

Partisan Gerrymandering Cases in State Supreme Courts in the 2020s Redistricting Round

ABSTRACT. After the U.S. Supreme Court opted out of any federal court role in policing partisan gerrymandering in its 2019 decision, *Rucho v. Common Cause*, if a redistricting plan was alleged to be a partisan gerrymander, that challenge needed to be brought in state courts. There are three possibilities: (a) a state supreme court could hold partisan gerrymandering claims nonjusticiable under state as well as federal law; (b) it could review a proposed map and find it unconstitutional; (c) it could review a map and reject the gerrymandering claim. Here, we focus on state court decisions that took place before the November 2022 elections in partisan gerrymandering claims regarding maps drawn for elections to the U.S. House of Representatives in the 2020s redistricting round. We are primarily interested in three issues: (1) How did state courts faced with a redistricting challenge based on a claim of partisan gerrymandering decide whether state law allowed them to address the factual aspects of the claim rather than treating the claim as non-justiciable? (2) If the court decided the claim was justiciable, what definition of partisan gerrymandering was used and, in particular, what kind of empirical evidence was cited by the justices – e.g., measuring the extent of gerrymandering via metrics based on election data, and/or evaluating maps in terms of the degree to which traditional good government criteria were satisfied, and/or considering the process of map drawing and what it implied about partisan intent? (3) Is there indirect evidence that the partisan predilections of the justices affected their decision about the constitutionality of a challenged congressional map?

I. INTRODUCTION	2
II. THREE KEY QUESTIONS	18
A. <i>How did state courts faced with a redistricting challenge based on a claim of a denial of equal treatment and “excessive” partisanship decide whether state law allowed them to address the actual aspects of the claim, rather than following the U.S. Supreme Court and treating the claim as non-justiciable?</i>	18
B. <i>How do courts determine what is an unconstitutional partisan gerrymander?</i>	21
C. <i>Is there (indirect) evidence that the decisions of individual state supreme court justices on partisan gerrymandering challenges to a congressional map reflect their partisan leanings?</i>	24
III. POST-SCRIPT, AFTER THE 2022 MIDTERM ELECTION	28

“Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.” – William J. Brennan

I. INTRODUCTION

State courts can become involved in the redistricting process (a) when those with primary redistricting authority fail to enact a plan in a timely fashion or (b) when they are the site of litigation challenging a plan as violating requirements of the state’s own constitution or other elements of state law. If they cannot motivate the primary redistricting authority to draw a constitutional map under specified time constraints, state courts can decide to draw their own map. However, courts may do so only reluctantly, and they may allow the principal redistricting authority a second chance

(or additional time) to provide a constitutional map before a court seeks to provide a map of its own.¹

In this essay we limit ourselves to redistricting cases that (a) came before state courts, (b) challenge plans for U.S. Congressional districts² and, (c) we are most interested in cases that were brought after the 2020 census decided before the November 2022 elections, but we will also provide some background on cases brought in the prior decade.³ Most

¹ *Growe v. Emison*, 507 U.S. 25, 33 (1993) (“In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.”); *see also Connor v. Finch*, 431 U.S. 407, 414 (1977) (“We have repeatedly emphasized that ‘legislative reapportionment is primarily a matter for legislative consideration and determination.’”) (internal citation omitted); Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, GEO. WASH. L.R 73, 1131–65, (2005); Jeffrey M. Wice & Leonard M. Kohen, *Court Deference to State Legislatures in Redistricting After Perry v. Perez*, 11 ELECTION L.J.: RULES, POLITICS, AND POLICY 431–45 (2012).

² The issues in partisan gerrymandering challenges to state legislative maps are very similar to those for congressional maps, except for differences in specific provisions of state law regarding legislative redistricting. For example, in Missouri, in addition to the traditional redistricting criteria required for both legislative and congressional redistricting, legislative maps are further required to create districts that are proportional to the political party power in the state and are competitive. *See* MO. CONST. ART. III, § 7. Both Kentucky (Congressional but not legislative) and North Carolina (Legislative but not congressional) must further consider the preservation of communities of interest. *See Redistricting Criteria*, NAT’L CONF. OF STATE LEG. (July 16, 2021), <https://www.ncsl.org/redistricting-and-census/redistricting-criteria>. Related issues arise in local redistricting, but most local elections are formally non-partisan in nature in that party labels are not on the ballot. Of course, even in non-partisan elections, the partisan orientations of many candidates may be known—at least to the more sophisticated voters. For example, in the City of Irvine, California, candidates for mayor in the 21st century have included someone who sought the Democratic Party nomination for President, and another who was a Republican Party leader in the California Senate. However, we are not aware of any partisan gerrymandering challenges to districted maps drawn for non-partisan elections.

³ Limitations in the time remaining to hold a trial and then to draw a new constitutional map may result in a court accepting the use of a challenged map for one election only, even though the evidence suggests the map is unconstitutional, and may later be proven unconstitutional. Under the *Purcell* principle, courts are, in effect, prohibited from interfering with an ongoing election process or one where the court concludes that there is not sufficient time to draw a remedial constitutional map with an adequate review of its properties. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (*per curiam*). Under the *Purcell* principle, decisions on some congressional redistricting cases brought in 2021 or 2022 were postponed until after the November 2022 election. This happened with several cases involving race-based challenges, e.g., *Merrill v. Milligan*, 142 S.Ct. 879, 879-80 (2022) (granting Alabama’s motion to stay a lower court order to redraw a second majority-black congressional district and allowing a likely unconstitutional map to be used for the 2022 election); *Alpha Phi Alpha v. Raffensperger*, Nos. 1:21-CV-5337-SCJ, 2022 U.S. Dist. LEXIS 40164 (N.D. Ga. Feb. 28, 2022) (finding that some parts of Georgia’s legislative redistricting plans were unconstitutional racial gerrymanders, yet allowing the maps to be used for the 2022 election); *Robinson v. Ardoin*, 605 F.Supp.3d 759, 766 (M.D. La. 2022) (concluding “that Plaintiffs are substantially likely to prevail on the merits of their claims brought under Section 2 of the Voting

importantly, (d) we focus on decisions about partisan gerrymandering.⁴ Because of the Supreme Court’s 2019 abdication in *Rucho v. Common Cause* of any federal court responsibility to police partisan gerrymandering,⁵ claims of partisan gerrymandering have become the

Rights Act” and would require the drawing of a second Black-opportunity district.). We do not discuss these or similar racial cases in any detail given our focus on cases that produced a final state court decision on whether a plan was an unconstitutional partisan gerrymander prior to the November 2022 election.

⁴ We believe that cases involving claims about racial gerrymandering are at least equally important, and the implications of such claims are often overlapping with partisan gerrymandering claims. However, for federal elections and statewide elections most of these claims are held in federal court, not state court. *See generally* *Allen v. Milligan*, 143 S. Ct. 1487 (2023); *see generally* *Alexander v. S.C. State Conf. of the NAACP*, 143 S. Ct. 2456 (2023). After the Supreme Court held the coverage formula in Section 4(b) of the Voting Rights Act unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013), and essentially nullified the preclearance provisions of Section 5, federal courts have three primary avenues to deal with claims of race-related Constitutional violations: (a) race-based voter dilution claims brought under Section 2 of the Voting Rights Act of 1965 (VRA) as amended, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986) (laying out factors that must be proved before courts can consider the totality of the circumstances to determine whether electoral structure was discriminatory in results), (b) racial vote dilution claims brought directly under the 14th or 15th Amendments, *see, e.g., Mobile v. Bolden*, 446 U.S. 55 (1980) (must prove discriminatory impact and intent); *see, e.g., Rogers v. Lodge*, 458 U.S. 613 (1982), and (c) racial gerrymandering claims brought under the Equal Protection Clause of the 14th amendment, where the claim is that race is the predominant factor used by mapmakers (a line of jurisprudence originating in *Shaw v. Reno*, 509 U.S. 630 (1993); *see also Alabama Black Legislative Caucus v. Alabama*, 575 U.S. 254 (2015)). As of November 2022, six states had Section 2 congressional challenges: Alabama, Arkansas, Georgia, Louisiana, Ohio, Texas. Racial gerrymandering claims were brought in six states: Alabama, Arkansas, Georgia, Missouri, South Carolina, and Texas. Intentional race discrimination claims were brought in seven states: Alabama, Arkansas, Florida, Georgia, Ohio, South Carolina, and Texas. Other miscellaneous race-based claims were brought in six states: Arkansas, Florida, Kansas, Michigan, North Carolina, and Ohio. *See Redistricting Litigation Roundup*, Brennan Center For Justice, <https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0> (last visited July 2, 2023) (hereafter, “Redistricting Litigation Roundup”). While there was once doubt that Section 2 of the VRA would have its constitutionality upheld in future challenges, in *Allen* (decided on June 8, 2023), a five to four opinion written by Chief Justice Roberts affirmed the *Gingles* standards. *Allen*, 143 S. Ct. at 1510. However, Justice Kavanaugh’s concurrence suggests that all the issues related to the standards for enforcing Section 2 are not yet permanently settled. *Id.* at 1517-19. While the various race-related cases are not directly about partisan gerrymandering, because minority voters are disproportionately Democratic, any plan that packs or cracks minority voters has partisan implications. Race-linked challenges were, for the most part, brought in federal courts. Challenges to congressional plans as partisan gerrymanders were exclusively litigated in state court, given that no claimant would have standing in federal court post-*Rucho*. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2506-07 (U.S. 2019). Thus, while racial claims are clearly relevant in terms of partisan outcome in congressional elections, we resist the urge to include them in our present essay.

⁵ The Supreme Court’s decision in the *Rucho* case, though specifically dealing with North Carolina, reversed other lower federal court decisions about maps created during the 2010 redistricting round which had struck down congressional or legislative plans as egregious partisan gerrymanders. *See Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (finding the redistricting plan enacted by

exclusive domain of state courts.⁶ In *Rucho*, a case on appeal from federal court in North Carolina, the U.S. Supreme Court definitively abdicated any federal responsibility for policing partisan gerrymandering, claiming, *inter alia*, that no judicially manageable standard allowed for courts to distinguish unconstitutional partisan gerrymandering from politics as usual, and therefore partisan gerrymandering claims presented a non-justiciable political question.⁷ In those subsequent 30+ years, the Supreme Court failed to agree to any more specific and judicially manageable standards with which to decide partisan gerrymandering cases, though some Justices enunciated proposed metrics, nor did the Supreme Court ever hold a redistricting map to be unconstitutional.⁸

Prior to *Rucho*, state courts had largely been uninvolved with the issue of partisan gerrymandering.⁹ While some states have direct language in their state constitution that forbids partisan gerrymandering—often

the Wisconsin Legislature constituted an unconstitutional partisan gerrymander), *vacated* 138 S. Ct. 1916 (2018), *remanded* No. 15-CV-421-JDP, 2019 U.S. Dist. LEXIS 111625 (W.D. Wis. July 2, 2019) (dismissing the lawsuit in light of *Rucho*); *see also Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018) (concluding that the “plaintiffs have sufficiently demonstrated that Maryland’s 2011 redistricting law violates the First Amendment by burdening both the plaintiffs’ representational rights and associational rights based on their party affiliation and voting history.”), *vacated per Rucho*, 139 S. Ct. 2484.

⁶ *See, e.g., Black Voters Matter Capacity Building Inst., Inc. v. Lee*, No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022); *see, e.g., Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022) (consolidated with *Alonzo v. Schwab*, No. 2022-CV-90 (Kan. Dist. Ct. Feb. 14, 2022) and *Frick v. Schwab*, No. 2022-CV-71 (Kan. Dist. Ct. Mar. 1, 2022)); *see e.g., Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Nov. 10, 2022); *Szeliga v. Lamone*, Nos. C-02-CV-21-001816 (Md. Cir. Ct. Mar. 25, 2022) (consolidated with *Parrott v. Lamone*, No. C-02-CV-21-001773 (Md. Cir. Ct. Dec. 21, 2021)); *see, e.g., Matter of Congressional Districts by New Jersey Redistricting Comm’n*, 268 A.3d 299 (N.J. 2022); *see, e.g., Republican Party of New Mexico v. Oliver*, No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022); *see, e.g., Matter of Harkenrider v. Hochul*, No. 60, 2022 N.Y. LEXIS 874 (N.Y. Apr. 27, 2022); *see, e.g., Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022); *see, e.g., Adams v. DeWine*, 167 Ohio St. 3d 499 (Ohio 2022); *see, e.g., Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021); *see, e.g., League of Women Voters of Utah v. Utah State Legislature*, No. 220901712 (Utah D. Ct. Mar. 17, 2022).

⁷ *Rucho*, 139 S. Ct. at 2506–07 (concluding that “[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.”). The Court’s abdication of responsibility for policing partisan gerrymandering came 30+ years after the Supreme Court had declared, in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering was justiciable in federal courts. In *Davis*, however, the lower court’s finding of a partisan gerrymander was reversed because the Court majority held it necessary to show that the disfavored party was “shut out of the political process” and this showing was not made in the challenge to Indiana’s legislative map. *Id.*, at 139.

⁸ *See Vieth v. Jubelirer*, 541 U.S. 267 (2004); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

⁹ However, an important exception is Florida. *See League of Women Voters of Fla. v. Detzner* 172 So.3d 363 (Fla. 2015).

language recently added via the initiative process—most states do not.¹⁰ For such states, plaintiffs would have to bring a claim based on a language in its constitution (e.g., about “free and open elections”) as a legal justification for court intervention.¹¹ Indeed, Justice Brennan in a law review article in 1977 argued that individual rights could be protected to greater degrees in *state courts* and through *state constitutions* than the federal constitution could provide.¹²

While there has been other work on the role of state courts as a check on partisan gerrymandering in the 2020 redistricting round, both in terms of an overview and in examining what happened in individual states (such as North Carolina, Virginia and New York),¹³ our approach in this essay is distinctive in being more explicitly empirically focused in looking at the types of evidence used by state courts, including social science evidence.¹⁴ For the 2020s round of congressional redistricting, we go beyond merely identifying the highest level state court resolution of the challenge and look at the partisan decision breakdown on that court as well as the differences in judicial reasoning and evaluation of empirical evidence found across justices both within and across states. We are primarily interested in three issues:

¹⁰ See *supra* note 16, Cervas, Grofman, and Matsuda (2023).

¹¹ Litigants have brought novel arguments based on language in a state’s constitution dating back to a state’s founding documents, which often provide robust voting protections not found in the U.S. Constitution. See *Ibid*; see also Samuel Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203 (2019); Joshua A Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 61 (2014).

¹² William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489–504 (1977) at 9, (noting that “Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.”)

