THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION

Appellate Case No. 2024-001227

LEAGUE OF WOMEN VOTERS OF SOUTH CAROLINA.....Petitioner,

v.

THOMAS ALEXANDER, in his official capacity as President of the South Carolina Senate; MURRELL SMITH, in his official capacity as Speaker of the South Carolina House of Representatives; and HOWARD KNAPP, in his official capacity as Director of the South Carolina Election Commission, ...Respondents,

and

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina,.....Intervenor–Respondent.

BRIEF OF GOVERNOR MCMASTER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

Legislative Acts and Materials

STATEMENT OF THE ISSUES

I. Whether a partisan gerrymandering claim is justiciable, when the South Carolina Constitution textually commits map-drawing to the General Assembly and courts have never agreed on any framework for analyzing such claims.

II. Whether the South Carolina Constitution prohibits considering partisan goals in redistricting, even though partisan gerrymandering has occurred in this State for hundreds of years, including—most notably—in the immediate aftermath of the adoption of the primary constitutional provision that the League of Women Voters cites.

INTRODUCTION

The League of Women Voters seeks to start—and asks this Court to referee indefinitely—a redistricting revolution in South Carolina. Rather than leaving partisan apportionment debates to the political branches, the LWV demands that this Court arrogate to itself an unprecedented role in that process. The United States Supreme Court has already recognized that the federal constitution prohibits federal courts from usurping that authority. *Rucho v. Common Cause*, 588 U.S. 684 (2019). The Court should similarly decline the LWV's invitation for two reasons. First, it would violate the South Carolina Constitution's mandate of separation of powers. And second, it would diverge from the South Carolina Constitution's original meaning.

As a threshold problem, partisan gerrymandering claims are not justiciable under South Carolina law. Our Constitution textually commits the regulation of elections to the General Assembly, *see* S.C. Const. art. II, § 10, and historical practice proves that the General Assembly has consistently exercised that authority without courts trying to fashion a test to decide whether a map is "too partisan." Nothing is unusual about this conclusion. Just as this Court in *Abbeville* ultimately held that what constitutes a free public school open to all children was a political

question, *see* Order, *Abbeville Cnty. Sch. Dist. v. State*, No. 2007-065159 (Nov. 17, 2017) (adopting then-Justice Kittredge's dissent in *Abbeville County School District v. State*, 410 S.C. 619, 767 S.E.2d 157 (2014) ("*Abbeville II*")), so too is the question of drawing electoral maps.

Confirming this conclusion is the lack of any legal principles or established test for evaluating complaints about the interplay between politics and reapportionment. The LWV points to other state courts' tests, but those tests vary, and even if limiting partisan gerrymandering might be "easy to agree with in the abstract," the divergent tests to identify and enforce any judicial limit "lack[] a discernible foundation and objective framework." *Abbeville II*, 410 S.C. at 682, 767 S.E.2d at 191 (Kittredge, J., dissenting). With no legal framework to apply, judicial involvement in such cases would effectively force courts to employ the Goldilocks rule when someone complains that a map is too political. Adopting the LWV's approach to adjudicating constitutional claims would threaten public confidence not only in the courts' independence but also in the integrity of public elections.

Even if the LWV's claims were somehow justiciable, they fail as matter of law. The original meaning of each clause the LWV cites has nothing to do with partisan gerrymandering. Both text and contemporaneous legislative action confirm as much.

To be sure, the Governor does not think and does not suggest that the congressional map he signed into law is a partisan gerrymander. The General Assembly carefully drafted a map that accounts for various traditional districting principles, and no matter what test the LWV might propose, the congressional map would pass muster. The Governor's argument here focuses not on the specifics of South Carolina's current map, but instead on the broader legal issue of whether any of the constitutional provisions that the LWV invokes prohibits partisan gerrymandering generally.

The Free and Open Elections Clause requires that all citizens qualified to vote be permitted to vote, free from any unconstitutional legal or physical restrictions, for any candidate qualified in an election. The map that the LWV challenges meets that standard: Everyone can vote in congressional elections for any candidate that meets the constitutional requirements for Congress. Historical practice confirms that this clause does not prohibit the legislature from considering partisan aims. In fact, the very first congressional map drawn after South Carolina adopted the Free and Open Elections Clause was a blatant partisan gerrymander. And so was the second map.

The Equal Protection Clause ensures that similarly situated South Carolinians are treated the same. That's exactly how they are treated under the congressional map. Each voter casts one ballot in properly apportioned districts. That clause does not create a right to have a voter's favored candidate win an election.

The Free Speech and Assembly Clauses have never been held, either under our Constitution or their federal counterparts, to have any relevance to partisan gerrymandering. Presumably that is why the LWV relies primarily on the *dissent* from *Rucho*. How voters are divided into districts does not limit their ability to speak or associate with like-minded voters. As the Fourth Circuit explained in the context of the First Amendment, free speech and assembly "protect[] the right to associate for the purposes of advocacy" but they "provide[] no guarantee that a speech will persuade or that advocacy will be effective." *Baten v. McMaster*, 967 F.3d 345, 359 (4th Cir. 2020).

Finally, article VII's provisions about county lines and election districts must yield to the federal one-person, one-vote rule, and districts may be drawn as the General Assembly "deem[s] wise and proper." S.C. Const. art. VII, § 13. Moreover, the LWV's apparent attempt to require as few counties be split as possible would wrongly force legislators to ignore longstanding traditional

districting principles and lead to litigation about why some counites were divided instead of others.

Ultimately, the law does not "hide elephants in mouseholes." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 677 (2023). Eliminating a long-standing practice like partisan gerrymandering would not have come buried in the clauses that the LWV cites, which have nothing to do with that subject. If the People wanted to prohibit partisan gerrymandering, they could have done so. But they haven't. So, for centuries, this Court has left political fights to the political branches. It should continue to do so, lest the People provide otherwise. Both the separation of powers and the original meaning of the Constitution demand it.

STATEMENT OF THE CASE

A. South Carolina redraws its congressional map after the 2020 census.

As it does every decade now, South Carolina reapportioned its congressional districts after the 2020 census. *See* 2022 S.C. Acts No. 118, § 1. Much of the redistricting debate focused on the First Congressional District and Charleston. That district had witnessed the most population growth over the previous decade, while the adjacent Sixth Congressional District had seen its population substantially decline during those years.

In undertaking its reapportionment responsibilities, the General Assembly intended to draw a new map that accounted for these population changes, while also enhancing the First Congressional District's partisan preference for Republican candidates. That district had been consistently represented by a Republican for nearly 40 years, with the only aberration arriving just before the latest decennial redistricting, when a Democrat held the seat for a single term. In redrawing the First District after the 2020 census, the General Assembly brought all of Beaufort and Berkeley Counties and Republican-leaning parts of Dorchester County into the district. At the same time, the General Assembly also made the deliberate decision to maintain Charleston

County's preexisting split, which would ensure it always had a Representative who shared the President's party. Ultimately, the projected Republican vote share in the First District rose a meager 1.36% to 54.39%.[1] *See Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 11–17 (2024) (recounting the adoption of the congressional map).

B. A federal racial gerrymandering lawsuit fails.

Even before that map was enacted, plaintiffs began suing about the redistricting process, claiming it was taking too long. Once the General Assembly passed and the Governor signed into law the new maps, that lawsuit's focus shifted to a racial gerrymandering claim.

The three-judge district court held for those plaintiffs. *S.C. State Conf. of NAACP v. Alexander*, 649 F. Supp. 3d 177 (D.S.C. 2023). It concluded that the General Assembly had a "target" of 17% African American population in the First District and that "race was the predominant motivating factor" in the design of the First District, which, the district court said, violated the United States Constitution. *Id.* at 189, 193.

The Supreme Court reversed. *Alexander*, 602 U.S. 1. The district court failed to apply the presumption of legislative good faith and conflated partisan goals with racial ones. *Id.* at 20–24. The plaintiffs' experts' testimony was deeply flawed. *Id.* at 24–33. And the district court should have, but did not, draw an adverse inference against the plaintiffs for failing to produce a map showing how the State "could have achieved its legitimate political objectives . . . while producing significantly greater racial balance." *Id.* at 34 (internal quotation mark omitted).

After the Supreme Court remanded the case for further proceedings on the plaintiffs' vote-dilution claim, the plaintiffs stipulated to dismissing that claim with prejudice. *See* Joint

[1] The LWV offers a much longer version of the redistricting process. *See* Compl. ¶¶ 40–178. Given the legal shortcomings of the LWV's claims, this long background—even if its account were accurate—is irrelevant.

Stipulation, *S.C. State Conf. of NAACP v. Alexander*, No. 3:21-cv-3302 (D.S.C. July 26, 2024), ECF No. 527.

C. The LWV asks this Court to recognize a partisan gerrymandering claim under state law.

A mere three days after that stipulation in federal court, the LWV (with many of the same counsel who represented the plaintiffs in the federal case) asked this Court to grant a petition for original jurisdiction. The LWV wants this Court to hold—for the first time ever—that the South Carolina Constitution prohibits partisan gerrymandering, based on various constitutional provisions.

This Court granted the original jurisdiction petition and set a briefing schedule.

