Question 1B.

Because the new provision addresses political speech, any investigations into its constitutionality will involve a strict basis of review[1]. As such, two requirements must be met for the new provision to pass constitutional muster: 1) the state must prove a compelling interest for adopting the provision, 2) the provision must be narrowly tailored to that interest. In *White*, the Court acknowledged that maintaining the impartiality of the judiciary, with impartiality meaning "openmindedness" or the demand that "[a judge] be willing to consider views that oppose his preconceptions, and remain open to persuasion"[2], is "desirable"[3] and therefore a compelling state interest. The new provision adheres to this definition since it aims to prevent judicial candidates from committing to specific rulings before the fact; not allowing judicial candidates to "pledge or promise" certain outputs ensures that a potential judge remains "openminded" to both sides. Furthermore, unlike the "announce clause," the proposed provision does not place any limitations on a candidate's expression of his/her position on certain issues; a candidate may still articulate his disapproval of abortion, but may not promise to rule against it should the matter come before him.

The new provision must also show that it is narrowly tailored to the aforementioned interest. The Court ruled that the "announce clause" was not narrowly tailored because it was under-inclusive in limiting statements only at "certain times and in certain forms"[4]. A candidate could freely express his views on certain matters "up until the very day before he declares himself a candidate"[5]. Justice Scalia noted Justice Stevens' dissenting opinion that "statements made in an election campaign pose a **special threat** to openmindedness because the candidate,

[1] White
[2] White, page 9
[3] White, page 9
[4] White, page 9
[5] White, page 9

when elected judge, will have a ***particular*** **reluctance** to contradict them"[6]. Although Justice Scalia acknowledged this argument, he then countered that "non-promissory" statements don't pose enough of a threat to warrant the "announce clause's" under-inclusive tailoring. He argued instead that such a method of tailoring would be plausible only with respect to "campaign *promises*"[7] because a candidate will "positively be breaking his word if he does not [rule in the manner he promised]"[8]. Because the new provision concerns promissory language, one can contend that its tailoring to "campaign speech" is narrow and consistent with its interest. Having met both requirements for strict scrutiny, one can safely assume that the new provision will survive constitutional inquiry.

1C

The manner by which states appoint electors is governed by Article II of the constitution, which specifies that "each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors". Those in opposition to the proposed plan may argue that the State, as a body politic, must appoint electors as a whole[9]. They argue that "appointments of electors by districts are not an appointment by the State, because all citizens otherwise qualified are not permitted to vote for all the presidential electors"[10]. But because congressional districts represent parts of a whole, "the combined result is the expression of the voice of the state"[11], thus adhering to the stipulations of Article II. Also, state districts must be roughly equal in population[12], thus further ensuring that each person has an equal part in choosing an elector.

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[6] White, page 9. Emphasis added
[7] White, page 10
[8] White, page 10
[9] Section 2, Article II
[10] McPherson, page 267
[11] McPherson, page 268
[12] Reynolds v. Sims

The proposal's methods are also akin to the "congressional mandate," which requires the election of congressional members through single member districts. Although Article 1, section 2 stipulates that "the people of the several states" shall elect members of Congress, the Court did not find constitutional fault in members being elected through districts rather than at large[13]; the interests of the "people" can therefore continue to be expressed despite the absence of statewide concurrence. Because congressional members can be elected through districts and still maintain the integrity of the people's voice, the proposed plan can similarly accomplish the same goal.

The question of who has the authority to approve change in elector selection, however, can raise an issue of constitutionality. Article II stipulates that the "manner" by which states appoint electors is "directed" by the "Legislature thereof". Legislatures have "plenary power…in the matter of the appointment of electors"[14]. Thus, because the current proposal is being attempted though a ballot initiative rather than a legislative mandate, it is not constitutional. The Court specifically noted in McPherson that determining the method of electoral selection is a question of "power and not of policy"[15], and it conferred that power "exclusively"[16] to the state legislature. Furthermore, the insertion of the clause "legislature thereof" in Article II was intended to "operate as a limitation upon the state in respect of any attempt to circumscribe the legislative power" [17]--the precise condition under which the proposed changes are being attempted.

Word Count: 1250

[13] McPherson
[14] McPherson, page 270. Emphasis added
[15] McPherson, page 271
[16] McPherson, page 269
[17] McPherson, page 268

IIA. Voting is a fundamental political right[18], and it falls primarily upon the states to ensure its realization[19]. As such, states must ensure the "equal weight" of each vote, and it may not "by arbitrary and disparate treatment, value one person's vote over that of another"[20]. The NAACP and voters from Steel Town and Iron city therefore challenge Michigana's use of punch card and lever machine voting systems—a method with leads to a higher likelihood of residual votes—in certain areas and not in others. They are likely to allege that such a practice violates the Equal Protection Clause of the 14th Amendment, their guarantee to Due Process (also under the 14th Amendment), and section 2 of the Voting Rights Act of 1965. They will seek declaratory and injunctive relief which prevents the cities in question from using the less accurate voting machines.

Because the current question involves possible infringements on the right to vote, plaintiffs will request a strict standard of review[21]. However, the standard of scrutiny will not matter much since the 6th Circuit Court of Appeals ruled in a similar case that the use of non error notice technology like the punchcard and lever systems "would also fail under rational basis of review"[22]. They argue that the state has no "legitimate interest" to use "technology that dilutes the right to vote"[23]. Steel Town and Iron City mayors claim that they don't have the necessary funds to purchase the more accurate machines. But the Court noted in Blackwell that added cost is not a "justified or rational" reason to not purchase the new machines since not having them comes at "the expense of thousands of votes"[24].