¹³ See, e.g., *supra* note 16, Cervas, Grofman and Matsuda (2023); see also Chad M. Oldfather, *Rucho in the States: Districting Cases and the Nature of State Judicial Power*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 111 (2023); see also Aroosa Khokher, Note, *Free and Equal Elections: A New State Constitutionalism for Partisan Gerrymandering*, 52.1 COLUM. HUM. RTS. L. REV. 1 (2020); see also Brett Graham, “Free and Equal”: *James Wilson’s Election Clause and its Implications for Fighting Partisan Gerrymandering in State Courts*, 85 ALBANY L. REV. 799 (2023); see also Richard Briffault, *Epic Fail: Harkenrider v. Hochul and New York’s 2022 Misadventure in “Independent” Redistricting*, 1 FORDHAM L. VOTING RTS. AND DEMOCRACY F. 251–260 (2023); see also David Imamura, *The Rise and Fall of Redistricting Commissions: Lessons from the 2020 Redistricting Cycle*, ABA (Oct 24, 2022); see also Alex Keena, *2021 Redistricting in Virginia: Evaluating the Effectiveness of Reforms*, 26 RICH. PUB. INT. L. REV. 85 (2022).

¹⁴ While we have most to say about direct challenges to maps as partisan gerrymanders, we also take notice of activities of a state court triggered by the failure of the principal redistricting authority to enact a new map in time for elections, since any court-drawn map will also have partisan consequences.

(1) How did state courts faced with a redistricting challenge based on a claim of a denial of equal treatment and “excessive” partisanship decide whether state law allowed them to address the actual aspects of the claim, rather than following the U.S. Supreme Court and treating the claim as non-justiciable? In seeking to answer this question we distinguish between those states that had some direct prohibition on partisan gerrymandering from those where a prohibition must be inferred from long existing provisions of the state constitution.

(2) The concept of partisan gerrymandering and appropriate metrics for its measurement remain controversial.¹⁵ When state court justices did choose to confront claims of partisan gerrymandering on the merits, what definition of partisan gerrymandering was used? We are particularly interested in what kind of empirical evidence was cited by the Court majority when it did find partisan gerrymandering—e.g., measuring the extent of gerrymandering via metrics based on election data, and/or evaluating maps in terms of the degree to which traditional good government criteria were satisfied, and/or considering the process of map drawing and what it implied about partisan intent?¹⁶

(3) Is there indirect evidence that the partisan predilections of the justices affected their decision about the presence of unconstitutional partisan gerrymandering in a map drawn by the state majority party? Namely, is this evidence in the form of apparent differences between the voting choices of justices who are sympathetic to that party as compared to justices who are sympathetic to the minority party?

¹⁵ In *Rucho*, 139 S. Ct. at 2500, Chief Justice Roberts, writing for the majority, opined that “[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral” that would allow federal courts to determine partisan gerrymandering. This view is strongly disputed by most election law experts in the social sciences and related areas. And, although there is no agreement on the best metric, there is a widely shared view that egregious partisan gerrymanders will raise red flags for most proposed metrics. See Grofman, Bernard and Gary King. 2007. *Partisan Symmetry and the Test for Gerrymandering Claims after LULAC v. Perry*. ELECTION L.J. 6 (1):2-3; see also Grofman, Bernard. 2019. *Partisan Gerrymandering Post-Gill*. ELECTION L.J. 18(2): 93-115; cf. Stephanopoulos & McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STANFORD L. REV. 1503, 1508–10 (2018) (discussing the academic debate and contentions regarding the utility of the efficiency gap metric, partisan bias, and the mean-median difference metric).

¹⁶ In this essay we do not try to provide an independent evaluation of the features of initial or remedial congressional maps used in the 2022 election in terms of their partisan or other consequences. See, e.g., Economist, *America’s congressional maps are a bit fairer than a decade ago, but even fewer seats in Congress will be competitive*, (June 2, 2022); see, e.g., Michael Li, *Anti-Gerrymandering Reforms had Mixed Results*. BRENNAN CENTER (September 19, 2022); see, e.g., Cervas, Grofman and Matsuda, *The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections*, 21 U.N.H. L. Rev. 421 (2023).

Before we address these three issues, we offer some useful background information about the 2020 redistricting round.

Table 1, incorporating data compiled in Cervas, Grofman, and Matsuda (2023)¹⁷, along with additional information collected by the present authors, reports on a state-by-state basis some basic data about the 2020 redistricting process (ca. November 2022). The information in that table includes:

- 1) what type of entity oversaw districting in each state
- 2) and, for states where plans were under legislative control, whether there was unified party control
- 3) and if so, in favor of which party

Table 1 also shows the states where partisan gerrymandering claims *vis-à-vis* congressional districting were made, and it shows whether those states had a partisan gerrymandering challenge in state court. In the cases where a partisan gerrymandering challenge was brought, or a race-related challenge with *partisan* implications was brought, we distinguish cases where the highest state court has already issued a ruling (ca. November 2022) and those still pending.¹⁸ For the partisan gerrymandering cases where we have a definitive court opinion, we indicate whether there was a ruling on the merits versus a finding by the state court that partisan gerrymandering was not a justiciable offense under that state's constitution. Where a court determined that partisan gerrymandering is justiciable, we identify whether that ruling found in favor of plaintiffs.¹⁹ So as to locate within a single table information for easy access on multiple factors that affected whether a partisan challenge was successful, we also include within this table some important information about the nature of the state constitutional provisions relevant to partisan gerrymandering. We show whether the state constitution provides either direct language prohibiting partisan gerrymandering (e.g., a requirement that a plan neither favor nor disfavor any political party) or an indirect check in terms of language like that relied upon by the Pennsylvania Supreme Court when it

¹⁷ See *supra* note 16, Cervas, Grofman and Matsuda (Table 1, Table 4).

¹⁸ In nine states (Alabama, Arkansas, Florida, Georgia, Louisiana, Michigan, North Carolina, Ohio, South Carolina, and Texas) there are still pending claims of racial gerrymandering ca. May 2023. See *supra* note 4, Redistricting Litigation Roundup.

¹⁹ Of course, new challenges might still be brought now that actual election outcomes are known, and there is a non-trivial chance that in states under clear partisan control, new maps may be proposed for the 2024 election to improve the dominant party's expected seat margins. For a historical account of mid-decade redistricting, see Erik J. Engstrom, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* (University of Michigan Press) (2013).

overturned a congressional map under a state constitutional requirement for “free and equal elections.”²⁰

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In 34 of the 44 states where there was more than a single congressional district, line drawing remained in the hands of state legislatures in 2021.²¹ But this reflected a *reduction* in the proportion of districts that were drawn by legislatures. Initiative procedures created the possibility that in states where redistricting had been in legislative hands, that control could be removed from the legislature and put into the hands of a bipartisan or ostensible non-partisan commission. In 2011, commissions drew congressional maps in six states²²; in 2021, commissions drew—or attempted to draw—congressional maps in 11 states.²³

Common sense and the empirical evidence tells us that the likelihood of partisan gerrymandering is highest in situations where one political party fully controls the redistricting process.²⁴ The most common way in which full party control occurs is with what is called trifecta control, where

²⁰ *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018).

²¹ See **Figure 1**. Justin Levitt, *National Overview*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/national-overview> [<https://perma.cc/5Y75-LM6A>] (last visited Dec. 21, 2022).

²² See *supra* Levitt, note 21 under “Who Draws the Lines?” Commissions in 2010: Arizona, California, Hawaii, Idaho, New Jersey, Washington.

²³ *Id.* Commissions in 2020: Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, New York, Virginia, Washington. In 2021, the Virginia Redistricting Commission released two statewide congressional map proposals but missed its deadline for approving the map proposals. Accordingly, the Virginia Supreme Court assumed authority over the process, and two special masters selected by the court released proposals for congressional districts which were subject to public comment and then revised and subsequently approved by the Virginia Supreme Court. See *Redistricting in Virginia after the 2020 census*, BALLOTPEdia, https://ballotpedia.org/Redistricting_in_Virginia_after_the_2020_census (last visited May 31, 2023). In 2014, the citizens of New York voted to adopt historic reforms to the redistricting process by establishing an Independent Redistricting Commission (IRC), and by “declaring unconstitutional certain undemocratic practices such as partisan and racial gerrymandering.” However, in 2021, after the IRC reached an impasse as to the design of its second set of constitutionally required maps, the Democrat-controlled Legislature enacted its own set of maps without participation of the Republican minority party. In *Harkenrider*, the New York Court of Appeals held that the Legislature’s failure to follow the prescribed constitutional procedure warranted invalidation of the Legislature’s congressional and state senate maps. Subsequently, new congressional and state senate districts were drawn by the special master. *Matter of Harkenrider*, 2022 N.Y. LEXIS 874, at *1.

²⁴ Anthony J. McGann et al., *GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY* (Cambridge University Press, 2016).

the map is legislatively drawn and both branches of the legislature and the governor are under the control of the same party, but it can also occur even without trifecta control if the governor has no veto power over a redistricting map,²⁵ or if one party controls both branches of the legislature and the governor is of the opposite party but the majorities in each branch of the legislature are sufficiently large to override a gubernatorial veto. Given the rise in partisan polarization operating at all levels of government,²⁶ the number of states with trifecta control has increased since the 1980s especially as states have realigned after the “Solid South” transitioned from Democratic control to Republican control.²⁷ However, although the total number of states where the redistricting process was wholly controlled by a single party increased from 2010 to 2020, the number of total *districts* in states under one party control decreased from 2010 to 2020.²⁸

Although it is possible to have partisan gerrymandering even when it is not legislative decisions that determine the shape of the map,²⁹ reformers viewed replacing legislative control over the map-making process with a

²⁵ In states with commissions, the governor has no veto power over state or federal maps because the legislature does not play a role in passing the maps. Finally, in North Carolina, while the legislature does pass both state and federal maps as regular legislation, the governor is expressly denied veto power over those maps.” See Fiona Kniaz & Kristoffer Shields, REDISTRICTING: THE ROAD TO REFORM, Rutgers (2021), <https://governors.rutgers.edu/governors-and-the-redistricting-process/>.

²⁶ See Kelsey L. Hinchliffe & Frances E. Lee, *Party Competition and Conflict in State Legislatures*, 16 STATE POLITICS & POLICY QUARTERLY 172–97 (2016); see also Joel Sievert & Seth C. McKee, *Nationalization in U.S. Senate and Gubernatorial Elections*, 47 AM. POL. RESEARCH 1055–1080 (2019); cf. Thomas L. Brunell & Bernard Grofman, *Explaining Divided U.S. Senate Delegations, 1788–1996: A Realignment Approach*, 92 AM. POL. SCI. REV. 391–99 (1998).

²⁷ Robert N. Lupton & Seth C. McKee, *Dixie’s Drivers: Core Values and the Southern Republican Realignment*, 82 J. OF POL., 921–36 (2020); see also John R. Petrocik, *Realignment: New Party Coalitions and the Nationalization of the South*, 49 J. OF POL., 347–375 (1987).

²⁸ See *infra* notes 51.

²⁹ This can happen for several reasons. Examples include when a court requires a map that is based on *least change* from the prior decade when the prior decade’s plan was excessively partisan or when a commission with evenly balanced partisan affiliations and a tiebreaker who is ostensibly neutral adopts a map proposed by one of the parties that results in a partisan gerrymander. In 2021 this latter situation was allegedly found in the state of New Jersey, where the tiebreaking Chair of the redistricting commission, John E. Wallace, Jr., a former state Supreme Court Justice and registered Democrat, was appointed by the New Jersey Supreme Court and was challenged as being partisan by state Republicans. *Matter of Congressional Districts by New Jersey Redistricting Comm’n*, 268 A.3d at 299. In addition to New Jersey, states with constitutional provisions that also require a state supreme court to appoint a tiebreaking member include Hawaii, Idaho, Montana, and Washington. Another potential way to get a partisan map from a commission is when there are state legislators or other elected officials as members whose selection rules leave open the possibility of one party having a majority of commission members.

reapportionment commission of a bi-partisan or non-partisan nature as a major goal.³⁰ Most of the state court cases we consider from the 2020s redistricting round involved states where the legislature is the primary redistricting authority. The belief in the need for institutional reform of the redistricting process only increased after the Supreme Court's decision in *Rucho*.³¹

Table 2 shows a different type of information about the litigation in states where partisan gerrymandering challenges were raised in state court - it shows who the plaintiffs were in those cases. Plaintiffs may have different motivations for bringing partisan gerrymandering challenges. The minority party may hope to improve their electoral chances by overturning a gerrymander benefiting the party that drew the map, or racial and community groups may wish to overturn a map that has consequences for their representation. On the other hand, good government groups may simply be concerned with traditional districting criteria or their own notions of overall "fairness." Perhaps the most important point to be made about Table 2 comes when we compare the limited number of partisan gerrymandering challenges in the 2010 redistricting in state courts, compared to the number of partisan gerrymandering challenges in state courts in the 2020 redistricting round. But in making comparisons between 2010 round partisan gerrymandering litigants and 2020 round partisan

³⁰ For example, the Brennan Center for Justice published and advocated for model legislation that would establish independent redistricting commissions to "promote[] independence, inclusivity, and transparency in the map-drawing process." See Yuriy Rudensky & Annie Lo, *A Better Way to Draw Districts*, BRENNAN CNTR. FOR JUSTICE (Dec. 12, 2019), <https://www.brennancenter.org/our-work/policy-solutions/better-way-draw-districts>. In addition, Common Cause, a nonpartisan grassroots organization "dedicated to upholding the core values of American democracy," was also a forceful advocate for redistricting reform via independent commissions. See *Fair Maps, Fair Representation, and a Fair Say*, COMMON CAUSE, https://www.commoncause.org/our-work/redistricting_and_representation/gerrymandering-redistricting/ (last visited Aug. 7, 2023). Since 2010, four additional states (Colorado, Michigan, New York, and Virginia) have established commissions to conduct redistricting more independently. In addition, in 2020, Montana used a commission to draw its congressional maps after the state gained a second congressional seat (in 2010, Montana's one congressional seat did not require the state to establish a commission to draw its congressional map). New York's implementation for the use of a commission is only advisory since the legislature can amend any proposal.

³¹ See *Rucho*, 139 S. Ct. at 2484. Not all commissions are equal in terms of their likelihood of directly acting as a check on partisan gerrymandering. For example, Hawaii, New Jersey, and Virginia have commissions that may include current officeholders. Moreover, several of the new commissions created prior to the 2020 redistricting round were severely flawed, either in creating a high likelihood of deadlock (e.g., commissions with an equal number of members affiliated with each party and without any tie-breaker mechanism, such as the one in Virginia, VA. CONST. ART. II, §6-A, or with rules, such as those in Ohio, OHIO CONST. ART. XIX, §1, that allowed the legislature to repeatedly override the court and that prevented the state court from imposing a plan of its own. *Adams*, 167 Ohio St. 3d at 527.

gerrymandering litigants, we also need to take into account the partisan gerrymandering challenges filed in federal courts in the 2010 redistricting round, including Pennsylvania, Maryland, North Carolina, and Wisconsin, since such federal challenges were not yet ruled out, and indeed the challenges in three of these four states – all but Pennsylvania – were successful in the lower federal courts. The next most important point to make about this table is that we can see that while state chapters of the League of Women Voters and groups such as Common Cause remain important in partisan gerrymandering litigation in state courts in the 2020 redistricting round, they were more important in state and federal courts in the previous round.³² Although groups of individual plaintiffs were also found in the 2010 round, redistricting challenges of the 2020 round were more likely to have the lawyers for such groups of “individuals” as key players. It does not seem unduly cynical to believe that partisan actors recruited members of the public to serve as named plaintiffs, so that what may appear to be civic-minded complaints about neutrality or fairness have partisan underpinnings, and the evidence here to that effect is clear.³³ Of course, it is very difficult to infer “true” motivations. Interest groups that are ostensibly non-partisan may have been “captured” by a political interest, or racial groups may recognize a kind of common fate with the

³² There are also some useful things to be learned from who/which type of entity was charged as defendants in the litigation. For example, how often are there named defendants who are part of the legislative majority and key actors in the redistricting process? We do not pursue these issues here, but we do provide Table A1 in the Appendix that compiles the relevant information.