STANDARD OF REVIEW

"This Court has a limited scope of review in cases involving a constitutional challenge to a statute." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). The Court "begins with a presumption of constitutionality." *S.C. Dep't of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 506, 757 S.E.2d 388, 392 (2014). And the Court must, "if possible," interpret a statute "to render [it] valid." *Id.* Only when a statute's "repugnance to the Constitution is clear and beyond a reasonable doubt" can it be declared unconstitutional. *Curtis*, 345 S.C. at 570, 549 S.E.2d at 597. A facial challenge "is the most difficult to mount successfully" because a petitioner must show the law "is unconstitutional in all its applications." *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 477, 892 S.E.2d 121, 128 (2023) (cleaned up).

ARGUMENT

I. A partisan gerrymandering claim is nonjusticiable.

The Court need not even reach the merits of the LWV's claims to reject them. The LWV makes a big deal about basic principles, such as judicial review and protecting constitutional rights. *See* Pet. Br. 42–43. As blackletter law, those concepts are unobjectionable.

This case, however, presents a more specific question: Even accepting those principles, is a partisan gerrymandering claim capable of judicial resolution? It is not.

A. Drawing maps is textually committed to the General Assembly.

This Court has recognized that "[t]he nonjusticiability of a political question is primarily a function of the separation of power." *S.C. Pub. Int. Found. v. Jud. Merit Selection Comm'n*, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006); *see also* S.C. Const. art. I, § 8 ("the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other"). "The fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *S.C. Pub. Int. Found.*, 369 S.C. at 142–43, 632 S.E.2d at 278. Such conflict occurs when "where the Constitution delegates authority to the General Assembly." *Id.* at 143, 632 S.E.2d at 278–79.

Sometimes, this assignment is easy to spot and generates little debate. For instance, the Constitution provides that "[e]ach house shall judge of the election returns and qualifications of its own members." S.C. Const. art. III, § 11. Based on this provision, the Court held, without dissent, that it "does not have jurisdiction over" a Senate candidate's protest, a conclusion that has never been seriously challenged. *Stone v. Leatherman*, 343 S.C. 484, 485, 541 S.E.2d 241, 241 (2001).

Other times, the assignment to another branch takes longer to recognize. *Abbeville* provides a prominent example. Article XI, section 3 requires "[t]he General Assembly" to "provide for the maintenance and support of a system of free public schools open to all children in the state." S.C. Const. art. XI, § 3. This Court first held that this meant the General Assembly must provide a "minimally adequate education," which the Court could oversee. *Abbeville Cnty. Sch. Dist. v. State*, 335 S.C. 58, 68, 515 S.E.2d 535, 540 (1999) ("*Abbeville I*"). This Court stood by that

decision a decade-and-a-half later. *See Abbeville II*, 410 S.C. at 661–62, 767 S.E.2d at 179–80. The LWV seems to cite the *Abbeville II* majority as if that opinion were still good law. *See* Pet. Br. 43, 44–45, 48.

But as this Court well knows, *Abbeville II* was overruled. The Court "vacated [its] continuing jurisdiction over this matter" and declared that "*Abbeville II* was wrongly decided as violative of the separation of powers" for the reasons then-Justice Kittredge had laid out in his dissent. Order 1, *Abbeville Cnty. Sch. Dist. v. State*, No. 2007-065159 (Nov. 17, 2017). That dissent explained that "these policy determinations are quintessentially nonjusticiable political questions which the constitution indubitably assigns to the General Assembly." *Abbeville II*, 410 S.C. at 665, 767 S.E.2d at 181 (Kittredge, J., dissenting). Just as this Court held that article XI, section 3 presented a nonjusticiable political question, so too does partisan gerrymandering.

1. Article II, section 10 includes the power to draw maps.

Our Constitution commits to "[t]he General Assembly" the mandatory duty to "regulate the time, place and manner of elections" and to "enact other provisions necessary to the fulfillment and integrity of the election process." S.C. Const. art. II, § 10. Article II, section 10 was a new addition in 1971, *see* 1971 S.C. Acts No. 277, based on the recommendation of the West Committee, *see Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895* 28 (1969) ("*West Report*"). The committee "recognize[d]" that the General Assembly had the power to regulate the time, place, and manner of elections even "without a constitutional mandate," yet the committee thought "these matters are extremely important to the proper functioning of the election process," so "the Constitution should give the General Assembly a mandate to act." *Id.* at 29. In its meetings, the West Committee instructed draft language be prepared for such a mandate, *see* Committee to Make a Study of the Constitution of South Carolina,

1895, *Minutes of Committee Meeting* 71 (Sept. 16, 1967), and that draft language tracked the federal constitution (including the missing Oxford comma). That's a strong indication that the framers of article II, section 10 intended the clause to mean what it meant under federal law, particularly when the ballot question didn't specify anything about this phrase other than that the new provision would "provide for . . . election procedures to be enacted by law." 1970 S.C. Acts No. 1271, § 2.

The power to regulate the time, place, and manner of elections has long been understood to include the power to draw maps. The federal constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. During the Ratification debates, Antifederalists charged that this clause "transferred" "the right of election itself" "from the people to their rulers," giving Congress the power to determine the district lines in a State. Brutus, *Essay IV* (Nov. 29, 1787) in *The Anti-Federalist*, at 131 (Herbert J. Storing ed., 2d ed. 1985); *see also, e.g.*, Patrick Henry, *Speech in the Virginia Ratifying Convention* (June 5, 1788) in *The Anti-Federalist*, at 311 ("What can be more defective than the clause concerning the elections?"). Alexander Hamilton answered that election regulation remained "primarily" in the States, but the federal government was given "ultimate[]" authority to prevent its "annihilat[ion]" if States refused to hold congressional elections. *The Federalist No. 59*, p. 360–61 (Hamilton) (C. Rossiter & C. Kelser eds. 2003). In continuing his defense of the proposed federal compact, Hamilton explained that the federal Times, Places and Manner Clause posed no greater threat to suffrage than state constitutions, and in making that argument, Hamilton took as a given that States had the power to divide themselves into electoral districts. *See The Federalist No. 60*, p. 371 (Hamilton) (using New York as an example); *see also* 1 Joseph Story, *Commentaries on the Constitution of*

the United States § 824 (Thomas M. Cooley ed. 4th ed. 1873) (discussing the original understanding of time, place, and manner regulations and noting that States drew electoral districts for state offices).

History confirms that the Times, Places and Manner Clause did not grant some new power to the States. Rather, it largely kept with them a power that they had enjoyed before the Revolution. Colonial South Carolina, for instance, had long had a legislature based on a certain number of representatives from each parish. *See, e.g.*, 1719 S.C. Acts No. 394, § 8, 3 *Statutes at Large of South Carolina* 51–52 (Thomas Cooper ed. 1838). This power was so entrenched in the States that New York's ratification of the Constitution in 1788 declared, "That nothing contained in the said Constitution is to be construed to prevent the Legislature of any State from passing Laws at its discretion from time to time to divide such State into convenient Districts, and to apportion its Representatives to and amongst such Districts." Ratification of the Constitution by the State of N.Y. (July 26, 1788), in 2 *Documentary History of the Constitution of the United States of America* 194 (1894).

South Carolina's early redistricting acts provide yet more evidence that the power to regulate the time, place, and manner of elections included the power to draw maps. Those acts used the constitutional terminology when establishing new districts. *See* 1788 S.C. Acts No. 1427, § 1, 5 *Statutes at Large of South Carolina* 84 (Thomas Cooper ed. 1839) (act establishing congressional maps entitled "AN ACT Prescribing, on the Part of This State, the Times, Places and Manner of Holding Elections for Representatives in the Congress"); 1790 S.C. Acts No. 1484, § 1, 5 *Statutes at Large of South Carolina*, at 146 (same); 1792 S.C. Acts No. 1553, § 1, 5 *Statutes at Large of South Carolina*, at 212 (act establishing congressional maps entitled "AN ACT Prescribing, on the Part of This State, the Times, Places and Manner of Holding Elections for

Representatives in the Congress of the United States"); 1802 S.C. Acts No. 1785, § 1, 5 *Statutes at Large of South Carolina*, at 430 (same); 1812 S.C. Acts No. 2003, § 1, 5 *Statutes at Large of South Carolina*, at 664 (same); 1822 S.C. Acts No. 2284, § 1, 6 *Statutes at Large of South Carolina* 182 (David J. McCord ed. 1839) (same).

On top of this historical evidence, the United States Supreme Court has consistently interpreted the Times, Places and Manner Clause to include the power to draw legislative maps. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015) *Smiley v. Holm*, 285 U.S. 355, 369–70 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916).

2. Article II, section 10 gives the power to draw maps exclusively to the General Assembly.

Knowing that article II, section 10 includes the power to draw maps, what's next important to recognize is the structure of that provision. Article II, section 10 uses the same structure as article XI, section 3 on public education: "The General Assembly shall provide for . . . ." *Compare* S.C. Const. art. II, § 10, *with id.* art. XI, § 3. Just as article XI, section 3 marks an "indubitabl[e]" textual assignment to the General Assembly, so too does article II, section 10. *Abbeville II*, 410 S.C. at 665, 767 S.E.2d at 181 (Kittredge, J., dissenting).

In fact, the conclusion that article II, section 10 leaves certain election-related decisions exclusively to the General Assembly is one that this Court has already reached in another context. During the 2020 election, the Court declared that article II, section 10 left it to the General Assembly to determine whether all voters should be permitted to vote absentee. The legislature was free to "change the law," but "this Court . . . w[ould] not" change it because "whether any

change should be made to the law is a political question."[2] *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 275–76, 844 S.E.2d 390, 394 (2020).

