elector." *Cothran*, 189 S.C. 85, 200 S.E. at 97 (emphasis added). This Court has rooted similar claims in the State's Equal Protection Clause, where it agreed that the "debasement or dilution of the weight of a citizen's vote" is "as nefarious as an outright prohibition on voting." *Burriss*, 369 S.C. at 451, 633 S.E.2d at 486. Together, these fundamental constitutional rights announce a clear and judicially manageable standard: the state must ensure citizens are afforded "equal influence" over elections. *See Rucho*, 588 U.S. at 720 (citing, as a manageable standard, Mo. Const. art. III, § 3, which mandates that voters "shall be able to translate their popular support into legislative representation with approximately equal efficiency").

ii.

Outside of *Rucho*, state high courts largely looked at the strength and specificity of their constitutional texts, their constitutional histories, and structures to determine whether partisan gerrymandering is justiciable. Results have gone both ways—depending on the text of the state constitutional provisions at issue. In Kansas, North Carolina, and New Hampshire, where challengers rested their claims on federal analogues and state constitutional rights of suffrage, partisan gerrymandering was ruled nonjusticiable. *Rivera*, 315 Kan. at 891–92, 512 P.3d at 179–80 (finding claims nonjusticiable where, "[a]t bottom, . . . the sole mechanism relied on for judicial enforcement of those rights is the constitutional guarantee of equal protection"); *Brown*, 176 N.H. at 337, 313 A.3d at 774 (applying the reasoning of *Rucho* where "plaintiffs acknowledge that their . . . claims under the State Constitution resemble at face value those made under parallel provisions of the federal document in *Rucho*"); *see also Harper v. Hall*, 384 N.C. at 363–64, 886 S.E.2d at 439 (An election is "free" if "voters are free to vote according to their consciences without interference or intimidation. Plaintiffs' partisan gerrymandering claims do not implicate this provision."). But in Kentucky, New Mexico, and Pennsylvania, where state constitutions contain independent rights to "free *and open*" or "free *and equal*" elections, such claims were embraced as justiciable. *Grisham*, 539 P.3d at 282 (New Mexico's "free and open" clause requires that each "vote, when cast, shall have the same influence as that of any other

voter.")[35]; *Graham*, 684 S.W.3d at 684 (Kentucky's "free and equal" clause requires that each vote "have the same influence as that of any other voter"); *League of Women Voters of Pa.*, 645 Pa. 1, 178 A.3d 737.

South Carolina's constitutional text is clearer still. By guaranteeing an "equal right to elect officers"—that is, the right to exercise "equal influence" over elections—Article I, § 5 announces a clear and administrable principle: lawmakers cannot enact laws that distort the electoral influence of certain voters.

iii.

Under this Court's precedent, partisan gerrymandering claims do not present a non-justiciable political question. For example, this case is much simpler than the Education Clause claim that this Court recognized in *Abbeville*. There, the Court interpreted Article XI, § 3 of the State Constitution—which commands the General Assembly to "provide for the maintenance and support of a system of free public schools open to all children in the state"—to contain an implicit right to a "minimally adequate" education. *See Abbeville II*, 410 S.C. at 626–27, 767 S.E.2d at 160–61 (discussing *Abbeville Cnty. Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999) ("*Abbeville I*")). The Court then went on to define "minimally adequate" as including the right to "adequate and safe facilities," and the opportunity to acquire "the ability to read, write, and speak the English language," the "knowledge of mathematics and physical science," and a "fundamental knowledge of economic, social, and political systems, and of history and governmental processes." *Id.* (quoting *Abbeville I*, 335 S.C. at 68–69, 515 S.E.2d at 540).

Admittedly, *Abbeville* was not without its critics. The dissent in *Abbeville II*, for example, characterized the phrase "minimally adequate education" as "purposely ambiguous, objectively

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[35] The New Mexico Supreme Court's holding arose under the state's Equal Protection Clause, but it pinned its reasoning (and its divergence from *Rucho*) on the state's independent textual protections for popular sovereignty and free and open elections. *Grisham*, 539 P.3d at 289 ("[O]ur Constitution contains provisions that *Rucho* did not consider, provisions with no federal counterpart."); *see also supra* Part III.B (discussing *Grisham*).

unknowable, and unworkable in a judicial setting." 410 S.C. at 632, 767 S.E.2d at 163 (Kittredge, J., dissenting). But South Carolina's partisan gerrymandering is more amenable to judicial intervention than the controversy over educational adequacy in *Abbeville*. Compared to *Abbeville*, this case advances a right that is much better tethered to the constitutional text, that applies this Court's pre-existing precedent, and that is far more amenable to judicial identification, determination, and application. No one asks that the Court act as a "super-legislature" over any area of policy; this case only requires the Court to adopt a standard for determining when a redistricting plan violates the "equal right to elect officers" guaranteed to all South Carolina voters.

iv.