³³ For example, in Florida, Ohio, and Pennsylvania, the citizen plaintiffs were supported by the National Democratic Redistricting Committee (“NDRC”) or an affiliate, such as the National Redistricting Foundation or National Redistricting Action Fund. The NDRC was established to fight for fairer maps and is chaired by former Attorney General Eric Holder and supported by democratic party leaders such as President Barack Obama and former House Speaker Nancy Pelosi, and others. See *Our Work*, NAT’L DEMOCRATIC REDISTRICTING COMMITTEE, <https://democraticredistricting.com/our-work/> (last visited Apr. 19, 2023); *NRF-supported Voters File Petition to Florida Supreme Court*, NAT’L REDISTRICTING FOUNDATION (May 23, 2022), <https://redistrictingfoundation.org/news/nrf-supported-voters-file-petition-to-florida-supreme-court>; *Supreme Court Blocks Republican Attempt to Overturn Pennsylvania’s Fair Congressional Map*, NAT’L REDISTRICTING ACTION FUND, <https://redistrictingaction.org/news/supreme-court-blocks-republican-attempt-to-overturn-pennsylvanias-fair-congressional-map> (last visited Apr. 19, 2019); *Supreme Court Blocks Extreme Republican Efforts to Absolve Checks and Balances Within State Governments*, NAT’L REDISTRICTING ACTION FUND, <https://redistrictingaction.org/news/scotus-blocks-extreme-republican-efforts-to-absolve-checks-and-balances-within-state-govs> (last visited Apr. 19, 2023). In Kansas, Kentucky, Maryland, New Mexico, New Jersey, New York, and Oregon, at least one of the individually named plaintiffs was a partisan elected official or candidate for elected office in 2022. For North Carolina and Utah, the individual plaintiffs were largely led by good government groups, such as Common Cause or the Campaign Legal Center and Mormon Women for Ethical Government.

party which provides most of the descriptive representation to members of their group.

<<Table 2 about here>>

Drawing on the information in **Tables 1** and **2** and other data sources we can summarize some important facts about 2020s redistricting as of November 2022:

1. Full partisan control is not a sufficient condition for a legislature to choose to impose a partisan gerrymander (or to maintain one already in place). The removal of any possibility of a federal lawsuit to restrain gerrymandering led many legislatures under one party control in the 2020 round to offer congressional plans that were labeled as partisan gerrymanders (or as racial gerrymanders with important partisan implications³⁴) by journalists in the state (and/or by academics). 10³⁵ of the 28³⁶ states under one party control (where the majority party could control redistricting without influence of the minority party) had an actual partisan gerrymandering challenge in state court to that congressional map prior to November 2022, although not all were resolved prior to the 2022 election.
2. Full partisan control of the redistricting process is not a necessary condition to implement a map with partisan advantage. States like Arizona, which have an independent commission with a tiebreaker, can still end up with maps that give one of the major parties an advantage. Additionally, courts can impose maps that have partisan bias. Wisconsin's supreme court ordered a "least-change" map derived from the previous decade's gerrymander.³⁷ A federal court ordered Ohio to implement a plan to be used for the 2022 midterm

³⁴ As noted earlier, there were also legal challenges to some congressional maps brought on race-related grounds in a federal court. *See supra* note 4

³⁵ Florida, North Carolina, Maryland, Kansas, Kentucky, New Mexico, New York, Ohio, Oregon, and Utah.

³⁶ Highlighted states in **Table 1**.

³⁷ *Evers' statement on Wisconsin Supreme Court decision to accept governor's redistricting maps* WIZM 92.3FM 1410AM, <https://www.wizmnews.com/2022/03/03/evers-statement-on-wisconsin-supreme-court-decision-to-accept-governors-redistricting-maps/> (last visited Feb 20, 2023)

election that was determined by the state court to violate the state constitution.³⁸

3. State courts were far more involved in redistricting in the 2020 round than in any previous redistricting round, with the most important cases involving challenges to congressional maps as partisan gerrymanders. However, the anticipation of a successful state court challenge to a map was reduced in deterrent impact because of the uncertainty about whether state courts would choose to act on partisan gerrymandering challenges, and further reduced by the delay in obtaining the census data needed for redistricting, thus creating a greater potential for stretching out the redistricting process to the point that a legislative map might be used in 2022 even if later found to be an unconstitutional gerrymander.³⁹
4. There was a high proportion of states where partisan gerrymandering challenges were initiated before the first election but were left unresolved in the 2020 redistricting round (5 of 11)⁴⁰,

³⁸ WTVG Staff, *Ohio Supreme Court makes final judgement on Congressional map challenges*, ABC ACTION NEWS 13, , <https://www.13abc.com/2022/03/18/ohio-supreme-court-makes-final-judgement-congressional-map-challenges/> (last visited Dec 23, 2022).

³⁹ Given the delay in the delivery of the census data needed for redistricting in 2021, *see Census Bureau Statement on Redistricting Data Timeline*, U.S. CENSUS BUREAU (Feb. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>, even if state courts did accept a partisan gerrymandering challenge (or where there was litigation in a federal court involving a challenge to racial gerrymandering whose resolution almost certainly would have partisan consequences), legislators were aware that court action might come too late to prevent legislative plans from going into effect in the critical 2022 election – thus allowing incumbency advantage for the gerrymandering party to carry over into the new redistricting decade. This happened in *Black Voters Matter Capacity Building Inst., Inc.*

⁴⁰ Florida, Kentucky, New Mexico, North Carolina, Utah. There were several additional federal challenges in place that were unresolved as of the 2022 election (Alabama, Arkansas, Louisiana, Georgia, South Carolina). Florida’s congressional map has been challenged under the state’s partisan gerrymandering and racial gerrymandering provisions, but parties jointly decided to drop the partisan gerrymandering claim in *Black Voters Matter Capacity Building Inst., Inc. v. Byrd*. *See* Mike Schneider and Brendan Farrington. 2023. “Deal over Florida’s redistricting plan could lead to restoration of Black-dominant district.” AP News. (August 15, 2023). <https://apnews.com/article/florida-redistricting-desantis-race-civil-rights-2f97367f325a77aca00701b08e9d22a4>. In addition to the protections against partisan gerrymandering, Florida’s constitution protects racial and language minorities by requiring districts that do not “diminish their ability to elect representatives of their choice.” FLA. CONST. ART. III, § 20(a). For example, the Florida legislature—under instruction from the Florida governor—could be accused of having gone “hog wild” in the 2020 redistricting round in seeking to advantage Republicans. *See* Joshua Kaplan, *How Ron DeSantis Blew Up Black-Held Congressional Districts and May Have Broken Florida Law*, ProPublica (Oct 11, 2022), <https://www.propublica.org/article/ron-desantis-florida-redistricting-map-scheme>; *see also* Greg Allen, *Gov. DeSantis takes over congressional redistricting in Florida*, NPR (Apr. 12, 2022),

and with other plans permitted for use in the 2022 election only.⁴¹ There are also maps that might yet be challenged as partisan or racial gerrymanders.⁴²

5. The proportion of partisan gerrymander challenges to maps in states under one party control (10 of 28)⁴³ is much higher than the proportion of partisan gerrymander challenges to legislative-drawn maps in states under divided control, since there were no such challenges (0 of 6).⁴⁴
6. In half of the cases where there was a partisan gerrymandering challenge resolved by November 2022, the state court found in favor of plaintiffs: 3 of 6 instances (Maryland, New York, Ohio).⁴⁵
7. The proportion of successful partisan gerrymander challenges to legislatively drawn maps in states under one party control (3 of 6) resolved by November 2022 is much higher than the proportion of successful partisan gerrymander challenges to legislatively drawn

<https://www.npr.org/2022/04/12/1092414662/gov-desantis-takes-over-congressional-redistricting-in-florida>; see also Gary Fineout, *Florida Supreme Court locks in DeSantis-backed redistricting map*, Politico (June 2, 2022), <https://www.politico.com/news/2022/06/02/florida-redistricting-map-court-decision-00036740>). A simultaneous federal racial gerrymandering case is also proceeding in Florida. *Common Cause v. Byrd*, No. 4:22-CV-109 (N.D. Fla. Mar. 11, 2022).

⁴¹ For example, the maps used for North Carolina and Ohio in 2022 will need to be redrawn for future election cycles. See Michael Li, *How Voting Districts Could Change Before 2024*, BRENNAN CENTER (Feb. 6, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/how-voting-districts-could-change-2024>. Plaintiffs in *Hoffmann vs. NYS Independent Redistricting* (904972-22) also seek to have the redistricting commission in New York replace the court-drawn map.

⁴² After the U.S. Supreme Court ruled in appellants' favor in *Allen*, Alabama was required to draw a second Black opportunity to elect district (all but guaranteeing an additional Democratic representative in the state). However, ca. August 2023, Alabama has refused the court's order and instead passed the "2023 Plan" which decreases the Black voting age population in the one performing district that previously existed, and raised the percentage in another to a level that still violates the Voting Rights Act. See Kim Chandler, *Federal judges question Alabama's new congressional map, lack of 2nd majority-Black district AP News* (Aug. 14, 2023), <https://apnews.com/article/alabama-redistricting-voting-rights-act-7e7d8ca2fac4063f91311bd363515304> (last visited Aug 16, 2023).

⁴³ *Supra* note 35.

⁴⁴ Of the six states where maps were to be drawn by the legislature and were under split control (Connecticut, Pennsylvania, Maine, Minnesota, New Hampshire, North Carolina), all but Maine were drawn by courts.

⁴⁵ Kansas, New Jersey, and Oregon are the three cases where the state court found in favor of the defendants (or determined that there was not a justiciable claim). Ohio is difficult to classify because of the inability of the state court to draw a map of its own, leading to federal court intervention to resolve a deadlock, but state law requires the map needs to be redrawn for 2024. Before federal court intervention, the state court did reject various maps.

maps in states under divided control (0 of 0), since the latter is an empty set.⁴⁶

8. While these comparisons must be interpreted with care since the nature of the case facts obviously affects the outcome, and commissions differ in their institutional rules, we see that the likelihood of a partisan challenge being brought to a congressional plan was higher in challenges brought to a legislative-drawn map (10 challenges out of 28 states)⁴⁷ than to a commission-drawn map (1 challenge out of 10 states).⁴⁸ The success rate of plaintiffs in *challenges* to a legislatively-drawn map (4 of 10)⁴⁹ was higher than the success rate of challenges to a map drawn by a commission (0 of 1).⁵⁰
9. In the 2020 redistricting round, not only did Republicans have many more states under one party control (20) than did the Democrats (8), but there were also many more congressional districts in states under full Republican control (191 districts) than there were congressional districts in states under full Democratic control (75 districts). Though the difference was smaller than in the 2010 round, partisan control in 2020 redistricting round still very disproportionately favored one party, the Republicans, and the partisan disproportionality from the partisan gerrymandering in the 2010 round reinforced the Republican advantage in the 2020 round because of the advantages of incumbency that persisted even as district configurations changed.⁵¹

⁴⁶ There is a conditional probability effect in that we can expect challenges to be more likely to be brought and those challenges to be more likely to be successful in states where there is egregious partisan gerrymandering and, as emphasized earlier, we also expect that partisan gerrymandering is most likely to be found in states where the redistricting process is under single party control.

⁴⁷ The 31 states are those in which the legislature drew a map, so it does not include Connecticut, Pennsylvania, and Wisconsin which, because of split control, were drawn by courts.

⁴⁸ New Jersey was the one (unsuccessful) challenge brought against a state court. A challenge was brought in state court against the maps drawn by the Michigan independent commission as racially discriminatory, but a 4-3 majority of the state Supreme Court dismissed the case for lack of evidence. *See Detroit Caucus v. Michigan Independent Citizens Redistricting Commission*, No. 163926 (Mich. Sup. Ct. Jan. 5, 2022).

⁴⁹ Successful challenges to enacted plans include Maryland, New York, North Carolina, and Ohio.

⁵⁰ *See Table 1.*

⁵¹ In the 2010 redistricting round, Democrats had party control in six states (Arkansas, Illinois, Maryland, Massachusetts, Rhode Island, West Virginia; 44 total districts). Republicans had party control in eighteen states (Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin; 206 total districts). Although Democrats nominally controlled the

10. Partisan gerrymandering challenges to congressional maps were more likely in states under Republican control (6)⁵² than in states under Democratic control (5)⁵³.
11. Among the four successful partisan *challenges* to congressional maps, the same number of successful challenges happened in states under Democratic control (2)⁵⁴ as those under Republican control (2).⁵⁵
12. We might expect that partisan gerrymandering litigation will come from non-partisan groups such as League of Women Voters or Common Cause, or local groups that identify themselves in non-partisan terms, on the one hand, or groups of voters whose strong partisan identifications make them willing to sign on as plaintiffs to partisan gerrymandering litigation when recruited by party officials, on the other. What we see from **Table 2** is interesting. In the 2010 round, since there were only a handful of cases brought in state court it is easy to determine that it was good government groups such as the League of Woman Voters which were the plaintiffs in the these early partisan gerrymandering cases in state court, and good government groups were also instrumental in the 2010 round in bringing partisan gerrymandering challenges in

process in Arkansas and West Virginia, these two states were at the end of a transition from single-party Democratic control to single-party Republican control. By the end of the decade, both states in both chambers had at least 2-to-1 Republican-to-Democrat ratios. Nebraska's legislature is non-partisan. Going into 2020, Democrats controlled the redistricting process in eight states (Illinois, Maryland, Massachusetts, Nevada, New Mexico, New York, Oregon, Rhode Island; 75 total districts). Republicans controlled the process in twenty states (Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana (supermajority), Mississippi, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia; 191 total districts [New Hampshire, 2 districts, also controlled by Republicans, but the governor vetoed his party's own plan]). In Kansas, the legislature was subject to the veto of the Democratic governor but overrode her veto with a supermajority vote. Nebraska's legislature is technically non-partisan, though the outcome of the legislative process matched the partisan character of the legislature. Thus, in 2020 Democrats controlled two more states than they had in 2010, and Republicans controlled the process in two more states in 2020 than they did in 2010. But, more importantly for the U.S. House of Representatives, in terms of districts, the advantage that Republicans had in 2010 (162-district advantage) was significantly reduced by 2020 (116-district advantage). The "district advantage" is calculated by finding the difference in the total number of districts for which each party had complete control over the process.

⁵² Florida, Kansas, Kentucky, North Carolina, Ohio, Utah, not including race-based claims.

⁵³ Maryland, New Mexico, New Jersey, New York, Oregon

⁵⁴ Maryland, New York [New Mexico has not yet been decided, as of November 2022].