B. Partisan gerrymandering claims lack a judicially manageable standard.

This textual commitment to the General Assembly is confirmed by the lack of judicially manageable standards to decide a partisan gerrymandering claim. The LWV cites a trio of cases from other States that have found such a claim justiciable: Pennsylvania looks at whether "neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage." *League of Women Voters v. Pennsylvania*, 178 A.3d 737, 817 (Pa. 2018). New Mexico applies the intent, effects, and causation test proposed by Justice Kagan in her *Rucho* dissent. *See Grisham v. Van Soelen*, 539 P.3d 272, 289 (N.M. 2023). And Kentucky asks whether an alleged partisan gerrymander "either involves a clear, flagrant, and unwarranted invasion of the constitutional rights of the people, or is so severe as to threaten our Commonwealth's democratic form of government." *Graham v. Adams*, 684 S.W.3d 663, 683 (Ky. 2023).

As then-Justice Kittredge put it in *Abbeville II*, the goal of these standards might be "easy to agree with in the abstract." 410 S.C. at 682, 767 S.E.2d at 191 (Kittredge, J., dissenting). "But as a legal concept," each test "lacks a discernible foundation and objective framework. It is precisely this amorphous quality that bespeaks the nature of this issue as a political question." *Id.*

The LWV seems to recognize the lack of any generally accepted test. It admits that "the Court must fashion a test" for evaluating the constitutionality of a redistricting plan. Pet. Br. 30.

[2] To quickly dispose of one potential counterargument, racial gerrymandering is subject to judicial review because a constitutional provision specifically prohibits denying the right to vote "on account of race," U.S. Const. amend. XV, § 1, which Congress can enforce "by appropriate legislation," *id.* amend. XV, § 2; *see also* Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (Aug. 6, 1965). No similar provisions speak to partisan gerrymandering.

And near the end of the Petition, the LWV reaches back to the height of the Warren Court for the idea that "sometimes 'there is no guide to the decision of cases'" in advocating for a "totality of the circumstances" test. Pet. 42 (quoting *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962)). Thus, it's no surprise that the LWV asserts that "the Court need not develop *per se* rules for determining how much bias or disparate influence is permissible." Pets. 29 n.31. This smacks of Justice Stewart's famous "I know it when I see it" test for pornography. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

When the LWV points to other areas of law for a flexible test, its argument is wanting. *See* Pet. Br. 46–47. As one example, the LWV cites a dissent from the denial of certiorari from Justice Thomas about Second Amendment challenges being subject to "a tripartite binary test with a sliding scale and a reasonable fit." *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., dissenting from denial of cert). But Justice Thomas explained that "there is nothing in our Second Amendment precedents that supports the application" of a tripartite test. *Id.* And just two years later, the United States Supreme Court confirmed as much, rejecting a balancing test and requiring gun regulations to be "consistent with this Nation's historical tradition" to pass Second Amendment muster. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). As a second example, the LWV points to Fourth Amendment searches for a totality-of-the-circumstance test, but courts have been considering "the circumstances of the case" for over a century in those cases. *E.g.*, *Lambert v. United States*, 282 F. 413, 417 (9th Cir. 1922). Courts therefore have large bodies of case law developed to guide decisions about how the constitutional text plays out in practice. Plus, that test is based on the textual command of "reasonableness"—a constitutional flexibility missing from article II, section 10. The LWV's examples therefore prove how different partisan gerrymandering claims are from claims that courts have historically decided.

Ultimately, the LWV confesses that it asks this Court to do something "novel," Pet. Br. 1; Pet. 4, 16, and inject itself into decennial political fights over apportionment. This Court has never had a role in deciding whether a map is too partisan, and to arrogate that power to itself would be "an unprecedented expansion of judicial power. . . . into one of the most intensely partisan aspects of American political life." *Rucho*, 588 U.S. at 718–19. That intrusion would be more than constitutionally unsound. It would also create unnecessary risks to judicial legitimacy, as the average voter will likely assume (even if incorrectly) that partisan considerations drove a court's decision on an undeniably political topic.

As the United States Supreme Court pointed out in *Rucho*, *see id.* at 719–21, the lack of a judicial solution does not mean that there are no ways to limit partisan gerrymandering. If the People wanted, state legislation and constitutional amendments are both options, as is congressional action. What is not an option is to adopt the view that "this Court *can* address the problem of partisan gerrymandering because it *must*" when no one else has acted yet. *Id.* at 718.

Of course, none of this means that every question related to voting and elections is off limits to judicial review, as even a cursory review of the South Carolina Reports makes clear. As just two illustrations, this Court often hears election disputes, as set out by statute, *see, e.g.*, *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 831 S.E.2d 429 (2019), and it hears redistricting cases that arise under statute, *see, e.g.*, *Elliott v. Richland Cnty.*, 322 S.C. 423, 472 S.E.2d 256 (1996). But partisan gerrymandering cases are nonjusticiable. Thus, this case should end before it even begins.

II. Nothing in the South Carolina Constitution prohibits partisan gerrymandering.

The LWV points to various constitutional provisions to argue that our State's social compact forbids partisan gerrymandering. None, however, supports the LWV's claims, much less

forbids the General Assembly from accounting for partisan considerations in the redistricting process.

In analyzing the LWV's claims, the original meaning of constitutional terms must be the focus because, in our system of government, the People make the law, and the written law is what "the citizenry and the General Assembly have worked to create." *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014). Thus, courts must "look at the ordinary and popular meaning of the words used, keeping in mind that amendments to our Constitution become effective largely through the legislative process." *Id.* (cleaned up). This is a longstanding and well-established rule. *See, e.g.*, *McWhirter v. Bridges*, 249 S.C. 613, 621, 155 S.E.2d 897, 901 (1967); *State v. Dawson*, 21 S.C. 100, 1836 WL 1498, at *3 (S.C. App. L. 1836). And it is one that this Court continues to employ. *See generally Owens v. Stirling*, 443 S.C. 246, 904 S.E.2d 580 (2024). To be sure, the Constitution can change, but that change must come through the People, not through the courts. *See* S.C. Const. art. XVI, § 1.

Before turning to each of the constitutional provisions that the LWV invokes, it's necessary to understand the history of partisan gerrymandering, both in the United States generally and South Carolina specifically.

Partisan gerrymandering generally. Gerrymandering is older than the United States. Even "[p]artisan gerrymandering is nothing new," as it "was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution." *Rucho*, 588 U.S. at 696.

The term "gerrymander" comes from an 1812 congressional map approved by Massachusetts governor Elbridge Gerry in favor of the Democratic-Republicans against the Federalists, prompting the now-famous cartoon on March 26, 1812, in the *Boston Gazette*. *See*

Elmer C. Griffith, *The Rise and Development of the Gerrymander* 17–18 (1907) (providing a picture of that cartoon). That map included "fantastic shapes" for districts such that one only "needed wings to resemble a prehistoric monster," making it the "most unfair districting law" passed in the early nineteenth century. *Id.* at 17, 62. The word "gerrymander" was "immediately picked up by the Federalist press and widely used . . . for campaign purposes," as Gerry "was accused of engendering political animosities and party spirit." *Id.* at 18–19. Other States also saw overtly partisan gerrymanders during this decade. *See id.* at 77–87 (discussing New York, New Jersey, Virginia, and New Hampshire).

Governor Gerry may have given gerrymandering its name, but he didn't create it. One prominent older example came from Virginia two decades earlier. Antifederalist Patrick Henry was accused (including by George Washington) of trying to gerrymander Virginia in 1788 for the first federal elections, hoping to keep Federalist James Madison from winning a seat in the House of Representatives. *Id.* at 31–32, 35. (Henry's efforts failed, and Madison would serve in the First Congress, where he led the effort to adopt the Bill of Rights. *See* Richard Brookhiser, *James Madison* 79–82 (2011).) Such partisan efforts to promote one side's election chances were frequent throughout the early Republic. *See, e.g.*, Griffith, *supra*, at 47–53 (discussing efforts in New York, New Jersey, and Pennsylvania).

By the mid-1800s, the gerrymander "had become a means employed by the colonies and states for partisan purposes." *Id.* at 121. The word was well entrenched in America's political lexicon. *See, e.g.*, Noah Webster, *Complete Dictionary of the English Language* 567 (1864) (defining "gerrymander" as "[t]o divide, as a state, into local districts for the choice of representatives, in a way which is unnatural and unfair, with a view to give a political party an advantage over its opponent"). "It was generally conceded that each party would attempt to gain

power which was not proportionate to its numerical strength." Griffith, *supra*, at 123.

In response to this gerrymandering, Congress and some States sought to curtail it. Congress required that Representatives be elected from single-member districts "compose of contiguous territory," Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491, though South Carolina was already doing that, *e.g.*, 1792 S.C. Acts No. 1553, § 1, 5 *Statutes at Large of South Carolina*, at 212 (dividing the State into six single-member districts). In the States, some "sought to exclude the gerrymander from their political practices by introducing in their constitutions provisions aimed to prohibit the formation of partisan districts." Griffith, *supra*, at 123.