To Petitioners' knowledge, this Court has never denied review for lack of judicially manageable standards. Nor should it; law libraries are replete with tests and standards that were developed to assess adherence to important, but imprecise principles. If the text of the Constitution creates a right, it is the Court's duty to develop standards to enforce that right.

And as the U.S. Supreme Court has conceded: sometimes "there is no guide to the decision of cases." *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962). Examples abound. Procedural due process rights turn on the gravity of the right at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Second Amendment challenges were recently subject to a "tripartite binary test with a sliding scale and a reasonable fit." *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (discussing tests that developed in the circuits). Many rights rely on judicial assessments of the "totality of the circumstances." *See, e.g.*, *Samson v. California*, 547 U.S. 843, 848 (2006) ("[W]e examine[] the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment."); *Gallegos*, 370 U.S. at 55 (admissibility of coerced confession); *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 668–69 (2021) (assessing claim under Section 2 of the Voting Rights Act). These tests are routinely applied by this Court. *E.g.*, *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246–47 (1990) (voluntariness of confession based on totality of circumstances); *Anderson*, 415 S.C. at 447, 783 S.E.2d at 54 (*Terry* stop evaluated

under totality of circumstances). Just as the political question doctrine does not preclude the Court from using flexible or imprecise tests to protect residents from "unreasonable" searches or from deprivations that lack "due process of law," it imposes no impediment here. As the Utah Supreme Court explained this summer in its own partisan gerrymandering case:

> [W]hen deciding whether a constitutional provision articulates a judicially definable rule, the question simply cannot be whether the rule is difficult to apply or whether we might wish for a clearer one. We look instead for whether the provision sets out a rule at all; if it does, we do our best to apply it.

*League of Women Voters of Utah v. Legislature*, — P.3d —, 2024 UT 21, 36 (July 11, 2024) (holding that "although the text does not explicitly detail what it means to 'alter or reform [the] government,' courts are well-equipped to determine the original public meaning of these terms and how the principles they embody apply to a given set of facts today.").

But in any event, as discussed above, judicially manageable standards *do* exist for testing the limits of partisan bias in redistricting. *See supra* Part III. And though more difficult line drawing might *hypothetically* arise in a future case, the Court need not address that here, where evidence of improper intent and effects is clear as day. *See supra* Part I.B; Complaint at ¶¶ 129–179; *see also Graham*, 684 S.W.3d at 683–84 ("[W]e need not resolve today precisely what level of disparate result would warrant such a finding [of unconstitutional bias].").

(D)

The consequences of declining review are dire.

Finally, if there remains any question whether judicial review is appropriate, the Court must weigh the consequences of inaction. Unlike many other states, South Carolina does not recognize any form of direct democracy. As this Court has explained, "Article III, § 1, of the South Carolina Constitution provides for a representative form of government in this state as opposed to a direct democracy." *Joytime Distributors & Amusement Co.*, 338 S.C. at 642, 528 S.E.2d at 651. As a result, voters can only achieve their policy preferences through their elected

representatives—who, in turn, have a deep self interest in configuring electoral districts in a manner that entrenches their power and reduces their political accountability.

Should this Court deem the Legislature's ability to gerrymander nonjusticiable and unreviewable, South Carolina legislators will have unfettered ability to manipulate the democratic process and dilute the voting power of South Carolina's citizens in violation of the Constitution's promises, thereby entrenching themselves in positions of power. And South Carolina's citizens will have no recourse, as their voting power will be diminished by the very actions the Court deemed too political too police. Indeed, in the case of extreme political gerrymandering, this Court stands as the last bastion against unchecked legislative tyranny.

## V

## CONCLUSION

This case is consequential, but simple. As Justice Gorsuch noted at oral arguments in *Alexander*, we must "take as a given" that the South Carolina congressional redistricting plan is a partisan gerrymander. Starting there, the only question is whether partisan gerrymandering violates the South Carolina Constitution. Because the text, history, and purpose of the Constitution prohibit laws that intentionally dilute or nullify the influence of voters, that treat similarly situated voters disparately, that suppress free expression based on a voter's political views, and that unnecessarily split counties between congressional districts, Petitioner is entitled to relief.

Respectfully submitted

July 29, 2024

[*signature blocks on following page*]

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