⁵⁵ North Carolina, Ohio [Florida and Utah have not yet been decided].

federal courts.⁵⁶ During the 2020 redistricting cycle, although non-partisan groups continued to be active, many of the plaintiffs were explicitly (or implicitly) affiliated with the political party that served to gain from state courts overturning the enacted plan.

Now we turn to the three key questions about state court jurisprudence in the 2020 redistricting round identified earlier.

II. THREE KEY QUESTIONS

- A. How did state courts faced with a redistricting challenge based on a claim of a denial of equal treatment and “excessive” partisanship decide whether state law allowed them to address the actual aspects of the claim, rather than following the U.S. Supreme Court and treating the claim as non-justiciable?*

While decisions to bring a challenge to a map and judicial rulings depend upon the case facts, we can nonetheless ask whether the features of the state constitution that are of direct or potential effect on partisan gerrymandering appear to influence such choices. The categories highlighted in **Table 1** identify constitutions that have an explicit prohibition on partisan gerrymandering in the form of a prohibition on favoring or disfavoring particular parties or candidates.⁵⁷ Some state constitutions have other (older) language (e.g., a requirement for free and open elections) that can be used to justify bringing a partisan gerrymandering challenge -- as was shown in the Pennsylvania and North Carolina cases from the 2010 round.⁵⁸

⁵⁶ See, e.g., *League of Women Voters of Pa.*, 178 A.3d at 737; see, e.g., *League of Women Voters of Fla.*, 172 So. 3d at 363. In *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019), Rebecca Harper, a member of the organization Common Cause, volunteered to be one of the named plaintiffs on the case. See Laura Leslie, *Meet the Cary woman behind the Supreme Court case Moore v. Harper*, WRAL NEWS (Dec. 9, 2022), <https://www.wral.com/story/meet-the-cary-woman-behind-the-supreme-court-case-moore-v-harper/20621561/>.

⁵⁷ A state constitutional prohibition on the use of partisan data in the redistricting process, found in the state constitutions of Arizona, California, Colorado, Florida, Hawaii, Idaho, Iowa, Montana, Nebraska, Ohio, Oregon, Utah, and Washington, may also trigger a partisan gerrymandering claim if it is thought that the redistricting authorities have flouted that provision.

⁵⁸ “[E]ven when there was no explicit anti-gerrymandering provision in the state constitution, beginning with the Pennsylvania Supreme Court decision in 2018, some state courts have begun to interpret older provisions of their state constitutions as implicitly prohibiting egregious gerrymandering—language that says elections shall be ‘free and equal,’ ‘free and open,’ simply ‘free,’ or language regarding the ‘right to vote.’” See *supra* note 16, Cervas, Grofman, and Matsuda at 6 & n.13 (2023).

1. Likelihood of a challenge

Partisan gerrymandering challenges to legislative maps usually occur in states controlled by one party.⁵⁹ Presumably, this is not a coincidence since partisanship is more likely in these states. But is the likelihood of challenge affected by the nature of state constitutional provisions?

In particular:

Hypothesis 1a. The likelihood of a partisan gerrymandering challenge to congressional maps is highest in states where there is direct language affecting partisan gerrymandering, and lowest in states where there is neither direct nor indirect language that could be used to restrain partisan gerrymandering.

Hypothesis 1b. The states with only an indirect constitutional constraint on partisan gerrymandering will be between those at each end of Hypothesis 1a.

Turning now to the evidence. As shown in **Table 1**, in states with an explicit constitutional prohibition on partisan gerrymandering, where congressional districting was under single party legislative control, and the redistricting authority offered a map, a challenge to the map was brought in only 5 of the 7 such states (71.4%).⁶⁰ In states with an indirect constitutional provision (e.g., Pennsylvania and North Carolina in the previous round) and the same prerequisites above, a challenge was brought in only 6 of the 16 states (37.5%) (note that some states have both provisions).⁶¹ In states where neither direct nor indirect provisions were found and the same prerequisites as above were met, a challenge was brought in only 1 of the 9 states (11.1%).⁶² Thus, the decision to bring a challenge is related to the strength of the provisions available, and the absence of any sort of prohibition on partisan gerrymandering resulted in fewer challenges being brought.

2. Likelihood of a successful challenge

But what can we say about the likely influence of state constitutional provisions on the *success* of partisan gerrymandering challenges? In particular, are states with constitutional provisions that prohibit favoring

⁵⁹ See *supra* paragraph 5 at page 15.

⁶⁰ FL, NY, OH, OR, UT out of FL, IA, NE, NY, OH, OR, UT.

⁶¹ KY, MD, NC, NM, OR, UT out of AR, IL, IN, KY, MD, MA, MO, NH, NC, NM, OK, OR, SC, TN, TX, UT

⁶² KS out of AL, GA, KS, LA, ME, MS, NV, RI, WV. We do not include NJ here because the map was drawn by a commission including a non-party tie-breaking vote.

or disfavoring particular candidates more likely, *ceteris paribus*, to have a successful gerrymandering challenge?⁶³

There were 7 partisan gerrymandering challenges to a congressional map in the 2020 round that were resolved before the 2022 election. In 4 of the 7 instances the court agreed that the challenged map was unconstitutional.⁶⁴

Hypothesis 2a. Partisan gerrymandering challenges will be least successful in states where there is neither direct nor indirect state constitutional language that could be used to restrain partisan gerrymandering.

Hypothesis 2b. Partisan gerrymandering challenges will be most successful in states where there is direct language affecting partisan gerrymandering.

Hypothesis 2b'. Alternatively, partisan gerrymandering challenges will be most successful in states where there is indirect but not direct state constitutional language affecting partisan gerrymandering.

Hypotheses 2b and 2b' are contradictory hypotheses. Legislatures charged with drawing districts under explicit direction of state law may choose to follow the law, or at least avoid violating it in a blatant fashion, knowing that a consequence of not following the law is possible forfeiture of any control over the process in the remedial stage.⁶⁵ There are arguments pointing in both directions. On the one hand, absent a direct bar on gerrymandering we might expect it to be difficult for plaintiffs to prevail in gerrymandering litigation. On the other hand, in states where there is a direct bar on partisan gerrymandering, we might expect mapmakers to be more cautious about drawing partisan gerrymanders and thus making it less likely that their plans are overturned.⁶⁶

⁶³ Of course, the likelihood of successful challenge depends not just on the state-specific legal environment, but also state-specific case facts.

⁶⁴ MD, NY, NC, OH out of KS, MD, NJ, NY, NC, OH, OR

⁶⁵ Relatedly, we would note that the vigorous implementation of Section 5 of the Voting Rights Act reduced the frequency of many types of discriminatory action by state authority and made counting successful section 2 challenges a misleading way of judging the success of that provision. As the dissenters said in *Shelby County*, 570 U.S. at 589, “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

⁶⁶ A case out of North Carolina, *Moore v. Harper*, decided by the Supreme Court after the November 2022 election, challenged whether a state court could be allowed to interpret indirect language from their state’s constitution to constrain a legislature from enacting a partisan gerrymander. *Moore v. Harper*, 143 S. Ct. 2065, 2065 (2023). The challenge in *Moore* suggested that the U.S. Constitution’s Election Clause gave exclusive power to state legislatures for

There were only a small number of partisan gerrymandering challenges brought before the 2020 midterm election (11 states).⁶⁷ There were even fewer challenges that were both decided and successful (7 states).⁶⁸ The data suggests that there are no clear differences regarding successful litigation in terms of differences in the state constitutional language upon which the challenge might hang. Of the four successful partisan gerrymandering claims that were brought, two states had only indirect state constitutional provisions (MD, NC), and two had direct constitutional provisions (NY, OH). In the three unsuccessful partisan gerrymandering claims, two states had neither direct nor indirect constitutional provisions (NJ, KS) and one state had both direct and indirect constitutional provisions (OR).

B. How do courts determine what is an unconstitutional partisan gerrymander?

Redistricting litigation fall into one or more of the following categories: (1) on the failure of maps to satisfy traditional good government criteria, (2) on statistical tests of partisan bias/partisan vote dilution, (3) on process grounds, such as failure to comply with requirements for public comment, or votes on passage that are entirely along partisan lines, (4) on examination of specific changes made in the proposed map *vis-a-vis* the map from the last decade such that inferences could be drawn about a deliberate intent to achieve partisan advantage, and/or (5) as violative of the Voting Rights Act or of the Equal Protection Clause of the U.S. Constitution. Numbers 1 through 4 are all challenges brought in state court, and 5 is usually brought in federal court.⁶⁹ Not all these items are explicitly about partisan advantage, but other issues may

determining rules for federal elections, including redistricting. *Id.* The court determined that the “Elections Clause does not insulate state legislatures from ordinary exercise of state judicial review for violations of state constitutional constraints on lawmaking.” *Id.*, at 2065. However, Justice Kavanaugh issued a concurring opinion that says, “a state court’s interpretation of state law in a case implicating the Elections Clause is subject to federal court review” and that state courts cannot “impermissibly distort[]” state law “beyond what a fair reading required.” *Id.* at 2090 (quoting *Bush v. Gore*, 531 U.S. 98, 115). The U.S. Supreme Court had previously denied *cert* in *Costello v. Carter*, 143 S. Ct. 102 (2022), a case which questioned the role of courts imposing remedial maps in response to either an impasse in the state legislature (and governor) or in response to a constitutional violation.

⁶⁷ FL, KS, KY, MD, NJ, NM, NY, NC, OH, OR, UT

⁶⁸ See *supra* note 64.

⁶⁹ Though, some states have adopted provisions similar to the federal Voting Rights Act. For additional information about state voting rights, see Ruth Greenwood & Nicholas Stephanopoulos, *Voting Rights Federalism*, Emory Law Journal (forthcoming).

be used as indirect means of overturning plans that are based on the belief that one party has benefitted from the lines as they were drawn. For instance, a disfavored party might challenge a plan for splitting too many political subdivisions when the state constitution requires the maintenance of these boundaries. Excessive political subdivision splits might allow for additional advantage for the majority party, and therefore a court remedy could act to decrease excessive partisanship.

Table 3, limited to claims made in state courts, uses the classification scheme above to identify the nature of the claim. The table also includes quotes, or our own paraphrasing of the language used to define a partisan gerrymander, when this is available.⁷⁰ The table additionally provides the partisan affiliations of the deciding justices, with those justices voting in favor of the opinion on the first line, followed by those justices who dissent on the second line.⁷¹

<< Table 3 about here >>

There are several interesting features of **Table 3**. Among plans created after the 2020 census, there are five states where a court rejected a congressional plan.⁷² These include four states where the state legislature was responsible for the plan's design, and a fifth, Pennsylvania, where the state high court rejected the lower court's plan in lieu of a map passed by the legislature.⁷³

⁷⁰ We leave to a subsequent essay a more detailed analysis of the use by individual justices or sets of justices of specific criteria/metrics and how they set a threshold to decide when a metric could be taken to provide evidence that the level of partisan gerrymandering was beyond "politics as usual" and rose to the level of a constitutional violation. In that essay we also discuss how justices dealt with tradeoffs/conflicts among criteria.

⁷¹ We have done our best to track down the partisan affiliations of justices. *See infra* note 79. There are several challenges to this task and our data here should be viewed as illustrative rather than definitive. For instance, on the Court of Appeals, New York state's highest court, justices are appointed by the governor and confirmed by the state senate (a list of possible appointees is provided to the governor by the Commission on Judicial Nominations. *See* NY Const. Art VI § 2). The justices themselves do not have a partisan affiliation the way someone who runs for office would (such as in Pennsylvania, where justices are elected via statewide election). When the governor and the majority party of the state senate have differing affiliations, it is not always clear how to classify them.

⁷² MD (never reached the state's high court, but the plan was ruled unconstitutional by the trial court), NY, NC, OH, PA. In no state did a trial court get reversed by the higher court.

⁷³ In Pennsylvania, the legislature's preferred map was selected by the lower court judge. The state Supreme Court, however, did not take the recommendation from the lower court and instead appointed an outside expert to help them draw their own map.

First, we see that of the court opinions finding unconstitutionality in the 2020 round, five made substantial use of two or more different types of factors.⁷⁴ Second, four of the cases used factor 1 (violation of good government criteria) and factor 2 (use of statistical criteria for evaluating the extent of gerrymandering), one court (New York) used three different factors, factor 2, factor 3 (process) and factor 4 (deliberate intent to achieve partisan advantage)⁷⁵, and Maryland used three factors, factor 1, 2 and 4.

Looking at both the 2010 and 2020 round, all of the eight cases where there was a finding of unconstitutionality used either a finding of a violation based on statistical analyses (factor 2) or deliberate intent to achieve partisan advantage to make their determination (factor 4).⁷⁶ Third, we see that despite the U.S. Supreme Court's ruling in *Rucho*, which essentially delegated partisan gerrymandering claims to state courts, two cases were dismissed due to non-justiciability (KS and NC). Kansas has no provision in their state constitution prohibiting partisan gerrymandering (either direct or indirect), and North Carolina has an indirect prohibition on partisan gerrymandering claims.⁷⁷ Further, New Jersey, which concluded there was a failure to state a claim on which relief could be granted, also has no provision prohibiting partisan gerrymandering in their state constitution. Fourth, we see a surprisingly high proportion of states

⁷⁴ As noted later (*see infra* note 99), another state supreme court (Alaska) is prepared to reject legislative plans as unconstitutional gerrymanders, but having only one congressional district, that state is not included in our data set.

⁷⁵ The congressional plan in New York was overturned on both substantive and procedural grounds, with the procedural violation relating to the failing of the redistricting commission to submit a second set of maps. *Id.*, at 521. (“[B]ased on the foregoing, the enactment of the congressional and senate maps by the legislature was procedurally unconstitutional, and the congressional map is also substantively unconstitutional as drawn with impermissible partisan purpose, leaving the state without constitutional district lines for use in the 2022 primary and general elections.”). The court relied on evidence from computer simulations to find that the legislature enacted a map that discouraged competition and favored Democrats. *In re Harkenrider*, 38 N.Y.3d at 519-20. In its opinion, it referred to this as partisan gerrymandering. *Id.* The state high court also determined that the legislature had no ability to create their own map, since the redistricting commission failed to first meet its constitutional requirements. *Id.*, at 522.

⁷⁶ These two criteria are overlapping in some ways, since evidence of “deliberate intent to achieve partisan advantage” might come from “statistical criteria”, such as an ensemble analysis comparing the enacted plan to thousands of computer-drawn alternatives and comparing the map as a statistical outlier.

⁷⁷ After there was a change in the partisan composition of the North Carolina Supreme Court in 2023, the new Republican majority reversed the previous Democratic majority and held that partisan gerrymandering was in fact, nonjusticiable under North Carolina state law. Montellaro, Zach. “North Carolina Supreme Court clears way for partisan gerrymandering.” *Politico*, 28 April, 2023; *see also Harper*, 868 S.E.2d at 499 (withdrawn by *Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023)).

in our sample where the majority party in the legislature is different from the majority party in the state's Supreme Court (Pennsylvania (twice), Kansas, and North Carolina (twice)). Additionally, in half of the cases we see states with a majority party in the legislature that is different from the majority party that rendered the final decision in the case in the state court. Finally, and perhaps most importantly, while there remains no clear consensus in the legal literature on how to define/operationalize a partisan gerrymander, two state courts in the 2010 round and four state courts in the 2020 round were able to develop judicially manageable standards sufficient to identify and determine a partisan gerrymander. These standards all seem to converge around a common idea that partisan gerrymandering occurs when there is an improper advantage based on political party affiliation. The academic literature on partisan gerrymandering generally emphasizes the use of various statistical metrics, and a majority of the above cases followed suit, but traditional good government criteria continue to be an important factor in most cases.