Partisan gerrymandering in South Carolina. But South Carolina did not take such steps, despite its history with partisan gerrymandering. Early elections in colonial South Carolina were "tumultuous affair[s]" in which "unscrupulous leaders of the factions in and about Charleston had their own way." William A. Schaper, *Sectionalism and Representation in South Carolina*, I American Historical Association 324 (1900). "Quarrel[ing] between factions" over representation in the colonial legislature was common. *Id.* at 341. As disputes arose over how many seats each parish received in the colonial legislature, concerns arose over the "evils of gerrymandering," with the tension typically between lowcountry planters and newer settlements in the upcountry. *Id.* at 347. Such concerns were "the main fight" in the late 1780s over whether the state constitution needed to be amended again. *Id.* at 376. They were then an important debate at the constitutional convention called in 1789, as "men from the tide-water would not budge" and "acted as a unit to keep the control of the government in their section" in what proved an "exciting and violent" contest. *Id.* at 378–79. This fight continued in the first decade of the 1800s, when districts finally became apportioned based more on population. *Id.* at 431–34; *see also* 1807 S.C. Acts No. 1913, 5 *Statutes at Large of South Carolina*, at 566.

These disputes, of course, were not necessarily driven by political parties as we think of them today, but often by geography. Still, the disagreement between the sides was over substantive issues (such as taxes), just as disagreements between Democrats and Republicans are today. These older fights over apportionment therefore show that disputes over how legislative seats are determined between competing political factions is nothing new in South Carolina.

To be sure, gerrymandering wasn't rampant at every turn in these years. Some congressional reapportionments in the early nineteenth century included "nothing of special interest" as "adjoining districts were grouped together roughly based on a population basis, without any apparent attempt at gerrymandering." Schaper, *supra*, at 449.

But at the end of the Civil War and as South Carolina was adopting another new constitution, reapportionment garnered attention yet again. Governor Benjamin Franklin Perry, appointed by President Andrew Johnson after the war, expressed to the President that the State's new constitution would include equal representation. *Id.* at 450. Yet the 1865 constitution did not fully achieve this goal. *Id.* at 451–54. So the 1868 Constitution took further steps to base apportionment on population. *Id.* at 454; *see also* S.C. Const. art. II, § 6 (1868).

Even more significant here, the 1868 Constitution also brought the State's first Free and Open Elections Clause. *See* S.C. Const. art. I, § 31 (1868). This Clause, however, did not stop partisan gerrymandering. When time came for congressional reapportionment after the 1870 census, the practice was so common that one Columbia newspaper predicted the new map would "no doubt" be "a Gerrymandering scheme" aimed "to secure Radical majorities in all the Congressional Districts, and to make it practicable for certain aspirants to get themselves before the people for seats in the Congress." Daily Phoenix (Columbia, S.C. Feb. 14, 1874).

The map didn't disappoint—and neither did the process of adopting it. The General

Assembly began debating a new map for 1874, and one House member was accused of introducing a map that "should be entitled 'a bill to gerrymander the State of South Carolina and provide a Congressional District for the author thereof.'" Charleston Daily News (Feb. 8, 1872). In the House, the only two members who were also delegates at the 1868 convention voted for the final map. *See* H. Journal, at 124–25, 50th Gen. Assemb. (Dec. 19, 1873) (Benjamin A. Thompson and Samuel B. Thompson). That map split the Third Congressional District (separating Richland from the rest of the district to the west), *see* 1874 S.C. Acts No. 474, § 1, despite federal law requiring contiguous districts, *see* Act of Feb. 2, 1872, § 2, 17 Stat. 28.

During the Senate debate, an amendment was proposed to switch Richland and Fairfield Counties, which would have made the counties in the Third District contiguous. *See* S. Journal, at 394, 50th Gen. Assemb. (Feb. 13, 1874). Roberts Smalls, a senator from Beaufort and an 1868 convention delegate, successfully moved that "further consideration of the amendment be indefinitely postponed." *Id.* at 413 (Feb. 18, 1874). When another senator moved again to adopt that amendment a few days later, Senator Smalls raised the point of order that "consideration of the amendment . . . had been previously indefinitely postponed," so the renewed effort was out of order. *Id.* at 443 (Feb. 20, 1874). The point was sustained, and the effort to rescind that postponement failed. *Id.* The gerrymandered map was then given second reading. *Id.* After third reading in the Senate, *id.* at 486 (Feb. 24, 1874), the new map was signed into law by Governor Moses, *see* H. Journal, at 427, 50th Gen. Assemb. (Mar. 4, 1874).

This unusual district was "a gerrymander scheme . . . intended to deprive democrats of all representation in the house" and for "republicans [to] monopolize the entire representation in the house." *A Gentle Hint*, Fairfield Herald (Mar. 29, 1876); *see also A Bogus Congressman*, The Pickens Sentinel (Dec. 23, 1875). This "scheme" was even more significant because the

noncontiguous district was the focus of the Senate debate, in which Senator Smalls led the opposition to modifying the gerrymandered map.[3] *See* S. Journal, at 443, 50th Gen. Assemb. (Feb. 13, 1874); *see also* Walter Edgar, *South Carolina: A History* 393 (1998) (discussing Republicans' gerrymandering efforts in the 1870s).

The South Carolina General Assembly flipped to Democratic control before the next round of redistricting, but partisan gerrymandering continued. After the end of Reconstruction in 1876, Democrats regained power in South Carolina, and in 1882, rumors swirled that a special session would be necessary for the General Assembly to adopt new congressional districts after Republicans "purposely delayed" a redistricting bill during the regular session. Anderson Intelligencer (Apr. 6, 1882). According to contemporaneous accounts, Democrats wanted to proceed with redistricting to "avoid[]" the State's two new members of Congress being Republicans. *Redistricting the State*, Newberry Herald (Mar. 16, 1882). The State Democratic Party's Executive Committee called for an extra session. Anderson Intelligencer (Apr. 6, 1882). J.C. Haskell (son-in-law of Wade Hampton) supported this position, explaining that redistricting the State "would secure the Democrats six Congressmen." *Id.* Alluding to the underlying partisan goals, one Democratic member of the state House of Representatives predicted that "[i]f wisely done there will be no money sent into six of our Congressional Districts by Northern Republicans to influence the elections, and none would need be sent into the Seventh." *Id.*

Governor Johnson Hagood called an extra session that began on June 27, 1882. The "absorbing topic" of this legislative meeting was, one newspaper observed, "the question of

[3] The General Assembly enacted a slightly different map ahead of the 1876 election, but the only change was moving Lexington County from the Second to the Third District. *See* 1876 S.C. Acts No. 198, § 1. That change made the Third District contiguous so that it complied with federal law and diffused a challenge in the House of Representatives about whether the member elected from the noncontiguous version of the Third District in 1874 could be seated.

redistricting the State [after the 1880 census] so as to secure the greatest political advantages, or the surest safeguards against Republican dominion." Yorkville Enquirer (June 22, 1882); *see also South Carolina's New Districts*, N.Y. Times, p. 5 (June 30, 1882) (predicting that "Democrats will probably control five of the districts" under the new map). "Of course," one paper noted, "gerrymandering will be resorted to," and, despite generally having kept counties together when drawing districts, "[i]t is a conceded fact that in redistricting the State is not obligated to regard county lines." Yorkville Enquirer (June 22, 1882). The partisan gerrymandering was so dramatic that a famous drawing of the new map was titled *The Congressional Districts of South Carolina as "Gerrymandered" by the Democracy in 1882*. *See* Library of Congress, *The Congressional Districts of South Carolina as "Gerrymandered" by the Democracy in 1882*, https://tinyurl.com/yvp9yurv (last visited Nov. 21, 2024).

Similar gerrymandering took place the next decade. *See, e.g.*, Laurens Advertiser (Sept. 26, 1893) (describing the new districts). One newspaper called the map "the most remarkable gerrymander ever known in South Carolina." *Id.* One district "appear[ed] to be a shoe string laced in a shoe, and a slow-footed shoe at that." *Id.* Again, counties were not kept whole in this round of redistricting. *See* 1893 S.C. Acts No. 301. Then, the next redistricting cycle, the State adopted a similarly gerrymandered map (though one that did not split counties). *Compare* 1893 S.C. Acts No. 301, *with* 1902 S.C. Acts No. 529.

This older history is most relevant to discerning the original meaning of the constitutional provisions here, given the dates those provisions were enacted. *Cf. Fulton v. City of Philadelphia*, 593 U.S. 522, 578 (2021) (Alito, J., concurring in the judgment) ("Since the First Congress also framed and approved the Bill of Rights, we have often said that its apparent understanding of the scope of those rights is entitled to great respect."). Still, it's worth briefly observing that partisan

interests have continued to play a significant role in redistricting. For instance, *The State* called for redistricting in the 1960s to "be handled without regard to political party considerations." *Reshuffling the Districts*, The State, p. 10 (Sept. 28, 1963). Unsurprisingly, this didn't happen. *See, e.g.*, *Richardson Hits Redistricting Bill*, The State, p. 13 (Feb. 24, 1966) (noting the "political factors" in a senator's opposition to proposed changes to the congressional districts that would move his home county out of a district that was solidly Republican). Similar concerns shaped the 1980s debate. *See, e.g.*, *Redistricting Mired by Filibusters*, The State, p. 20 (Jan. 29, 1982) (discussing opposition to proposals related to Richland, Lexington, and Dorchester Counties because of partisan calculations). And the 1990s. *See, e.g.*, Jeff Miller, *Lawmakers Get Last Chance on Remap*, The State, p. 1B (Nov. 19, 1991) (observing that the Republican plan would create not only more majority-minority districts but also more Republican districts); Jeff Miller, *House Hurls Redistricting Toward Court*, The State, p. 1B (Feb. 6, 1992) ("Republican lawmakers took a significant step toward diminishing Democratic dominance of the General Assembly by voting Wednesday to uphold Gov. Carroll Campbell's vetoes of legislatively drawn House and Senate districts."). And the 2000s. *See, e.g.*, Schuler Kropf & Warren Wise, *Lawmakers End Session Without Key Agreements*, Post & Courier, p. 1 (June 8, 2001) (the "underlying reason" for legislative inactions on multiple issues "was the partisan battle over how to redraw Statehouse and congressional district lines").