[18] Yick Wo v. Hopkins
[19] Black v. McGuffage
[20] Bush v. Gore, Dec. 12, 2000
[21] Stewart v. Blackwell
[22] Stewart v. Blackwell
[23] Stewart v. Blackwell
[24] Steward v. Blackwell

The plaintiffs argue that "no state shall deny to any person…the equal protection of the laws"[25], and Michigana's use of more accurate voting machines in certain cities and not in others violates this right. Their expert social scientist has demonstrated that the two cities using punchcard and lever machines display "disproportionate rates of undervotes", thus qualifying their claim. Michigana allows local officials to choose which voting machines are used in their area, leaving some authorities to choose more accurate machines than others. This varying treatment leads "voters in some counties [to be] statistically less likely to have their votes counted than voters in other counties in the same state"[26]. The district court for the Northern District of Illinois dealt with similar claims, ultimately ruling that "any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional"[27].

The plaintiffs will allege that the arbitrary choice of which voting machines will be used in each city violates their right to due process. The plaintiffs, as in *Black v. McGuffage*, are questioning the "statutory scheme which, depending upon the choices made by local election jurisdiction officials, will necessarily result in the dilution of an entire group of citizens' right to vote"[28]. Michigana's lack of a uniform standard for choosing voting machines leads to the use of machines with varying accuracy rates. Such a practice ultimately "value[s] one person's vote over that of another"[29] since it allows for the arbitrary treatment of voters. The state's procedure therefore leads to instances of "fundamental unfairness"[30]. Ultimately, plaintiffs will argue that Michigana has no rational basis for its current practice, and as the Court ruled in McGuffage, a "law that allows significantly inaccurate systems of vote counting to be imposed upon some

[25] 14th Amendment
[26] Black v. Mcguffage
[27] Black v. Mcguffage
[28] Black v. McGuffage
[29] Bush v. Gore Dec. 12, 2000
[30] Black v. McGuffage

portions of the electorate and not others…runs afoul of the due process clause of the U.S. Constitution"[31].

The use of less accurate machines in predominantly minority populated Steel Town and Iron city will raise complaints under section 2 of the Voting Rights Act of 1965. The law condemns any practice that "results in a denial or abridgement of the right…to vote on account of race or color"[32]. Although no outright denial of voting is being made against the plaintiffs, the 6th Circuit Court of Appeals noted in a similar case that the "Act clearly encompasses within the 'right of any citizen of United States to vote' the right to 'have such ballot counted properly'[33]. Because the plaintiffs' expert has found "disproportionate rates of undervotes" within the cities in question, they are being denied the right to have their "ballots counted properly"[34], which impedes their right to vote. The act is violated if under a "totality of circumstances" the political processes of elections are "not equally open to participation" to minority groups[35]. In McGuffage, the court established two statutory elements for a section 2 claim: 1) the use of a "standard, practice or procedure" which 2) leads to the "diminution" of minorities to take part in the electoral process[36]. Plaintiffs will therefore claim that the electoral process of deficient voting systems in the minority populated cities limits the members of those groups from taking part in electing their representatives. Plaintiffs will refer to the findings of their expert social scientist to demonstrate that the "totality of circumstances" reveal a discriminatory outcome.

[31] Black v. McGuffage
[32] Voting Rights Act
[33] Stewart v. Blackwell, quoting Voting Rights Act
[34] Voting Rights Act
[35] Voting Rights Act
[36] Black v. McGuffage

IIB

As counsel to the governor, I would first advice him to raise a claim of *res judicata,* since the current suit bears much similarity to *Suburban Action Coalition v. Goldman, et. al.* case. In order to establish such a claim, three requirements must be made: 1) similarity in the identity of claims, 2) whether there was a final judgment on the merits, 3) privitiy between the parties [37]. In *Suburban*, the plaintiffs demanded that Michigana use touch screen technology in the *entire* state. The evidence they presented in that case will therefore be the same as what the NAACP, et. al. will present: that the use of non-error warning technology like punchcard and lever systems leads to high incidences of residual votes, and ultimately dilutes the weight of their votes. Both cases therefore claim an infringement of the same right, the right to vote. The two cases also arise from the same nucleus of facts (the most important requirement in establishing a similarity of claims[38]) since the basic constitutional challenges to the use of outdated machines (violation of equal protection and due process) are the same. The only variation between the two cases is the current litigation's VRA claims, which I will diffuse shortly. Because the parties in *Suburban* entered "a consent decree" a final judgment was made on the merits of the case[39]. Finally, there is privity—which is established if the parties' interests "are so closely aligned as to be virtually representative"[40]—between the parties in *Suburban* and the current litigation. Although the plaintiffs in *Suburban* were residents of suburban areas and did not include members of the urban areas in question, their interests are nonetheless the same: to change the voting machines in Michigana. The plaintiffs' interest in *Suburban* are "representative" since their remedy demanded a change for the *entire* state, not just their areas. The interests of the current plaintiffs

[37] Shelly, panel
[38] Shelly, panel
[39] Shelly, panel
[40] Shelly, panel quoting Tahoe-Sierra Preservation Council

were therefore acknowledged in the previous case, thus establishing privity between the parties. If *res judicata* is invoked, the current litigation will be halted.

The plaintiffs VRA complaints can be countered by noting that rural areas, which don't have heavy minority populations, have not adopted touch screen voting machines. One can argue that these areas are also likely to have large numbers of residual votes though they lack a large minority population. Therefore, under the "totality of the circumstances" no infringement on rights due to race has been made.