C. Is there (indirect) evidence that the decisions of individual state supreme court justices on partisan gerrymandering challenges to a congressional map reflect their partisan leanings?

We begin with the presupposition that legal decision-makers make decisions based on what facts are in front of them. Further, the legal provisions they use to inform their decisions are neutral applications of the law. Regardless of the stated reasons for individual justice's ultimate decisions about plan unconstitutionality, there is always the suspicion that underlying those stated reasons are hidden partisan motivations. But we also believe that the breakdown of votes on the state courts in terms of actual or inferred partisan affiliations of state court justices can be used to create indirect evidence about the claim that partisan considerations affected the judicial outcomes in redistricting cases before state courts.⁷⁸ We first focus on comparing the votes by justices and their relationship to the party that drew the map.⁷⁹

⁷⁸ For example, the North Carolina Supreme Court reversed its own understanding of its constitution as the membership of the court changed. While the court's membership changed, the facts and the law were unchanged. For more information, *see infra* page 28.

⁷⁹ There are multiple ways that states have chosen to select supreme court justices: gubernatorial election, where the governor directly appoints justices (New Jersey); partisan elections, where justices indicate their party affiliation on a ballot and are elected by the people (Pennsylvania, North Carolina, Ohio); nonpartisan elections where judges are listed on a ballot with no party affiliation and elected by the people (Maryland Cir. Ct., Kentucky Cir. Ct., Florida Cir. Ct.); and assisted

Hypothesis 3a: Democratic (Republican) appointed justices would be more likely to vote down a plan proposed by the opposing party, or a plan that seems to favor the opposing party.

Hypothesis 3b: Regardless of which party drew the map, Republican aligned justices would be less likely to find plans to be partisan gerrymanders than Democratic aligned justices.

Hypothesis 3a is straightforward, in that one expectation is that justices are not entirely independent of politics, and therefore rule on cases in ways that match their partisan tendencies.⁸⁰

Table 4 allows us to examine these hypotheses. This table examines the number of Republican or Democratic affiliated justices that voted in favor of the decision, displayed as a percentage of the total number of justices from the majority or minority party. For example, in Florida, the congressional map was drawn by a Republican legislature after 2010. There were six Republican justices who voted in *League of Women Voters of Fla.* Four of those six justices voted that the plan was unconstitutional and two that rejected the claim of partisan gerrymandering, leading to 66.6% majority party agreement with the decision.⁸¹

appointment, where a commission either appointed by the governor or the state bar association compiles a list of judges for nomination that the governor then votes on (Florida, New York, Kansas). See “Judicial Election Methods by State.” *Ballotpedia*. Justice party affiliation for gubernatorial election states (NJ) were determined based on the party affiliation of the governor who appointed them. For partisan election states (PA, NC, OH), justice party affiliation was determined by the party each justice chose to affiliate with for that election. For assisted appointment states (FL, NY, KS), the justice affiliation was determined by the party affiliation of the governor who appointed the justice, except for J. Lewis (FL), J. Quince (FL) and J. Garcia (NY). These three justices were appointed by Democratic governors but received conservative scores on a 2012 survey by Stanford University, titled “State Supreme Court Ideology and ‘New Style’ Judicial Campaigns (Oct. 31, 2012) (both FL justices) and a 2020 study by Ballotpedia titled “Ballotpedia Courts: State Partisanship” (NY justice). Aside from J. Standridge (KS), J. Fuentes and Pierre-Louis (NJ), and J. Singas, J. Cannataro and J. Troutman (NY), who were not included in the surveys, the remaining justices’ party affiliation based on appointing governor matched the scores they received on the surveys. See “Judicial Election Methods by State.” *Ballotpedia*.; see also “Bonica and Woodruff campaign finance scores of state supreme court justices, 2012.” *Ballotpedia*.; see also “Ballotpedia Courts: State Partisanship.” *Ballotpedia*. For nonpartisan states (MD, KY, FL Cir. Ct.), justice party affiliation was determined based on the previous two studies listed, if available. J. Wingate (KY) and Judge J. Lee Marsh (FL Cir. Ct.) were not listed on one of these studies, and their partisan affiliation could not be determined.

⁸⁰ It would be useful to differentiate between justices that ascend via neutral institutions (such as merit) and those whose rise to the high court are more partisan in nature. However, statistical significance on these tests would be difficult due to the few cases that fit into these categories, and other complications such as when justices are appointed by the governor of one party and confirmed by a majority consisting of the other party. This is beyond the scope of this paper.

⁸¹ Justice Pariente (D) issued the 5-2 opinion, in which Chief Justice Labarga (R), and Justices Quince (R) and Perry (R), concurred; Justice Lewis (R) concurred in the result. Justice Canady (R) dissented with an opinion, in which Justice Polston (R) concurred.

<<Table 4 about here>>

Hypothesis 3a is clearly confirmed. While there are some justices (like those in Florida in 2015) who vote to find a congressional plan drawn by a legislature controlled by their own party unconstitutional, overall, it is less than half – only 33.3% of majority party justices voted against their own party. Overwhelmingly, minority party justices voted to find a plan drawn by the opposing party to be an unconstitutional partisan gerrymander – 95.6% of minority party justices agreed with a finding of unconstitutionality.⁸² In all but one case, minority party justices had 100% agreement with a finding of unconstitutionality,⁸³ with the remaining case at 80% agreement.⁸⁴ But, because all but one of the legislatively drawn maps we are examining are drawn by legislatures under Republican control, we cannot fully rule out the potential confound (Hypothesis 3b) that Republicans are simply less likely to find plans to be partisan gerrymanders, while Democrats are much more likely to do so.⁸⁵ In the one state where the plan was overturned (and reached the highest court) and the map was drawn by a Democratic legislature (New York), the Republican leaning justice voted to find the map unconstitutional.⁸⁶ In Ohio, the Republican Chief Justice Maureen O'Connor voted to overturn the Republican drawn plan (multiple times), and as noted earlier, four justices in Florida voted against their own party's congressional plan (in 2015).

Relating **Table 1** to **Table 4**, we see that the presence of an explicit provision prohibiting partisan gerrymandering affects the willingness of justices to find a plan to be an unconstitutional gerrymander, even when it negatively affects their own political party. In the three states with express

⁸² Of course, the cases in **Table 4** do not reflect a random sample of all redistricting maps, and we should not expect them to. Cases are brought where they are likely to succeed. Moreover, it only examines the links to partisanship of justices in situations where maps are drawn under one party control and where partisan gerrymandering is suspected enough to trigger a credible lawsuit.

⁸³ FL, PA (2018), NY, NC (*Harper I* and *Harper II*), OH.

⁸⁴ In Pennsylvania (2022), one Democratic justice voted to uphold the plan created by the Republican legislature.

⁸⁵ We will revisit this question in future work when we look in more detail at these court opinions to see the reasons given for their view by those justices who did not find a plan to be unconstitutional when a majority of their fellow justices did find the plan to be unconstitutional.

⁸⁶ In Maryland, although the decision did not reach the highest state court, the trial court judge was appointed by a Democratic governor. So, in both cases in which a Democrat-drawn legislature map was overturned, justices of the same party voted to overturn the plan.

prohibitions (FL, NY, OH), majority party justices agreed with a finding of unconstitutionality at a level between 25% and 66.6%, as compared to a level of 0% in the two states (PA, NC) where more indirect language had to be interpreted as banning partisan gerrymandering.

Moreover, it is Republican-affiliated justices that resist interpreting their state constitution to have broad voting rights provisions that ban partisan gerrymandering. This can even be seen in the two cases that did not reach the merits of the partisan gerrymandering claim due to non-justiciability (KS, NC). Majority party agreement was 100% for those two cases, both of which were Republican controlled legislatures. Minority party agreement was 44.4%. Nonetheless, the data show that even in situations where there is an explicit constitutional prohibition of partisan gerrymandering, there is some unwillingness on the part of justices to find a map drawn by their own party as unconstitutional. This is true both for cases where the map was drawn by Republicans (FL, OH) and Democrats (NY).

In states where there is not a direct ban on partisan gerrymandering (NC, PA), the failure of majority party justices to find a map unconstitutional might reflect partisan concerns, or might simply come as a result of an unwillingness of justices to read into the state constitutions a prohibition on partisan gerrymandering when the language is less clear, or perhaps the dissenting justices do not find the concept of partisan gerrymandering sufficiently well-defined to allow for a finding of unconstitutionality.

When looking at the dissenting opinions of the justices who vote to uphold a plan, they commonly criticize the court majority's disregard of separation of powers and critique the standard of review that was used by the majority.⁸⁷ These criticisms generally held true for all dissenting

⁸⁷ Justice Baer's dissent in *League of Women Voters of Fla.* emphasizes that the majority assumes that the Legislature operates under a "presumption of unconstitutionality" by "reweigh[ing] the evidence" and repudiating the "beyond a reasonable doubt" standard. 172 So.3d at 417, 420. As a result, the Court violates the separation of powers and impermissibly encroaches on the Legislature's power to draw congressional districts. *Id.* at 424; *see also Rivera*, 512 P.2d at 196 (majority incorrectly tied state constitutional provision to the 14th amendment and as a result went "beyond ... [their] authority ... [by essentially implementing a] judicial constitutional amendment.") (J. Rosen dissenting); *see also Matter of Harkenrider*, 38 N.Y. 3d at 528 (the evidence does not rise to "the level of certainty required to invalidate the 2022 redistricting as unconstitutional" – i.e. "beyond a reasonable doubt.") (J. Wilson dissenting); *see also Harper I*, 868 S.E.2d at 563 (majority overstepped into the role of "policymaker[]" and essentially amended the Constitution in the name of "judicial activism.") (J. Newby dissenting); *see also League of Women Voters of Pa.*, 178 A.3d at 826 (imposing "court-designated districting criteria on the Legislature" violates separation of

justices that disagreed with a finding of unconstitutionality regardless of their partisan affiliation, and regardless of whether there was an express or implied state constitutional provision. This could perhaps imply that the reluctance of justices to find a map unconstitutional may lie in the justice's interpretation of *foundational legal principles and statutory construction*, rather than *partisan intent*.

III. POST-SCRIPT, AFTER THE 2022 MIDTERM ELECTION

When we turn to what has happened after the November 2022 elections, the most important development relevant to this section of our essay comes out of North Carolina. The November election included a state Supreme Court contest that resulted in a change in the partisan majority on the North Carolina Supreme Court from Democratic to Republican.⁸⁸ A large amount of money was spent on this judicial election, with the view in mind that both redistricting decisions and abortion-related decisions were going to come before the North Carolina Supreme Court.⁸⁹ The court promptly reversed its earlier decision finding the Republican-drawn congressional map in the state to be unconstitutional and found that partisan gerrymandering claims are not justiciable under the North Carolina Constitution.⁹⁰ Thus, the North Carolina legislature will be unchecked in its ability to draw a partisan gerrymander.⁹¹

Another important development comes from New York. After the New York Court of Appeals ruled the New York congressional map unconstitutional and implemented a map of its own for 2022, we see a similar pattern but with the partisanship reversed – a map enacted by the Democratic-controlled legislature being held unconstitutional. Although the majority of justices in New York had been appointed by a Democratic

powers) (J. Baer dissenting); *see also Adams*, 167 Ohio St. 3d at 529 (majority oversteps into policy arena by saying it disagrees with the choice of counties that were split, rather than the map “unduly divide[d] counties.”) (J. Kennedy, J. Fischer, J. DeWine dissenting).

⁸⁸ Montellaro, Zach. “North Carolina Supreme Court clears way for partisan gerrymandering.” *Politico*, 28 April, 2023.

⁸⁹ Campaign finance reports indicated that the candidates and political action committees spent at least \$15 million for this election, with “two super PACs alone hav[ing] spen[t] over \$8 million.” Associated Press. “Candidates, PACs spend \$15M in North Carolina Supreme Court races.” *WUNC 91.5*, 7 Nov. 2022.

⁹⁰ *Harper*, 886 S.E.2d at 393 (granting petition for rehearing).

⁹¹ Gary D. Robertson, *North Carolina gerrymander ruling gives electoral gift to GOP in Congress*, Associated Press, May 24, 2023.

governor, some were seen as conservative.⁹² When there was a post-election vacancy on the New York Court of Appeals, the Democrat-controlled New York legislature was unwilling to accept a replacement that in their view was not sufficiently committed to overturning the 2022 court-drawn map.⁹³ Also, a Democrat-affiliated justice who voted against finding the legislatively-drawn map unconstitutional was appointed the new Chief Justice of the court.⁹⁴ Given the shifting makeup of the court since its original decision in 2022, there is an expectation that the Democrats may get a second opportunity to redraw the map in their favor.⁹⁵ This expectation is strengthened given the new round of ongoing litigation that is challenging whether the 2022 redistricting map approved by the court should remain in effect until the next census.⁹⁶

⁹² Sam Mellins, *A New Conservative Majority on New York's Top Court is Upending State Law*, New York Focus, July 7, 2022.

⁹³ Luis Ferré-Sadurní, *State Senate Rejects Nominee for Chief Judge in Defeat for Hochul*, New York Times, Feb. 16, 2023, at A22.

⁹⁴ See *In re Harkenrider*, 494 N.Y.3d at 527 (J. Wilson dissenting); Luis Ferré-Sadurní, *Rowan Wilson Is Confirmed as New York's Chief Judge*, The New York Times, April 18, 2023, at A12.

⁹⁵ Nicholas Fandos, *Could Democrats Get Another Shot at Redistricting in New York?* The New York Times, June 8, 2023, at A14.

⁹⁶ Petitioners filed a motion compelling the NY State IRC to prepare a second redistricting plan for use after the 2022 election. *Hoffman v. New York State Ind. Redistricting Comm'n*, 2022 N.Y. Misc. LEXIS 10439 at *1-2 (Sup. Ct. Sept 12, 2022). The Albany County Supreme Court granted respondent's motion to dismiss the petition, finding that the court-ordered map satisfied the constitutional mandate to create a map every ten years, and having the IRC submit a new one would "run[] afoul of that intent." *Id.*, at *15-16. On appeal to the Appellate Division, Third Department, the Court reversed the lower court's decision and ordered the IRC to create a second plan. *Matter of Hoffman v. New York State Ind. Redistricting Comm'n*, 2023 NY Slip Op 03828 at *5 (N.Y. App. Div. 3D, July 13, 2023). The Court reasoned that it was unlikely the Court of Appeals' silence in *Matter of Harkenrider* implied "further ramifications than strictly required," meaning the map should have only been used for the 2022 election. *Id.*, at *4. Further, the IRC has a constitutional duty to provide a second map after the first one is rejected. *Id.* The Court of Appeals will have an opportunity to hear once again questions regarding these redistricting maps.