This history matters because "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning." *Smiley*, 285 U.S. at 369. This is "especially true in the case of constitutional provisions governing the exercise of political rights." *Id.*; *see also Williams v. Morris*, 320 S.C. 196, 205, 464 S.E.2d 97, 102 (1995) ("Both this Court and the United States Supreme Court have found that courts should accord weight to past

practices and legislative interpretations.").

A. Article I, section 5

The LWV's primary claim rests on article I, section 5. The Free and Open Elections Clause provides, "All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office." S.C. Const. art. I, § 5.

This language substantively matches article I, section 31 of the 1868 Constitution, in which a Free and Open Elections Clause was introduced into South Carolina law. *See* S.C. Const. art. I, § 31 (1868). The record from that convention on this Clause is sparse. The 1868 constitutional convention changed some of the proposed wording ("public office" was originally "public employments"), and it declined to add "civil and political" between "equal right." *Proceedings of the Constitutional Convention of South Carolina* 350–51 (1868). But the Convention said nothing specifically about what "free and open" meant. *See generally id.*

Article I, section 5 matches language from the 1895 Constitution. *See* S.C. Const. art. I, § 10 (1895). The 1895 convention sought "to cripple the black vote" in various ways, 4 James Lowell Underwood, *The Constitution of South Carolina* 58 (1994), including through poll taxes and literacy tests, *see* S.C. Const. art. II, § 4 (1895). But for all its efforts to change voting in South Carolina, the convention did little with the Free and Open Elections Clause. The committee report made only minor (seemingly irrelevant, for this case) tweaks, substituting "State" for "Commonwealth" and "have" for "possess." *Journal of the Constitutional Convention of South Carolina* 276 (1895). The convention at first saved its discussion of the Free and Open Elections Clause for when it took up the article on suffrage. *Id.* at 346. It then adopted the proposed clause without recorded discussion or debate. *Id.* at 642. The clause ultimately found its home in article

I, section 10. S.C. Const. art. I, § 10 (1895).

When the West Committee took up its study of the 1895 Constitution, that group "discussed at length" the Free and Open Elections Clause. Committee to Make a Study of the Constitution of South Carolina, 1895, *Minutes of Committee Meeting* 4 (Sept. 15, 1967). Despite multiple "suggestions concerning the phraseology," the Committee "decided to leave the wording of [the Free and Open Elections Clause] as is now." *Id.* The Committee ultimately declared that "this provision establishing the principle of free and open elections is rightly part of the Declaration of Rights." *West Report*, at 15.

The General Assembly kept this same language in its proposed amendments in 1970. *See* 1970 S.C. Acts No. 1267, § 1. The question put to the voters was whether the Constitution should be amended to include a "new Article I" that "provide[d]" for "elections free and open." *Id.* § 2. After the voters approved it, the General Assembly ratified the language. *See* 1971 S.C. Acts No. 276.

1. The Clause's history does not prohibit partisan gerrymandering.

Given this consistency in the constitutional language, the inquiry into the meaning of the Free and Open Elections Clause should focus on what that term meant when it was first included in the South Carolina constitution. *See, e.g.*, *Owens*, 443 S.C. at 269–70, 904 S.E.2d at 592 (looking to the meaning of "cruel" when it was first added to the state constitution in 1790); *id.* at 354, 904 S.E.2d at 638 (Kittredge, J., dissenting in part) (looking to the meaning of "unusual" at the time of its original enactment); *see also* Pet. Br. 24 (acknowledging the importance of "text and history" in determining constitutional meaning).[4]

[4] To be sure, this Court recently departed from this established method of interpreting constitutional terms, instead picking one definition from a dictionary to declare that term's meaning was "plain." *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 182, 906 S.E.2d 345, 353

By the Clause's introduction in 1868, partisan gerrymandering was a well-established political reality, and the LWV's theory is incompatible with the history. Gerrymandering based on political differences was common in South Carolina even before the end of the Civil War and occurred again in 1874 in the first redistricting after the 1868 Constitution was adopted. (This was the map with the noncontiguous Third District.) In fact, that map was supported by legislators (including Robert Smalls) who were also delegates at the 1868 convention. *See* H. Journal, at 124–25, 50th Gen. Assemb. (Dec. 19, 1873); S. Journal, at 443, 50th Gen. Assemb. (Feb. 20, 1874). That such a map—"a gerrymander scheme . . . intended to deprive [one political party] of all representation in the house," *A Gentle Hint*, Fairfield Herald (Mar. 29, 1876)—could be adopted by a legislature that included leaders from the 1868 convention just six years after that convention is strong evidence that the Free and Open Elections Clause, originally understood, does not prohibit a legislature from considering partisan aims as part of the reapportionment process.

Of course, this understanding wasn't limited to Republicans. Democrats shared that view, as they proved the next decade. They too sought "to secure the greatest political advantages" over their political opponents. And in so doing, they drew a map that became infamous. *See* Library of Congress, *The Congressional Districts of South Carolina as "Gerrymandered" by the Democracy in 1882*.

Rather than delve into the history, the LWV offers only a cursory (and conclusory) historical claim specific to South Carolina, noting that the 1868 Constitution was the first South

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(2024). Without relitigating what "direct" means, "free and open" are much more like "cruel" or "unusual," which are "are inherently vague" and require historical context to define. *Owens*, 443 S.C. at 301, 904 S.E.2d at 609 (Hill, J., concurring). In fact, if the Court just picked a dictionary definition, depending on what definition of "free" or "open" the Court chose, the definitions could cast doubt on all sorts of election regulations, from voter registration to precincts. *See* Webster, *Complete Dictionary*, *supra*, at 541 (first definition of "free": "[e]xempt from the subjection to the will of others"); *id.* at 913 (first definition of "open": "[f]ree of access").

Carolina constitution to include a Free and Open Elections Clause and that constitution was intended secure political and civil rights for the recently freed slaves. *See* Pet. Br. 24–25. Neither observation is necessarily incorrect, but neither helps explain what, if anything, the Free and Open Elections Clause has to do with prohibiting the legislature from considering partisan goals.

In claiming that history supports its view of the Free and Open Elections Clause, the LWV's lead cite is the Pennsylvania Supreme Court's decision finding partisan gerrymandering claims justiciable under that State's "free and equal" election clause. Pet. Br. 23. That's a curious move, given that the law review article the LWV cites a few pages later to "trac[e] the shared philosophical roots of 'free and open' and 'free and equal' elections clauses," *id.* at 25, concluded that South Carolina's Free and Open Elections Clause has "no apparent connection to the 1790 Pennsylvania convention, nor any of the states with 'free and open' provisions derived therefrom," 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, 819 n.162 (2022). In other words, any out-of-state history the LWV cites means nothing here.

2. The Clause's text does not prohibit partisan gerrymandering.

The LWV says the Free and Open Elections Clause mandates three things. First, it says, the Clause "requires free and open elections; that is, elections that are public and open to all qualified electors alike." Pet. Br. 26 (cleaned up). Second, it means that "the qualifications 'to elect' and 'be elected' are coextensive." *Id.* And third, it demands that each qualified voter have an "equal right to elect officers" such that "the vote of every elector must be granted equal influence with that of every other elector." *Id.* at 26–27 (emphasis omitted).

As for the first command the LWV finds in the Clause, under the existing congressional map, every qualified elector may vote after registering to do so. *See* S.C. Code Ann. § 7-5-120(A).

Thus, the LWV's first factor is met. To be certain, look no further than the fact that the LWV never alleges that any of its members has been denied the ability to cast a ballot.

Turning to the LWV's second factor, it is a misreading of the text (at least in its strongest form). The South Carolina Constitution provides the franchise to "[e]very citizen of the United States and of this State of the age of eighteen and upwards who is properly registered." S.C. Const. art. II, § 4; *see also* U.S. Const. amend XXVI. But the South Carolina Constitution requires that a person be at least 21 years old to be a Representative. *See* S.C. Const. art. III, § 7; *see also* art. XVII, § 1A ("Every qualified elector is eligible to any office to be voted for, *unless disqualified by age*, as prescribed in this Constitution." (emphasis added)). An age requirement for office that varies from the age requirement for voting is nothing new. Even the 1868 Constitution imposed age requirements for different offices. *See* S.C. Const. art. II, § 10 (1868) (21 years for Representatives; 25 years for Senators). And the United States Constitution requires that a person be at least 25 years old to serve in Congress. *See* U.S. Const. art. I, § 2. So there's no way that the LWV's second requirement could be true for congressional elections. *See id.* art. VI, cl. 2 (Supremacy Clause).