Figure 1. Control Over Redistricting in 2022

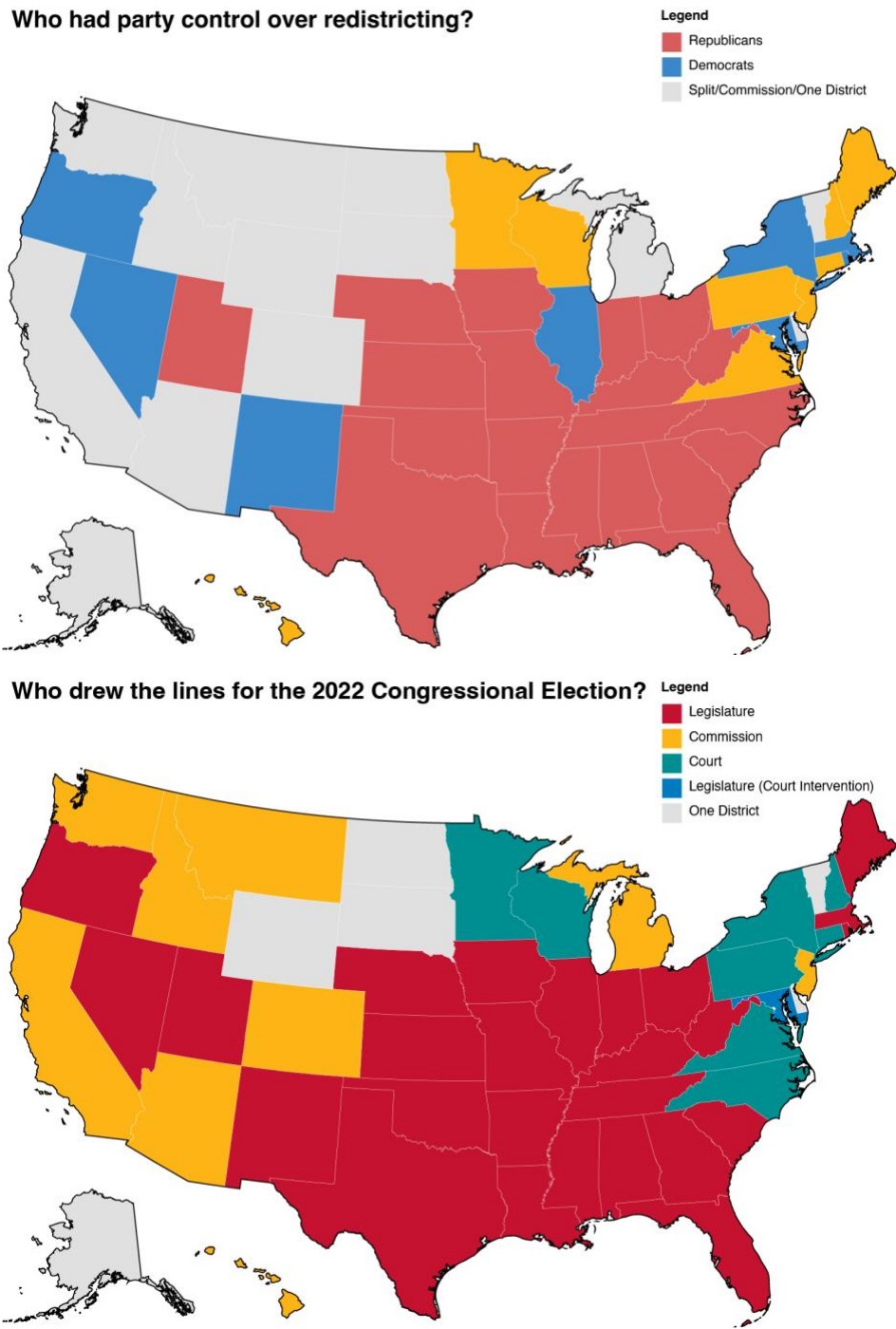


Table 1. Potential Partisan Gerrymanders and State Law

State	Seats	Primary Authority for Drawing the Lines ⁹⁷	Party Control	Partisan or Racial Challenge ⁹⁸	Who Drew the 2022 Map	Free and Equal/Open	Direct Partisan Neutrality requirement
AL	7	Leg	GOP	R	Leg		
AK ⁹⁹	1	-	-	-	-		
AZ	9	Comm.	SPLIT		Comm.	x	x
AR	4	Leg	GOP	R	Leg	x	
CA	52	Comm.	SPLIT		Comm.	x	x
CO	8	Comm.	SPLIT		Comm.	x	x
CT	5	Leg(C)	SPLIT	F	Court	x	
DE	1	-	-	-	-	x	
FL	28	Leg	GOP	P, R	Leg		x
GA	14	Leg	GOP	R	Leg		
HI	2	Comm.	SPLIT		Comm.		x
ID	2	Comm.	SPLIT		Comm.	x	x
IL	17	Leg	DEM		Leg	x	
IN	9	Leg(C)	GOP		Leg	x	
IA	4	Leg	GOP		Leg		x
KS	4	Leg	GOP	U	Leg		
KY	6	Leg	GOP	P	Leg	x	
LA	6	Leg	GOP	R	Leg		
ME	2	Leg	SPLIT		Leg		
MD	8	Leg	DEM	S	Leg (Court) ¹⁰⁰	x	

⁹⁷ L=Legislature, C=Commission, C(L)=Commission with Legislative Backup, - =One district, L(C)=Legislature with Commission Backup. In some states (Connecticut, Indiana, and Ohio), commissions may also be used as backup if there is no political agreement on a congressional plan.

⁹⁸ R = race-based challenge, S= successful partisan gerrymander challenge, U = unsuccessful partisan gerrymandering challenge, P=pending partisan gerrymandering challenge as of November 2022, F = litigation based on failure to draw a map in a timely fashion, N = no relevant litigation or state court action.

⁹⁹ In a state court challenge to the state legislative redistricting maps that was decided after the pre-November 2022 election cutoff we have been using, the Alaska Supreme Court expressly recognized that partisan gerrymandering is unconstitutional under the Alaska Constitution's equal protection doctrine. See *In the Matter of the 2021 Redistricting Cases*, Nos. S-18332 & S-18419 at *110 (Alaska Sup. Ct. Apr. 21, 2023); see also Sean Maguire, *Alaska Supreme Court, in landmark ruling, says partisan gerrymandering violates state constitution*, Anchorage Daily News (Apr. 22, 2023), <https://www.adn.com/politics/2023/04/21/alaska-supreme-court-in-landmark-decision-rules-that-partisan-gerrymandering-is-unconstitutional>. However, in 2023, the new Republican majority on the North Carolina Supreme Court reversed the opinion issued by the previous Democratic majority on the court that partisan gerrymandering was justiciable under the North Carolina constitution. Thus, even absent the constitutional provision limiting the use of a court-drawn map, North Carolina would be drawing a new congressional map for 2024 use.

¹⁰⁰ Maryland's plan was initially struck down by the state court, and under its supervision, the Legislature passed a replacement. On April 1, 2022, the Maryland Court of Appeals assumed jurisdiction over the appeal from the Court of Special Appeals, and on April 4, 2022, both parties voluntarily dismissed the appeal after the Governor agreed to sign the new congressional redistricting plan into law.

MA	9	Leg	DEM		Leg	x	
MI	13	Comm.	SPLIT		Comm.		x
MN	8	Leg	SPLIT	F	Court		
MS	4	Leg	GOP		Leg		
MO	8	Leg	GOP		Leg	x	
MT	2	Comm.	SPLIT		Comm.	x	x
NE	3	Leg	GOP		Leg	x	x
NV	4	Leg	DEM		Leg		
NH	2	Leg	SPLIT ¹⁰¹	F	Court	x	
NJ	12	Comm.	SPLIT	U	Comm.		
NM	3	Leg	DEM	P	Leg	x	
NY	26	Comm. (Leg)	DEM ¹⁰²	S, P	Court		x
NC	14	Leg	GOP	S, P	Court ¹⁰³	x	
ND	1	-	-	-	-		
OH	15	Leg (Comm.) ¹⁰⁴	GOP	S	Leg ¹⁰⁵		x
OK	5	Leg	GOP		Leg	x	
OR	6	Leg	DEM	U	Leg	x	x
PA	17	Leg	SPLIT	F	Court	x	
RI	2	Leg	DEM		Leg		
SC	7	Leg	GOP	R	Leg	x	
SD	1	-	-		-		x
TN	9	Leg	GOP	R	Leg	x	

¹⁰¹ While party control in NH is listed as SPLIT because the governor, who is also a Republican, vetoed the legislature's plan. A court ultimately drew the map.

¹⁰² New York is considered one-party control because the commission's maps need to be approved by the legislature, which had supermajorities in both chambers controlled by Democrats. Litigation pending as of the time of this writing as to whether the court-drawn map could be used for more than the 2022 election.

¹⁰³ Map to be used in 2022 only. We included "P" to indicate that litigation is ongoing. See previous footnote explaining reversal of previous North Carolina Supreme Court decision about justiciability of partisan gerrymandering by the new court. *Supra* note 78.

¹⁰⁴ Under the OHIO CONST. ART. XIX, § 1, the Ohio legislature first can draw congressional lines by a three-fifth's supermajority, including votes of half of each major party in each chamber. If that fails, the process goes to a seven-member backup commission, comprised of the Governor, State Auditor, Secretary of State, and one commissioner chosen by each of the two party's legislative leaders in each chamber. The plan must pass with votes from at least two members affiliated with each major party. If the commission fails to pass a plan, the state legislature may then pass a congressional plan via a simple majority subject to gubernatorial veto. Maps that are passed by a supermajority of the legislature or by bipartisan approval of the commission are valid for ten years, whereas maps passed by legislation are valid for only two general elections. In the 2020 redistricting cycle, the Ohio Redistricting Commission failed to agree, and the state legislature ran out the clock by repeatedly proposing a map either very similar to or identical to a map that the state court had previously rejected as an unconstitutional partisan gerrymander; every one of its maps, including its last proposed map were held to be unconstitutional. But Ohio's recent redistricting amendment forbids state courts from imposing impose their own maps even if the legislature or Commission repeatedly fails to offer a constitutional map. To provide a congressional plan for the 2022 election a federal court mandated use of the last map offered to the Ohio State Court by the legislature. The federal court held that there was insufficient time to create a new map and have it reviewed by the state court.

¹⁰⁵ Map to be used in 2022 only.

PARTISAN GERRYMANDERING CASES

TX	38	Leg	GOP	R	Leg	x	
UT	4	Leg	GOP	P¹⁰⁶	Leg	x	x
VT	1	-	-	-	-	x	
VA	11	Comm.	SPLIT	F	Court	x	
WA	10	Comm.	SPLIT		Comm.¹⁰⁷	x	x
WV	2	Leg	GOP		Leg		
WI	8	Leg	SPLIT	F	Court¹⁰⁸		
WY	1	-	-	-	-	x	

Note: States where there is full partisan control of the redistricting process are identified in bold. Party control and identification of redistricting authority from National Conference of State Legislatures, Redistricting and Elections, Redistricting and Elections Standing Committee, <https://www.ncsl.org/ncsl-in-dc/standing-committees/redistricting-and-elections.aspx> (last visited Dec 28, 2022); Justin Levitt, All About Redistricting, <https://redistricting.ils.edu> (last visited Dec 23, 2022). Data on long-standing constitutional language on Free and Equal/Open from Joshua A Douglas, The Right to Vote Under State Constitutions, 67 VANDERBILT LAW REV. 61 (2014); see also Free and Equal Election Clauses in State Constitutions, Nat'l Conf. State Leg. (Nov. 4, 2019), <https://www.ncsl.org/redistricting-and-census/free-and-equal-election-clauses-in-state-constitutions>. Information on Direct language in current constitutions regarding gerrymandering from National Conference of State Legislatures. See Redistricting Criteria, Nat'l Conf. State Leg. (July 16, 20212), <https://www.ncsl.org/redistricting-and-census/redistricting-criteria>. By comparing who drew the map used in November 2022 with who had initial primary authority to draw the map, the involvement of state courts can be inferred. However, it is important to note that a number of state courts have maps constitutionally limited to use in the 2022 election only (North Carolina and Ohio); and others where state courts have postponed a decision on the merits until 2023 (Florida, New Mexico, Utah, and Kentucky); and other states where the U.S. Supreme Court has intervened to block final decisions by lower courts on redistricting challenges related to race (e.g., Alabama, Georgia); and in New York as of the time of this writing there was still ongoing litigation as to whether the state court ordered congressional plan could be used beyond 2022.

¹⁰⁶ In *LWVU*, the plaintiffs filed a complaint alleging that the Utah Legislature's 2021 Congressional Plan "violates multiple provisions of the Utah Constitution, including the Free Elections Clause, the Uniform Operation of Laws Clause, protections of free speech and association, and the right to vote" and that "the Legislature's repeal of Proposition 4 [a bipartisan citizen initiative that prohibited partisan gerrymandering] violated the people's constitutionally guaranteed lawmaking power and right to alter and reform their government." *LWVU*, No. 220901712, Compl. Page 2 (Mar. 16, 2022). After the District Court denied the defendants' motion to stay and motion to dismiss, the defendants appealed the case to the Utah Supreme Court. *LWVU*, No. 220901712 (Oct. 24, 2022). In July 2023, the Utah Supreme Court agreed to hear the plaintiffs' partisan gerrymandering claims. The entry in **Table 1** above reflects the situation in November 2022.

¹⁰⁷ The Commission missed the deadline for submission of its plan by only a few minutes and the state court held that the commission was in substantial compliance with state requirement. But the plan still had to be referred to the legislature, which adopted it with only minor changes.

¹⁰⁸ In *Wisconsin*, while the Court in *Johnson v. Wisconsin Elections Comm'n*, 972 N.W.2d 559 (Wis. 2022), chose a congressional plan, it was based on the previous decade's plan, which was widely considered to be a gerrymander. Thus, the claim has been made that the litigation simply ended up with a court-drawn gerrymander.

Table 2. Who challenges in state courts? The plaintiffs identified in partisan gerrymandering lawsuits

Redistricting Cases in State Court	Plaintiffs
Florida	
<i>League of Women Voters of Fla. V. Detzner</i> , 172 So. 3d 363 (Fla. 2015)	League Plaintiffs: The League of Women Voters of Florida, Common Cause, Citizens registered to vote in Florida Romo Plaintiffs: Citizens registered to vote in Florida
<i>Black Voters Matter Capacity Building Inst., Inc. v. Lee</i> , No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022) (outcome pending)	Black Voters Matter Capacity Building Institute, Inc. Equal Ground Education Fund, Inc. League of Women Voters of Florida, Inc. League of Women Voters of Florida Education Fund, Inc. Florida Rising Together Citizens registered to vote in Florida.
Kansas	
<i>Rivera v. Schwab</i> , 512 P.3d 168 (Kan. 2022) (consolidated with <i>Alonzo v. Schwab</i> , No. 2022-CV-90 (Kan. Dist. Ct. Feb. 14, 2022); and <i>Frick v. Schwab</i> , No. 2022-CV-71 (Kan. Dist. Ct. Mar. 1, 2022))	Rivera Plaintiffs: Citizens registered to vote in Kansas Alonzo Plaintiffs: Citizens registered to vote in Kansas Frick Plaintiffs: Citizens registered to vote in Kansas
Kentucky	
<i>Graham v. Adams</i> , No. 22-CI-00047 (Ky. Cir. Ct. Nov. 10, 2022)	Kentucky democratic party, Citizens registered to vote in Kentucky
Maryland	
<i>Lamone v. Benisek</i> , 139 S. Ct. 2484 (2019) (consolidated with <i>Rucho v. Common Cause</i>)	Citizens registered to vote in Maryland
<i>Szeliga v. Lamone</i> , Nos. C-02-CV-21-001816, C-02-CV-21-001773, (Md. Cir. Ct. Mar. 25, 2022)	Szeliga Plaintiffs: Citizens registered to vote in Maryland. Parrott Plaintiffs: Citizens registered to vote in Maryland.
New Mexico	
<i>Republican Party of New Mexico v. Oliver</i> , No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022) (outcome pending)	Republican Party of New Mexico Citizens registered to vote in New Mexico.
New Jersey	
<i>Matter of Congressional Districts by New Jersey Redistricting Comm'n</i> , 268 A.3d 299 (N.J. 2022)	New Jersey redistricting commission members
New York	
<i>Matter of Harkenrider v. Hochul</i> , No. 60, 2022 N.Y. LEXIS 874, at *1 (N.Y. Apr. 27, 2022)	Citizens registered to vote in New York.
North Carolina	
<i>Harper v. Lewis</i> , No. 19-CVS-012667 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019)	Harper Plaintiffs: Citizens registered to vote in North Carolina NCLCV Plaintiffs: North Carolina League of Conservation Voters, Inc., Citizens registered to vote in North Carolina

PARTISAN GERRYMANDERING CASES

<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019)	Common Cause, North Carolina Democratic Party, Citizens registered to vote in North Carolina
<i>Harper v. Hall</i> , 868 S.E.2d 499 (N.C. 2022)	Harper Plaintiffs: Citizens registered to vote in North Carolina NCLCV Plaintiffs: North Carolina League of Conservation Voters, Inc., Citizens registered to vote in North Carolina
Ohio	
<i>Adams v. DeWine</i> , No. 2021–1428 (Ohio Dec. 2, 2021)	Citizens registered to vote in Ohio.
Oregon	
<i>Clarno v. Fagan</i> , No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021).	Citizens registered to vote in Oregon.
Pennsylvania	
<i>League of Women Voters of Pa. v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	League of Woman Voters of Pennsylvania Citizens registered to vote in Pennsylvania
<i>Corman v. Acting Secretary Commonwealth of Pennsylvania</i> , No. 18-1816 (3rd Cir. 2018) (per curiam)	Legislators/citizens registered to vote in Pennsylvania
<i>Carter v. Chapman</i> , 270 A.3d 444 (Pa. 2022) (per curiam).	Carter Petitioners: Citizens registered to vote in PA Gressman Petitioners: Citizens registered to vote in PA and “leading professors of mathematics and science[.]”
Utah	
<i>League of Women Voters of Utah v. Utah State Legislature</i> , No. 220901712 (Utah D. Ct. Mar. 17, 2022) (outcome pending)	League of Women Voters of Utah Mormon Women for Ethical Government Citizens registered to vote in Utah
Wisconsin	
<i>Baldus v. Members of Wisconsin Government Accountability Bd.</i> , 849 F. Supp. 2d 840 (E.D. Wis. 2012)	Voces de la Frontera, Inc. Citizens registered to vote in Wisconsin

Table 3. How State Courts Defined and Operationalized Partisan Gerrymandering*Category 1 – violation of good government criteria**Category 2 – statistical criteria**Category 3 – process grounds**Category 4 – deliberate intent to achieve partisan advantage*

Case	Who drew the plan	C1	C2	C3	C4	Outcome	Definition – partisan gerrymander
2010 REDISTRICTING ROUND							
FLORIDA							
<i>League of Women Voters of Fla. v. Detzner</i> , 172 So.3d 363 (Fla. 2015)	(R) Legislature	Y	-	-	Y	5-2 unconstitutional 1 (D) 4 (R) - 2 (R)	Was the plan or district drawn with an improper partisan intent in mind? ¹⁰⁹
PENNSYLVANIA							
<i>League of Women Voters of Pa v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	(R) Legislature	-	Y	-	Y	5-2 unconstitutional 5 (D) - 2 (R)	Partisan gerrymandering occurs when traditional neutral criteria are subordinated in favor of partisan advantage. ¹¹⁰
NORTH CAROLINA							
<i>Harper v. Lewis</i> , No. 19-CVS-012667 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019)	(R) Legislature	Y	Y	-	Y	Granted preliminary injunction ¹¹¹ 2 (D) 1 (R)	"Redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens

¹⁰⁹ *League of Women Voters of Fla.*, 172 So.3d at 375. This doesn't necessarily mean it was drawn with a "malevolent or evil purpose." *Id.* at 379. If unconstitutional intent is found, the burden shifts to the Legislature to justify the plan. *Id.* at 400.

¹¹⁰ *League of Women Voters of Pa.*, 178 A.3d at 817.

¹¹¹ E.g., Plaintiffs are likely to succeed on the merits of a constitutional partisan gerrymandering claim, and the maps were prevented from being used in the 2020 elections. *Harper*, 2019 N.C. Super. LEXIS 122 at *14.

PARTISAN GERRYMANDERING CASES

							compared to others." ¹¹²
2020 REDISTRICTING ROUND							
KANSAS							
<i>Rivera v. Schwab</i> , 512 P.3d 168 (Kan. 2022)	(R) Legislature	Y	-	-	-	4-3 non-justiciable 2 (R) 2 (D) - 3 (D)	When partisan factors are used "too much." ¹¹³
NEW JERSEY							
<i>Matter of Congressional Districts by New Jersey Redistricting Comm'n</i> , 268 A.3d 299 (N.J. 2022)	Redist. Comm. including partisan members	Y	Y	-	-	5-0 failure to state a claim ¹¹⁴ 3 (D) ¹¹⁵ 2 (R)	n/a ¹¹⁶
NEW YORK							
<i>Matter of Harkenrider v. Hochul</i> , 38 N.Y.3d	(D) Legislature ¹¹⁷ with	-	Y	Y	Y	4-3 unconstitutional	"Congressional districts were drawn with a particular impermissible intent

¹¹² *Id.*, at *7.

¹¹³ *Rivera*, 512 P.2d at 184. While the definition of partisan gerrymandering is similar to the definition used in other states, it is worth noting that Kansas tries to quantify how much is too much. "[A]t the heart of a claim of partisan gerrymandering is not merely that partisan factors were used, but rather that they were used 'too much.'" *Id.* (adopting the reasoning in *Rucho* that "whether there can ever be 'too much' of a legitimate legislative purpose in the process of state law-making...presents no 'clear, manageable and politically neutral' judicial standard.").

¹¹⁴ The Plaintiffs did not challenge the map because it invidiously discriminated or was unlawful, as required by the New Jersey state Constitution. *Matter of Congressional Districts by New Jersey Redistricting Comm'n*, 268 A.3d at 307. Instead, they challenged the reasons given by the individual who cast the tiebreaking vote for choosing one map over the other, which was based in large part on an evaluation of partisan fairness. *Id.* Ultimately, for reasons not important in this context, the Court held that even if all factual allegations were true, they were insufficient to establish a cause of action. *Id.*, at 310.

¹¹⁵ Judge Jose L. Fuentes was temporarily assigned to the Supreme Court by Justice Rabner to hear this decision. Justice Fuentes was originally appointed to the New Jersey Superior Court by a democratic governor and is represented with a democratic party affiliation.

¹¹⁶ The usual type of partisan gerrymandering claim was not actually before the state court. *Supra* note 114. The Commission indicated that it made use of the requirement that "no district may be formed solely to favor or disfavor any political party or the election of any person." *Matter of Congressional Districts by New Jersey Redistricting Comm'n*, 268 A.3d at 305.

¹¹⁷ The Legislature is free to offer amendments to maps created by the Independent Redistricting Committee (IRC) only after rejection of a second set of IRC maps. *In re Harkenrider*, 38 N.Y.3d at 503-04.

494 (N.Y. 2022)	Independent Redist. Comm.					3 (D) 1 (R) - 3 (D)	or motive ... to ‘discourage competition’ or to ‘favor[] or disfavor[] incumbents or other particular candidates or political parties.’ ¹¹⁸
NORTH CAROLINA							
<i>Harper v. Hall</i> , 868 S.E.2d 499 (N.C. 2022) (a/k/a <i>Harper I</i>)	(R) Legislature Joint Redist. Committee	Y	Y	-	-	4-3 unconstitutional 4 (D) - 3 (R)	“When a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size – the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power.” ¹¹⁹
OHIO							
<i>Adams v. DeWine</i> , 167 Ohio St. 3d 499 (Ohio 2022)	(R) Legislature	Y	Y	-	-	4-3 unconstitutional 3 (D) 1 (R) - 3 (R)	“A plan with a partisan advantage that ‘is unwarranted by valid considerations, namely, the redistricting criteria set forth in Article XIX.’” ¹²⁰
PENNSYLVANIA							
<i>Carter v. Chapman</i> , 270 A.3d	PA Judiciary	Y	Y	-	-	4-3 unconstitutional ¹²¹	Where maps meet traditional criteria but still dilute a particular group’s

¹¹⁸ *Matter of Harkenrider*, 38 N.Y.3d at 519 (quoting N.Y. CONST. ART. III, § 4, cl. 5).

¹¹⁹ *Harper I*, 868 S.E.2d at 546-47.

¹²⁰ *Adams*, 167 Ohio St. 3d at 509 (quoting OHIO CONST. ART. XIX). Criteria include ensuring contiguous territory with a single nonintersecting boundary line, various guidelines of splitting municipalities, providing no districts share portions of more than one county unless the population exceeds 400,000, and maintaining compact districts. *Id.* at 510. If the proposed plan favors a political party to a degree that is in excess of the neutral constitutional criteria, then the plan is considered a political gerrymander and unconstitutional. *Id.*

¹²¹ The Court determined that the Special Masters’ process for choosing a plan was unconstitutional, leaving it up to the Court to select a plan that comported with traditional criteria and did not exhibit partisan unfairness. *Carter v. Chapman*, 270 A.3d 444, 459, 471 (Pa. 2022).

PARTISAN GERRYMANDERING CASES

444 (Pa. 2022)						4 (D) - 1 (D) 2 (R)	vote, partisan fairness metrics can be used for objective evaluation of proposed plans to determine whether they are fair. ¹²²
MARYLAND							
<i>Szeliga v. Lamone</i> , No. C-02-CV-21-001816 (Md. Cir. Ct. March 25, 2022) ¹²³	(D) Legislature	Y	Y	-	Y	1 unconstitutional 1 (D)	A plan drawn with “partisanship as a predominant intent, to the exclusion of traditional redistricting criteria” found in “Article III, Section 4 of the Maryland Constitution.” ¹²⁴
2020 REDISTRICTING ROUND (Post-November 2022)							
KENTUCKY							
<i>Graham v. Adams</i> , No. 22-CI-00047 (Ky. Cir. Ct. Nov. 10, 2022)	(R) Legislature	Y	Y	-	Y	1 constitutional ¹²⁵ 1 (X) ¹²⁶	n/a ¹²⁷
ARKANSAS							

¹²² *Id.*, at 470.

¹²³ This case was consolidated with *Parrot*, No. C-02-CV-21-001773. Another related case petitioned the Maryland Court of Appeals to take original jurisdiction over the action and consolidate it with *Szeliga* and *Parrot*, however the Court denied the petition. *Alban v. Lamone*, Misc. No. 30 (Md. Feb. 25, 2022)

¹²⁴ *Szeliga*, 2022 Md. Cir. Ct. LEXIS at *11, *124.

¹²⁵ Despite the Court finding that the proposed maps were partisan gerrymanders, the Court ultimately held they were constitutional. “[T]he Kentucky Supreme Court has recognized that apportionment is a political process...[a]nd does not explicitly forbid the consideration of partisan interests in apportioning representation.” *Graham*, No. 22-CI-00047 at page 62. There is currently an appeal pending to the Kentucky Supreme Court. *Graham v. Adams*, Nos. 2022-SC-0522, 2023-SC-0139 (Ky. 2023).

¹²⁶ Partisan affiliation for Hon. Thomas D. Wingate was unable to be determined. He was elected in a nonpartisan election and is not included in either of the 2 studies mentioned. See *supra* note 79.

¹²⁷ The Court does not expressly define partisan gerrymandering, but determines that the proposed maps are partisan gerrymanders based on expert testimony using various computer algorithms and evaluating traditional criteria such as “cracking” and “packing” to determine whether the proposed map “unusually favors one party over another.” *Graham*, No. 22-CI-00047 at page 5, 12.

<i>Suttlar v. Thurston</i> , No. 60CV-22-1849 (Ark. Cir. Ct. May 11, 2023)	(R) Legislature	-	-	-	-	Dismissed ¹²⁸	n/a
FLORIDA							
<i>Black Voters Matter v. Byrd</i> , No. 2022-CA-000666 (Fla. Cir. Ct. Sept. 2, 2023)	(R) Legislature	-	-	-	-	1 unconstitutional ¹²⁹ 1 (X) ¹³⁰ Currently pending on appeal in Florida's First District Court of Appeal ¹³¹	n/a
UTAH							
<i>League of Women Voters of Utah v. Utah State Legislature</i> ,	(R) Legislature	-	-	-	-	Ongoing ¹³²	-

¹²⁸ The Court held that it lacked subject-matter jurisdiction over Plaintiff's claim, as it should have been brought in Arkansas Supreme Court - the Court did not reach the merits of the case. *Suttlar v. Thurston*, No. 60CV-22-1849, page 4 (Ark. Cir. Ct. May 11, 2023).

¹²⁹ After *League of Women Voters of Fla.*, the Supreme Court determined that "partisan intent tainted the entire redistricting process" and ordered and approved a new map that "would preserve a historically performing Black district." *Black Voters Matter v. Byrd*, No. 2022-CA-000666, page 5 (Fla. Cir. Ct. Sept. 2, 2023). During the 2020 redistricting round, the Governor vetoed both newly proposed plans for that particular district, one of which maintained the previous configuration, and created a new plan, subsequently passed by the Legislature. *Id.*, at page 6-8. The Plaintiff's then sued claiming that the new map violated the Florida constitution since it was "drawn with improper discriminatory and partisan intent" and also by diminishing "Black voters' ability to elect their candidate of choice." *Id.*, at page 9. The parties agreed to limit the case to only the diminishment claim and allowed the Court to decide as a matter of law by stipulating to various facts. *Id.*, at page 9-10. The Court ultimately held the new map unconstitutional because it "weaken[ed]...[and] actually eliminate[d]...Black voters' ability to elect the candidate of their choice." *Id.*, at page 18.

¹³⁰ Florida's local courts use the nonpartisan election method to elect judges, so partisan affiliation for Judge J. Lee Marsh could not be determined. See *supra* note 79.