But if the LWV would concede that constitutional age limits are a constitutional disability and thus excepted from the LWV's second factor, *see* Pet. Br. 26, this factor is still met. Just as anyone can vote, anyone can be voted for. How district lines are drawn does not change this basic fact.

Finally, on the third factor, it too is satisfied under existing law. Every voter gets one vote. Every vote counts the same. Every district contains the same number of voters. *See* S.C. Code Ann. § 7-19-45; *see also Baker v. Carr*, 369 U.S. 186 (1962) (adopting the one-person, one-vote rule). Each voter's ballot therefore has the same legal impact as every other voter's ballot (though

the actual effect on each election will likely vary with voter turnout in each district).

What the LWV seems to want here—but appears loath to admit—is some form of proportional representation. *See Rucho*, 588 U.S. at 704 ("Partisan gerrymandering claims invariably sound in a desire for proportional representation."). But proportional representation has never been the rule in South Carolina. Indeed, whatever an "equal influence" and an "equal right to elect officers" means to the LWV, Pet. Br. 26–27, the LWV cannot draw a principled distinction between its apparent desire to elect a Democrat in the First Congressional District and the right of the Libertarian Party or Communist Party to have a seat or two in the General Assembly. Members of those parties are no different from the LWV's members in the First District: They have a right to cast a ballot that counts the same as every other voter's, but their preferred candidate (most likely) will not win.

History reveals what the Free and Open Elections Clause actually means. It requires that all citizens qualified to vote be permitted to vote, free from any unconstitutional legal or physical restrictions, in an election for any candidate qualified for an office. Take who can vote as an example. Before the Civil War, only white men could vote. *E.g.*, 1803 S.C. Acts No. 1819, § 1, 5 *Statutes at Large of South Carolina*, at 468 (local elections for Winnsborough). In the years right before the Revolution, for instance, voting was limited to white Protestant men who had lived in the colony for at least a year and met certain landowning, tax, or property qualification. 1759 S.C. Acts No. 885, § 1, 4 *Statutes at Large of South Carolina* 99 (Thomas Cooper ed. 1838). The Free and Open Elections Clause was intended to prohibit such statutory restrictions on who can vote.

Or consider old rules about who could hold office. Old statutes limited the right to hold office to white male citizens with certain property holdings, *see* 1721 S.C. Acts No. 446, § 8, 3 *Statutes at Large of South Carolina*, at 137, or to white male Protestant citizens who had lived in

the State for at least one year and had sufficient property, 1776 S.C. Acts No. 1046, § 2, 4 *Statutes at Large of South Carolina*, at 356. The Free and Open Elections Clause forbids such laws. Thus, if a voter meets the constitutional qualifications for office (such as age requirements for Congress or the General Assembly or years-of-practice requirements for state judges), that person is eligible to be elected. *Cf. Billings v. United States*, 232 U.S. 261, 282 (1914) ("the Constitution is not self-destructive"); *Mercer v. Magnant*, 40 F.3d 893, 898 (7th Cir. 1994) ("procedures required by the Constitution are not themselves unconstitutional").

3. This Court's precedent does not prohibit partisan gerrymandering.

The LWV fares no better when it comes to this Court's old case law. *See* Pet. Br. 27–29. *First*, it looks to *Gardner v. Blackwell*, 167 S.C. 313, 166 S.E. 338 (1932). There, candidates for office challenged the general election practice of "tickets containing only the names of the Democratic nominees for office and separate tickets containing only the names of the Republican nominees for office to be placed on the tables used by the managers of the election for use of the qualified voters," such that it was "impossible" to vote by secret ballot. *Id.* at ___, 166 S.E. at 339. For at least two reasons, *Gardner* does not help the LWV. Most importantly, despite being an election case, *Gardner* never mentioned, much less discussed, the Free and Open Elections Clause. That case therefore can shed little, if any light, on the clause.

And in any event, the *Gardner* court was focused on ensuring that voters could cast a secret ballot for the candidate of their choice. *See id.* at ___, 166 S.E. at 341. That has nothing to do with whether a voter is eligible to vote or how districts are drawn. In other words, whether a voter is in a district that is virtually certain to elect a candidate of one party or in a district that is a toss-up, a voter still may cast one, secret ballot. *Gardner* is satisfied without implicating the Free and Open Elections Clause.

Second, the LWV points to *State v. Huntley*, 167 S.C. 476, 166 S.E. 637 (1932), which at least involved the Free and Open Elections Clause. That case stemmed from an election for school trustees in Chester County. A state statute provided that the election for trustees was to be conducted according to the rules governing primary elections. *Id.* at __, 166 S.E. at 638. Primary elections allowed someone to vote if—and only if—that person's name was on the party roll. *Id.* at __, 166 S.E. at 639–40. In general elections, by contrast, the Constitution established who was a qualified voter. *Id.* at __, 166 S.E. at 639. Because qualified voters who did not appear on a party roll were excluded from the election for school trustees, the statutory restriction violated the Free and Open Elections Clause. *Id.* at __, 166 S.E. at 640.

Huntley is distinguishable from this case. There, the impediment to the election was a legal one that restricted who could vote. The statute that this Court struck down prevented certain people from casting a ballot for a particular school board election. They were, to use the LWV's own word, "exclude[d]" from the election. Pet. Br. 29. Not so here. The LWV's members (like every other qualified elector) face no such impediment, and the LWV has not even alleged that any member was denied the right to cast a ballot.

Ultimately, the LWV's *Huntley* argument reveals yet again that its underlying goal is advancing some amorphous theory—unmoored from the constitutional text—of proportional representation. The LWV claims that the State is "denying voters of all but a single party an equal vote in the election of officers." *Id.* (cleaned up). But that can't be correct, at least not if "an equal vote" means each person being able to cast a ballot. The LWV's argument makes sense only if "an equal vote" means a certain share of the total number of seats up for election. Yet that has never been a constitutional requirement. "Socialists, Prohibitionists, Farm Laborites, and independent voters," not to mention both Republicans and Democrats, have lost elections, *id.*, but that does not

mean the losing voters in each election had their right to "an equal vote" violated. After all, a "fundamental democratic principle" is "that the one who receives the most votes wins, and the others lose." *Baten*, 967 F.3d at 355.

And third, the LWV cites *Cothran v. West Dunklin Public School District No. 1-C*, 189 S.C. 85, 200 S.E. 95 (1938). There, an election about school bonds was open to all voters, not just those who had real or personal property subject to taxation, as Act 102 of 1933 limited the election. *Id.* at __, 200 S.E. at 95. The plaintiff challenged the election as violating Act 102. This Court held that the act limiting who could vote was unconstitutional, so the election in which everyone had a right to vote was valid. *Id.* at __, 200 S.E. at 97.

Like *Huntley*, *Cothran* provides little help to the LWV. Look no further than the long paragraph in *Cothran* that the LWV block quotes. *See* Pet. Br. 29. Under the congressional map, every qualified elector's vote counts the same. *Id.* at __, 200 S.E. at 97 ("the vote of every elector must be granted equal influence with that of every other elector"). Every qualified elector is free from wrongful impediments to cast a ballot. *Id.* ("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" and "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" (emphasis omitted)). Every qualified elector is free to cast a ballot. *Id.* ("an election is free and equal within the meaning of the Constitution when it is public and open to all qualified electors alike"). Every qualified elector is treated the same. *Id.* ("every voter has the same right as any other voter"). Every qualified elector's vote is counted. *Id.* ("when each voter under the law has the right to cast his ballot and have it honestly counted"). Therefore, under this

congressional map, "no constitutional right of the qualified elector is subverted or denied him," *id.*, so the map does not violate the Free and Open Elections Clause. *Cf. Baten*, 967 F.3d at 359 ("The winner-take-all system may raise the stakes of victory, but it does not interfere with the plaintiffs' opportunity to associate for the purposes of advocating for such victory.").

4. The weight of authority across the country is against the LWV.

The LWV repeatedly looks to Kentucky, New Mexico, and Pennsylvania judicial decisions holding that "free and open" or "free and equal" constitutional provisions in those States prohibit partisan gerrymandering. Those cases are not compelling here, given our State's text, history, and precedent.

But even assuming that other States might help explain South Carolina's Free and Open Elections Clause, in cherry-picking these few judicial decisions, the LWV ignores the States that have a similar constitutional clause but also explicitly prohibit partisan gerrymandering either by another constitutional provision or statute. *Compare* De. Const. Art. 1, § 3 ("free and equal"); Mont. Const. art. II, § 13 ("free and open"); Or. Const. art. II, § 1 ("free and equal"); Wash. Const. art. I, § 19 ("free and equal"), *with* Del. Code Ann. tit. 29, § 804(4) (no districts that "unduly favor any person or political party"); Mont. Code Ann. § 5-1-115(3) ("A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress."); Or. Rev. Stat. Ann. § 188.010(2) ("No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person."); Wash. Const. art. II, § 43(5) ("The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.").

All these States follow the rule against superfluity. *See Parker v. Delaware*, 201 A.3d 1181, 1186 (Del. 2019); *Montana v. Ohl*, 521 P.3d 759, 762 (Mont. 2022); *Dish Network Corp. v. Dep't of Revenue*, 434 P.3d 379, 393 (Or. 2019); *Nwauzor v. The Geo Grp., Inc.*, 540 P.3d 93, 102 (Wash.

2023). If their "free and open" or "free and equal" constitutional provisions prohibited partisan gerrymandering, then their other constitutional or statutory provisions would waste paper and ink. That most of those States that have limited partisan gerrymandering have done so explicitly speaks volumes to what the more general "free and open" or "free and equal" constitutional provisions mean—and don't mean.

Plus, at least seven other States have "free and open" or "free and equal" clauses. *See* Ariz. Const. art. II, § 21 ("free and equal"); Ind. Const. art. II, § 1 ("free and equal"); Mo. Const. art. I, § 25 ("free and open"); Okla. Const. art. III, § 5 ("free and equal"); S.D. Const. art. VII, § 1 ("free and equal"); Tenn. Const. art. I, § 5 ("free and equal"); Wyo. Const. art. I, § 27 ("open, free and equal"). Yet none of these States forbids partisan gerrymandering. It's implausible, to put it mildly, that all these States have misunderstood their clauses.

* * *

As this Court recently explained, the Free and Open Elections Clause illustrates "the unassailable proposition" that "the right to vote is a cornerstone of our constitutional republic." *Bailey*, 430 S.C. at 271, 844 S.E.2d at 391. Each qualified elector in this State has the right to vote, just the same as everyone else, under the map that the LWV challenges. That map therefore does not violate the Free and Open Elections Clause.

B. Article I, section 3

The LWV next cites the Equal Protection Clause, which requires that no "person be denied the equal protection of the laws." S.C. Const. art. I, § 3. Just as the Free and Open Elections Clause does not prohibit considering partisan goals in redistricting, neither does the Equal Protection Clause.

South Carolina first adopted an equal protection clause in the 1895 Constitution. *See* S.C.

Const. art. I, § 5 (1895) ("nor shall any person be denied the equal protection of the laws"). The West Committee recommended that this language be "retained," *West Report*, at 13, demonstrating a continuity of meaning when the provision was reenacted by the People. From a historical perspective then, the LWV's equal protection claim is exceptionally weak. They have not pointed to a single historical source indicating that the framers and the People—either in 1895 or in 1970—understood the Equal Protection Clause as having anything to do with whether the legislature may consider partisan aims in drawing electoral maps.

The LWV's claim does not get any stronger by looking to this Court's case law. *See* Pet. Br. 32–33. Start with *Sojourner v. Town of St. George*, 383 S.C. 171, 679 S.E.2d 182 (2009). In that case, the town sought to convey its water and sewer system to the county, and a town resident sued, claiming that the town could not do so without an election and without a quarter of the town's residents petitioning the municipality before the election. In affirming the lower court's order that the town's decision was lawful, this Court observed that "[t]he right to vote is a fundamental right protected by heightened scrutiny under the Equal Protection Clause." *Id.* at 176, 679 S.E.2d at 185.

But the very next sentence of *Sojourner*—which the LWV even quotes—shows why this case does not help a partisan gerrymandering claim. "*Restrictions on the right to vote* on grounds other than residence, age, and citizenship generally violate the Equal Protection Clause," this Court explained, "and cannot stand unless *such restrictions* promote a compelling state interest." *Id.* (emphasis added). The congressional map that the LWV challenges does not "restrict[] . . . the right vote" in any way. The map merely sets forth who votes in what district, but it does not otherwise regulate, much less restrict, the franchise.

Turn to *Burriss v. Anderson County Board of Education*, 369 S.C. 443, 633 S.E.2d 482 (2006), which involved a challenge to the two-tier structure of the school boards in Anderson

County. This Court ultimately upheld that structure when faced with an equal protection challenge, *id.* at 458, 633 S.E.2d at 489, and the LWV unsurprisingly does not look to the holding of that case. Instead, the LWV cherry-picks a favorable-sounding quote about vote dilution. Pet. Br. 33 (quoting *Burriss*, 369 S.C. at 451, 633 S.E.2d at 486). There is, however, no vote dilution here. Every voter, in every congressional district, has one vote, and each vote counts the same in evenly apportioned districts.

Without any help in South Carolina law, the LWV spends most of its argument invoking a New Mexico decision that largely tracks Justice Kagan's *Rucho* dissent. *See* Pet. Br. 34–36. To begin, the LWV makes a big deal of the New Mexico Supreme Court reading constitutional provisions together. *See id.* at 35–36 (citing *Grisham*, 539 P.3d at 283). To be sure, constitutional provisions "should be construed together, and, if possible, meaning given to each section." *Trustees of Wofford Coll. v. City of Spartanburg*, 201 S.C. 315, ___, 23 S.E.2d 9, 12 (1942). But reading provisions together is not license to "create[] rights and duties out of thin air, such that [a judge's] policy preference is accorded constitutional status." *Abbeville II*, 410 S.C. at 664, 767 S.E.2d at 181 (Kittredge, J., dissenting). That is exactly what the LWV invites this Court to do by following New Mexico: Create a new restriction on the General Assembly's ability to draw electoral maps.

And there are other distinctions between New Mexico and South Carolina law that counsel against following *Grisham*. For instance, New Mexico had long interpreted its Equal Protection Clause to be broader than the federal one. 539 P. 3d at 286. This Court, however, has traditionally treated the state and federal Equal Protection Clauses as coextensive. *See, e.g.*, *Harleysville Mut. Ins. v. State*, 401 S.C. 15, 26, 736 S.E.2d 651, 656–57 (2012). Similarly, New Mexico's courts are not limited by any case-or-controversy requirement. 539 P.3d at 288. But South Carolina's courts

may decide only "cases." S.C. Const. art. V, § 5; *id.* art. V, § 11 (circuit courts). Thus, without even reaching whether the New Mexico court was correct to adopt the *Rucho* dissent, *Grisham* is a poor guide here.

Plus, the *Grisham* test suffers from its own flaws—flaws that were readily exposed by the *Rucho* majority. *See* 588 U.S. at 715–16. Simply saying "'This much [gerrymandering] is too much'" "is not even trying to articulate a standard or rule." *Id.* at 716. Even if artfully styled as an "(1) intent; (2) effects; and (3) causation" test, *Grisham*, 539 P.3d at 289 (quoting *Rucho*, 588 U.S. at 735 (Kagan, J., dissenting)), such a "test" amounts to little more than guidelines for applying the Goldilocks rule. It is not a principled legal framework with any textual or historical basis.

C. Article I, section 2

The LWV then turns to the Freedom of Speech and Freedom of Assembly Clauses in article I, section 2. These provisions prevent the General Assembly from "abridging the freedom of speech or of the press; or the right of the people peaceably to assemble." S.C. Const. art. I, § 2.

Similar provisions first appeared in the 1868 Constitution. That document protected "[t]he right of the people to peaceably assemble to consult for the common good," S.C. Const. art. I, § 6 (1868), and it ensured that "[a]ll people may freely speak, write and publish their sentiments on any subject" such that "no laws shall be enacted to restrain or abridge the liberty of speech," *id.* art. I, § 7 (1868). The same protections were in the 1895 Constitution, but in the more familiar First Amendment form: "The General Assembly shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." S.C. Const. art. I, § 4 (1895). The West Committee recognized that this language "is the same as" the First Amendment and is "sound and broad enough to cover all of the subjects mentioned." *West Report*, at 13. The voters ultimately approved retaining this language, and the General Assembly ratified the new article I. *See* 1971

S.C. Acts No. 276.

This history dooms the LWV in two ways. In the first place, it confirms that no one, for most of the time since these protections have been enshrined in our Constitution, thought that they had anything to do with partisan gerrymandering. No case in this State has ever even mentioned that topic. And the term "partisan gerrymandering" doesn't even appear in any case law until *Reynolds v. Sims*, when the Supreme Court spoke ill of the concept but did not suggest it was unconstitutional, so long as there was a "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[5] 377 U.S. 533, 579 (1964). As the party with the burden of proving that the congressional map violates article I, section 2, *see Powell v. Keel*, 433 S.C. 457, 461, 860 S.E.2d 344, 346 (2021), it's an insurmountable problem for the LWV that it has not offered any historical evidence that these clauses were understood when they were adopted to preclude partisan gerrymandering—particularly when the West Committee described the language as sufficient to cover the "subjects mentioned," none of which was voting, despite voting appearing in multiple places throughout the Constitution.

In the second place, history shows that this Court's treatment of article I, section 2 as "coextensive with the First Amendment" is proper. Pet. Br. 38. The West Committee recognized that the language was the same as the First Amendment. *See West Report*, at 13. The LWV tries to

[5] Speaking of federal courts, the LWV overreads the history of partisan-gerrymandering cases. Although the Supreme Court held partisan gerrymandering claims were justiciable in *Davis v. Bandemer*, 478 U.S. 109, 113 (1986), a majority could not agree on the appropriate standard for evaluating such claims. About two decades later, a plurality recognized that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims" had emerged in the lower courts, which had a "long record of puzzlement and consternation" in trying to resolve such claims, so "political gerrymandering claims are nonjusticiable." *Vieth v. Jubelirer*, 541 U.S. 267, 281–82 (2004). The Supreme Court ultimately put this question to rest in *Rucho*, when a majority held that these claims were nonjusticiable. 588 U.S. at 721.

downplay a 1977 Attorney General's opinion, *see* Pet. Br. 37 n.28, but that opinion is yet more evidence on the scale against them. It represents a contemporaneous interpretation from "the chief legal officer of the State," *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003), that the scope of article I, section 2 and the First Amendment "are, for all intents and purposes, the same," S.C. Att'y Gen. Op., 1977 WL 24372, at *1 (1977). For however much the LWV may criticize the brevity of that opinion, the LWV offers nothing to prove that the conclusion is wrong. And that's on top of their burden to prove that this Court's statement about the scope of article I, section 2 in 1992 is not binding today. *See Charleston Joint Venture v. McPherson*, 308 S.C. 145, 151 n.7, 417 S.E.2d 544, 548 n.7 (1992) ("Our constitution affords the same protections as does the Federal constitution.").

As the for substance of a free speech and assembly argument, the LWV started with a single paragraph from (once again) Justice Kagan's *Rucho* dissent in its Petition. *See* Pet. 31 (quoting *Rucho*, 388 U.S. at 731–32 (Kagan, J., dissenting)). The LWV has dropped that long block quote from its brief, but it's telling that the LWV could do no better than Justice Kagan's dissenting opinion. No majority opinion. Just a dissent that, in turn, quotes a concurrence. *See Rucho*, 388 U.S. at 731–32 (Kagan, J., dissenting) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment)). If in fact the rights embodied in article I, section 2 and the First Amendment were originally understood to prohibit accounting for partisan goals in redistricting, it is inconceivable that no binding opinion says so when that practice is as old as our Republic. What the LWV really asks is for this Court to create a right "out of thin air" from a constitutional provision that has never been about partisan gerrymandering. *Abbeville II*, 410 S.C. at 664, 767 S.E.2d at 181 (Kittredge, J., dissenting).

Framing its claim as viewpoint discrimination does not help the LWV. Viewpoint

discrimination has nothing to do with partisan gerrymandering. *See* Pet. Br. 37. That is a First Amendment doctrine that requires government to "abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Redistricting is not a speech restriction in any way. It is, rather, an election regulation—and a constitutionally required one at that. The LWV and its members are still free to speak as they wish and associate with whom they choose.

Finally, if the LWV's theory of partisan gerrymandering and viewpoint discrimination were correct, the General Assembly could never consider communities of interest in redistricting. That entire concept assumes that certain communities share certain views and values. If political views could not be considered under article I, section 2, neither could any other views. That would fundamentally alter longstanding law and traditional approaches to drawing legislative maps.

D. Article VII, sections 9 and 13

In searching the South Carolina Constitution for a provision to which they can tether their arguments, the LWV's final stop is article VII. Section 9 provides that "[e]ach County shall constitute one election district, and shall be a body politic and corporate." S.C. Const. art. VII, § 9. Meanwhile, section 13 instructs that "[t]he General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts, including the County of Saluda, as it may deem wise and proper, and may establish or alter the location of voting precincts in any County." *Id.* art. VII, § 13. Neither section supports the LWV's position.

Both sections were standalone provisions in the 1895 Constitution. *See* S.C. Const. art. VII, §§ 9, 13, But this idea goes back further in South Carolina law. The 1868 Constitution, for example, provided that "[e]ach County shall constitute one election district." S.C. Const. art. II,

§ 3 (1868). (Before the 1868 Constitution, election districts were based on judicial districts, *see* S.C. Const. art. I, § 3 (1865), or parishes, *see* S.C. Const. art. I, § 3 (1790).)

The 1868 Constitution's use of identical phrasing to article VII, section 9 about "one election district" is significant. In the second and third rounds of redistricting immediately after the 1868 Constitution was adopted, counties were not kept whole. *See* 1882 S.C. Acts No. 718 (splitting Berkeley, Charleston, Colleton, Orangeburg, Richland, Spartanburg, and Williamsburg Counties); 1893 S.C. Acts No. 301 (splitting Berkeley, Colleton, Richland, Spartanburg, Union, and Williamsburg Counties).

To be sure, after the 1895 Constitution, counties were kept whole from the 1902 redistricting, *see* 1902 S.C. Acts No. 529, until the 1980s, when a federal court divided counties again, *see S.C. State Conf. of Branches of Nat. Ass'n for Advancement of Colored People, Inc. v. Riley*, 533 F. Supp. 1178 (D.S.C 1982). But this does not mean that the "one election district" language required counties to be kept whole. If that were the case, it's likely that the disadvantaged political party or a frustrated candidate would have challenged those maps from the late 1800s. That no one did strongly suggests that the "one election district" language was not originally understood to preclude counties being split.

The West Committee recommended deleting both provisions. *See West Report*, at 95. But the General Assembly disagreed and left both provisions in article VII when a new, different section was added to article VII. *See* 1971 S.C. Acts No. 90; 1970 S.C. Acts No. 1264.

By the 1970s, two changes reinforce the conclusion that, even if "one election district" did (somehow) originally require counties not to be split, that provision could no longer be strictly applied. First, the United States Supreme Court had decided *Westbury v. Sanders*, 376 U.S. 1 (1964), which brought one-person, one-vote to congressional districts. Thus, any authority that the

General Assembly had in previous redistricting cycles to guarantee that counties were kept together was now gone. As even the LWV admits, any "state constitutional preference for preserving county boundaries must yield to superseding federal law." Pet. Br. 40. The framers and People must therefore have understood during the constitutional amendments in the 1970s that these provisions would play a diminished role moving forward. In the 1980s redistricting, the State again began splitting counties for the first time since the 1890s. *See Riley*, 533 F. Supp. 1178. In the 2000 round of redistricting, 12 counties were split in the congressional map. *See Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 663–68 (D.S.C. 2002) (map drawn by federal court). Twelve counties were also split in the 2010 round. *See* 2011 S.C. Acts No. 75.

Second, any practical concerns with keeping counties whole diminished when South Carolina adopted Home Rule in the 1970s. Before Home Rule, "legislative delegations of the General Assembly controlled virtually every aspect of local government." *Hosp. Ass'n of S.C., Inc. v. Cnty. of Charleston*, 320 S.C. 219, 224, 464 S.E.2d 113, 117 (1995). That changed with the adoption of article VIII in 1973. *See* 1973 S.C. Acts No. 63. Able to set their own budgets, counties depended less on legislators and Columbia, so there was less of a need to keep counties unified in drawing electoral maps. *See* 4 Underwood, *supra*, at 287, 294; *cf. O'Shields v. McNair*, 254 F. Supp. 708, 718–19 (D.S.C. 1966) (discussing the reliance of counties on the General Assembly).

This idea that county lines matter but do not always control is reflected in the General Assembly's redistricting principles that resulted in the map the LWV challenges. The Senate included "minimizing divisions of county boundaries" as the third of five additional considerations, after the first two principles of complying with federal law and ensuring contiguous territory. *See* S.C. Senate, *2021 Redistricting Guidelines*, § III(C) (Sept. 17, 2021), https://tinyurl.com/yckbnkrx. The House of Representatives similarly explained that "[c]ounty

boundaries, municipality boundaries, and precinct lines (as represented by the Census Bureau's Voting Tabulation District lines) may be considered as evidence of communities of interest to be balanced, but will be given no greater weight, as a matter of state policy, than other identifiable communities of interest." S.C. House of Representatives, *2021 Guidelines and Criteria for Congressional and Legislative Redistricting*, § VII (Aug. 3, 2021), https://tinyurl.com/55kcuw7h.

What the LWV seems to argue, without saying so explicitly, is that the General Assembly must adopt the map that splits the fewest counties while still complying with federal law. *See* Pet. Br. 40. But perhaps they ask for less, asking that this map be struck down because it splits too many counties. That only raises more questions: How many split counties is too many? When is splitting more counties than necessary permissible? Which counties may be split? Does it matter what the motive is for splitting one county but not another?

These questions reveal a distinction between this claim and the LWV's other claims. Their county-splitting claim cannot be based on *why* counties were split, but only on *that* counties were split. In other words, if minimizing county splits is central to redistricting, the General Assembly is still free to decide which parts of which counties to split, and nothing in article VII prohibits the General Assembly from considering partisanship in doing so.

Ultimately, there are many considerations in redistricting, and communities of interest do not always fall neatly along jurisdictional lines—a point that the most recent redistricting guidelines recognize. That may represent a shift from decades ago. *See, e.g.*, *Burton on Behalf of Republican Party v. Sheheen*, 793 F. Supp. 1329, 1341 (D.S.C. 1992) (discussing guidelines and noting that "preserving county lines should enjoy a preeminent role in South Carolina's redistricting process"), *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).

But "the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision," so it is free to shift the weight given to various redistricting criteria within constitutional bounds. *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013). The LWV has not pointed to a single authority that treats article VII, sections 9 and 13 as mandating that the State split the fewest counties possible. It therefore, yet again, asks the Court to break new constitutional ground. As with the LWV's other three claims, the Court should decline this ill-advised invitation.

CONCLUSION

For these reasons, the Court should reject the LWV's claims.

Respectfully submitted,
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION

Appellate Case No. 2024-001227

LEAGUE OF WOMEN VOTERS OF SOUTH CAROLINA.....Petitioner,

v.

THOMAS ALEXANDER, in his official capacity as President of the South Carolina Senate; MURRELL SMITH, in his official capacity as Speaker of the South Carolina House of Representatives; and HOWARD KNAPP, in his official capacity as Director of the South Carolina Election Commission, ...Respondents,

and

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina,.....Intervenor–Respondent.

CERTIFICATE OF SERVICE

I certify that *Brief of Governor McMaster* was served on counsel of record on January 13, 2025, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

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