¹³¹ Case Number 1D22-3834.

¹³² The Third District Court of Utah denied Defendant's motion to dismiss the partisan gerrymandering claims. *League of Women Voters of Utah*, No. 220901712. Defendants then appealed to the Utah Supreme Court where the case is currently pending. *League of Women Voters of Utah v. Utah State Legislature*, No. 20220998-SC (Utah 2023) (consolidated with case No. 20220991-SC).

PARTISAN GERRYMANDERING CASES

No. 220901712 (Utah Dist. Ct. Oct. 24, 2022)							
NORTH CAROLINA							
<i>Harper v. Hall</i> , 881 S.E.2d 156 (N.C. 2022) (a/k/a/ <i>Harper II</i>) ¹³³	(R) Legislature	Y	Y	-	-	4-3 unconstitutional (in part) ¹³⁴ 4 (D) - 3 (R)	"[W]hen a districting plan systematically makes it harder for individuals of one political party to elect a governing majority than individuals of another party of equal size based upon...partisanship, it deprives a voter of his or her fundamental right to equal voting power." ¹³⁵
<i>Harper v. Hall</i> , 886 S.E.2d 393 (N.C. 2023)	Court	-	-	-	-	5-2 nonjusticiable ¹³⁶ 5 (R) - 2 (D)	"There is no judicially manageable standard by which to adjudicate partisan gerrymandering claims." ¹³⁷

¹³³ The Court in *Harper I* remanded the case back to the trial court so they could oversee the creation of remedial maps, in accordance with their holding in *Harper I*. *Harper v. Hall*, 881 S.E.2d 156, 161 (N.C. 2022). The trial court rejected the remedial Congressional Plan but approved the House and Senate Plans. *Id.* All plans are at issue in the present case on appeal.

¹³⁴ The Court affirmed the lower court's rejection of the remedial Congressional Plan and acceptance of the remedial House Plan. *Harper*, 881 S.E.2d at 162. The Court rejected the lower court's approval of the remedial Senate Plan, finding that it was unconstitutional. *Id.*

¹³⁵ *Id.*, 881 S.E.2d at 161.

¹³⁶ The Court overruled its decision in *Harper I* and withdrew its opinion in *Harper II*, reinstating the original trial court's decision on January 11, 2022 that the plaintiff's claims presented non-justiciable political questions and were dismissed. *Harper*, 886 S.E.2d at 449.

¹³⁷ *Id.*, at 448-49.

Table 4. Majority and Minority Party Justice Agreement with the Decision¹³⁸

State	Majority Party	Majority Party % agreement with decision	Minority Party (% agreement with decision)
Ruled Unconstitutional			
FLORIDA (2015)	R	66.6% (4/6)	100% (1/1)
PENNSYLVANIA (2018)	R	0% (0/2)	100% (5/5)
NEW YORK (2022)	D	50% (3/6)	100% (1/1)
NORTH CAROLINA (2022) (<i>Harper I</i>)	R	0% (0/3)	100% (4/4)
OHIO (2022)	R	25% (1/4)	100% (3/3)
PENNSYLVANIA (2022)	R ¹³⁹	0% (0/2)	80% (4/5)
MARYLAND (2022)	D	100% (1/1)	n/a (0/0)
NORTH CAROLINA (2022) (<i>Harper II</i>)	R	0% (0/3)	100% (4/4)
OVERALL (averaged by Justices, not by states)		33.3% (9/27)	95.6% (22/23)
Ruled on other grounds (e.g., justiciability, failure to state a claim)			
KANSAS (2022)	R	100% (2/2)	40% (2/5)
NEW JERSEY (2022)	Commission (plan considered D) ¹⁴⁰	100% (3/3)	100% (2/2)
NORTH CAROLINA (2023)	R	100% (5/5)	0% (0/2)
OVERALL (averaged by Justices, not by states)		100% (10/10)	44.4% (4/9)

Note: R=Republican, D=Democratic, U=unconstitutional, C=constitutional

¹³⁸ Ongoing, pending, and dismissed cases, as well as those cases that did not rule on constitutionality (e.g., *Harper v. Lewis*) from **Table 3** were omitted here, as well as *Graham v. Adams* due to inability to determine justice party affiliation.

¹³⁹ The Republican legislature proposed a plan (without the support of the Democratic governor). The Commonwealth Court, which heard proceedings to adopt a plan, selected this plan unaltered. The State Supreme Court, however, rejected that plan as an unconstitutional gerrymander.

¹⁴⁰ The plan was proposed by a non-partisan redistricting commission, with the tie-breaking vote cast by an independent, non-partisan member of the commission. *Matter of Congressional Districts by New Jersey Redist. Comm'n*, 268 A.3d at 302. Here, we consider the plan Democratic since the claim was that it unduly favored Democrats. *Id.*, at 302-03.

Appendix Table 1. Plaintiffs in State and Federal Court Cases

State	Case	Individually Named Plaintiffs from Cases
Florida		
2015 (State Court)	League of Women Voters of Fla. V. Detzner, 172 So. 3d 363 (Fla. 2015)	League Plaintiffs: Robert Allen Schaeffer, Brenda Ann Holt, Roland Sanchez-Medina, Jr., and John Steel Olmstead. Romo Plaintiffs: Rene Romo, Benjamin Weaver, William Everett Warinner, Jessica Barrett, June Keener, Richard Quinn Boylan, and Bonita Again.
Pending (State Court)	Black Voters Matter Capacity Building Inst., Inc. v. Lee, No. 2022-ca-000666 (Fla. Cir. Ct. Apr. 22, 2022)	Pastor Reginald Gundy, Sylvia Young, Phyllis Wiley, Andrea Hershorin, Anaydia Connolly, Brandon P. Nelson, Katie Yarrows, Cynthia Lippert, Kisha Linebaugh, Beatriz Alonso, Gonzalo Alfredo Pedroso, and Ileana Caban
Pending (Federal Court)	Common Cause v. Byrd, No. 4:22-CV-109 (N.D. Fla. Mar. 11, 2022).	Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan Institutions: Common Cause Florida, FairDistricts Now
Kansas		
2022 (State Court)	Rivera v. Schwab, 512 P.2d 168 (Kan. 2022)	Rivera Plaintiffs: Faith Rivera, Diosselyn Totvelasquez, Kimberly Weaver, Paris Raite, Donnavan Dillon, and Loud Light Alonzo Plaintiffs: Tom Alonzo, Sharon Al-Uqdah, Amy Carter, Connie Brown Collins, Sheyvette Dinkens, Melinda Lavon, Ana Marcela Maldonado Morales, Liz Meitl, Richard Nobles, Rose Schwab, and Anna White. Frick Plaintiffs: Susan Frick, Lauren Sullivan, Darrell Lea, and Susan Spring Schiffelbein
Kentucky		
2022 (State Court)	Graham v. Adams, No. 22-CI-00047 (Ky. Cir. Ct. Nov. 10, 2022)	Derrick Graham, Jill Robinson, Mary Lynn Collins, Katima Smith-Willis, Joseph Smith
North Carolina		
2019 (State Court)	Harper v. Lewis, No. 19-CVS-012667 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019)	Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Anthony Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen, Jr., Shawn Rush, Jackson Thomas Dunn, Jr., Mark S. Peters, Joseph Thomas Gates, Kathleen Barnes, Virginia Walters Brien, and David Dwight Brown.
2022 (State Court)	Harper v. Hall, 868 S.E.2d 499 (N.C. 2022)	Harper Plaintiffs: Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Anthony Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen, Jr., Shawn Rush, Jackson Thomas Dunn, Jr., Mark S.

		Peters, Kathleen Barnes, Virginia Walters Brien, and David Dwight Brown. NCLCV Plaintiffs: Henry M. Michaux, Jr., Dandrielle Lewis, Timothy Chartier, Talia Fernós, Katherine Newhall, R. Jason Parsley, Edna Scott, Roberta Scott, Yvette Roberts, Jereann King Johnson, Reverend Reginald Wells, Yarbrough Williams, Jr., Reverend Deloris L. Jerman, Viola Ryals Figueroa, and Cosmos George.
2019 (Federal Court)	Rucho v. Common Cause, 139 S. Ct. 2484 (2019)	Larry D. Hall, Douglas Berger, Cheryl Lee Taft, Richard Taft, Alice Bordsen, William Freeman, Melzer Morgan, Jr., Cynthia Boylan, Coy Brewer, Jr., John Morrison McNeill, Robert Warren Wolf, Jones Byrd, John Greshma, Russell Walker Jr.
Maryland		
2019 (Federal Court)	Lamone v. Benisek, 139 S. Ct. 1316 (2019) (consolidated with Rucho v. Common Cause)	O. John Benisek, Edmund Cuman, Jeremiah DeWolf, Charles W. Eyler, Jr., Kat O'Connor, Alonnie L. Ropp, and Sharon Strine
2022 (State Court)	Szeliga v. Lamone, Nos. C-02-CV-21-001816, C-02-CV-21-001773, (Md. Cir. Ct. Mar. 25, 2022)	Szeliga Plaintiffs: Kathryn Szeliga, Christopher T. Adams, James Warner, Martin Lewis, Janet Moye Cornick, Rickey Agyekum, Maria Isabel Icaza, Luanne Ruddell, and Michelle Kordell. Parrott Plaintiffs: Neil Parrott, Ray Serrano, Carol Swigar, Douglas Raaum, Ronald Shapiro, Deanna Mobley, Glen Glass, Allen Furth, Jeff Warner, Jim Nealis, Dr. Antonio Campbell, and Sallie Taylor.
Michigan		
2022 (State Court)	Detroit Caucus v. Michigan Independent Citizens Redistricting Commission, No. 163926 (Mich. Sup. Ct. Jan. 5, 2022)	Dr. Carol Weaver, Wendell Byrd, Darryl Woods Institutions: Detroit Caucus, Romulus City Council
New Jersey		
2022 (State Court)	Matter of Congressional Districts by New Jersey Redistricting Comm'n, 268 A.3d 299 (N.J. 2022)	Douglas Steinhardt, Michele Albano, Jeanne Ashmore, Mark Duffy, Mark Logrippo, Lynda Pagliughi (each in their official capacity as members of the New Jersey redistricting commission; Douglas Steinhardt also in his official capacity as delegation Chair of the commission)
New Mexico		
Pending (State Court)	Republican Party of New Mexico v. Oliver, No. D-506-CV-202200041 (N.M. D. Ct. Jan. 21, 2022)	David Gallegos, Timothy Jennings, Dinah Vargas, Manuel Gonzales, Jr., Bobby and Dee Ann Kimbro, and Pearl Garcia
New York		
2022 (State Court)	Matter of Harkenrider v. Hochul, 38 N.Y.3d 494 (N.Y. Apr. 27, 2022)	Tim Harkenrider, Guy C. Brought, Lawrence Canning, Patricia Clarino, George Dooher, Jr., Steven Evans, Linda Fanton,

PARTISAN GERRYMANDERING CASES

		Jerry Fishman, Jay Frantz, Lawrence Garvey, Alan Nephew, Susan Rowley, Josephine Thomas and Marianne Volante
Ohio		
2021 (State Court)	Adams v. DeWine, No. 2021–1428 (Ohio Dec. 2, 2021)	Regina C. Adams, Bria Bennett, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Carrie Kubicki, Dana Miller, Meryl Neiman, Holly Oyster, Constance Rubin, Solveig Spjeldnes, Everett Totty
2021 (State Court)	League of Women Voters of Ohio v. Ohio Redistricting Commission, No. 2021–1449 (Ohio Sup. Ct. Nov. 30, 2021)	Bette Evanshine, Janice Patterson, Barbara Brothers, John Fitzpatrick, Janet Underwood, Stephanie White, Renee Ruchotzke, Tiffany Rumbalski
2021 (Federal Court)	Simon v. DeWine, No. 4:21-CV-2267 (N.D. Ohio Dec. 1, 2021)	Institutions: League of Women Voters of Ohio, A. Philip Randolph Institute of Ohio Honorable Reverend Kenneth L. Simon, Helen Youngblood (in their individual capacities as registered Black voters in Mahoning County, Ohio and as successor representatives of the class of Black voters certified in Ezell Armour v. State of Ohio, 775 F. Supp 1044 (6th Cir. 1991))
Oregon		
2021 (State Court)	Clarno v. Fagan, No. 21-CV-40180, 2021 WL 5632370 (Or. Cir. Ct. Nov. 24, 2021)	Beverly Clarno, Gary Wilhelms, James L. Wilcox, and Larry Campbell
Pennsylvania		
2018 (State Court)	League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737 (Pa. 2018).	Carmen Febo San Miguel, James Solomon, John Greiner, John Capowski, Gretchen Brandt, Thomas Rentschler, Mary Elizabeth Lawn, Lisa Isaacs, Don Lancaster, Jordi Comas, Robert Smith, William Marx, Richard Mantell, Priscilla McNulty, Thomas Ulrich, Robert McKinstry, Mark Lichty, Lorraine Petrosky.
2018 (Federal Court)	Corman v. 'Sec'y of Pennsylvania, 751 Fed. Appx. 157 (3d Cir. 2018) (per curiam)	Jacob Corman (in his official capacity as Majority Leader of the PA Senate), Michael Folmer (in his official capacity as Chairman of the PA Senate State Gov. Committee), Lou Barletta, Ryan Costello, Mike Kelly, Tom Marino, Scott Perry, Keith Rothfus, Lloyed Smucker, Glenn Thompson, Jeffrey Cutler
2022 (State Court)	Carter v. Chapman, 270 A.3d 444 (Pa. 2022) (per curiam).	Carter Petitioners: Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom Dewall, Stephanie McNulty and Janet Temin. Gressman Petitioners: Philip T. Gressman, Ron Y. Donagi, Kristopher R. Tapp, Pamela

		Gorkin, David P. Marsh, James L. Rosenberger, Amy Myers, Eugene Boman, Gary Gordon; Liz McMahon, Timothy G. Feeman, and Garth Isaak.
		Utah
Pending (State Court)	League of Women Voters of Utah v. Utah State Legislature, No. 220901712 (Utah D. Ct. Mar. 17, 2022).	Stefanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, Jack Markman, and Dale Cox
		Wisconsin
2012 (Federal Court)	Baldus v. Members of Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840 (E.D. Wis. 2012)	Baldus Plaintiffs: Alvin Baldus, Carlene Bechen, Elvira Bumpus, Ronald Biendseil, Leslie Davis III, Brett Eckstein, Gloria Rogers, Richard Kresbach, Rochelle Moore, Amy Risseuw, Judy Robson, Jeanne Sanchez-Bell, Cecelia Schliepp, Travis Thyssen, Cindy Barbera, Ron Boone, Vera Boone, Evanjelina Cleerman, Sheila Cochran, Maxine Hough, Clarence Johnson, Richard Lange, Gladys Manzanet Intervenor Plaintiffs: Tammy Baldwin, Gwendolynne Moore, Ronald Kind Voces de la Frontera, Inc. Plaintiffs: Ramiro Vara, Olga Vara, Jose Perez, Erica Ramirez
2021 (Federal Court)	Hunter v. Bostelmann, No. 3:21-cv-00512 (W.D. Wis. Aug. 13, 2021)	Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim