ELECTION LAW AT THE CROSSROADS:
Independent State Legislature Theory and Vote Suppression

IMLA 2022 Annual Conference, Portland, OR
October 21, 2022 (10:55-11:55am)

Benjamin E. Griffith

.

Introduction: Weakening of Voting Rights Act

On July 1, 2021, the last day of its term one year ago, the U.S. Supreme Court released its opinion in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), a case that was broadly read as further weakening Section 2 of the Voting Rights Act (VRA) after a near-death blow to Section 5 in the 2013 case of *Shelby County v. Holder.* 133 S.Ct. 2612, 570 U.S. 529 (2013).

Brnovich wasn't the end of the Court's focus on the VRA. Two other groups of cases the Court will review next term could have long-lasting implications on democracy. One is *Moore v. Harper*, 142 S. Ct. 1089 (2022) (Alito, J., dissenting from denial of application for stay, joined by Justices Thomas and Gorsuch), cert. granted (U.S. June 30, 2022), a North Carolina case seeking the United States Supreme Court's endorsement of the Independent State Legislature theory, and the other consists of consolidated cases also from Alabama involving racial gerrymandering challenges to congressional and legislative maps under Section 2 and the Equal Protection Clause, in which Alabama seeks to jettison *Gingles* and replace it with a new race-blind framework for the vindication of voting rights, essentially gutting the Section 2 vote dilution standard.

This presentation will focus first on the Court's agreement on June 30, 2022, to hear *Moore v. Harper.* Let's begin with a little background for context.

As the Court demonstrated in *Brnovich v. Democratic National Committee*, robust enforcement of election law and voting rights cannot be taken for granted. In *Brnovich*, the Court's conservative wing weakened the ability of voters to bring

claims under one of the few significant federal voting rights laws still on the books: Section 2 of the Voting Rights Act. Section 2 was designed to ensure minority voters an equal opportunity to participate in the political process and to elect representatives of their choice. In his opinion in *Brnovich*, however, Justice Samuel Alito cut back the scope of circumstances in which the law would apply, calling a more powerful reading of the law too "radical." That narrow interpretation made it even more difficult to challenge discriminatory election laws and voting practices in federal courts under the Section 2 vote dilution standard as it was enacted in 1982 and decisively interpreted in the 1986 *Gingles* case.

One year later, a common theme is emerging: federal courts will play a pivotal role no matter what laws Congress enacts (if any), but the Supreme Court's new right-wing majority will have the final word.

Independent State Legislature Theory

The Supreme Court on June 30, 2022 agreed to hear *Moore v. Harper*, an "independent state legislature" theory case following the North Carolina Supreme Court's rejection of a racial gerrymander challenge. This case has the potential to fundamentally rework the relationship between state legislatures and state courts in protecting voting rights in federal elections. It also could provide the path for election subversion in congressional and presidential elections. The issue presented in this case has been a recurring one in recent years. Two parts of the Constitution—Article I, Section 4 as to congressional elections and Article II as to presidential elections—give state "legislatures" the power to set certain rules (in the Article I, Section 4 context, subject to congressional override).

A recent case focused on Section 4 of the Constitution and its power conferred on state legislatures regarding the "times, places, and manner" of elections, the Court held in the 2019 decisions in *Rucho v. Common Cause* and *Benisek v. Lamone*, that the redrawn North Carolina Congressional redistricting map was not reviewable

under the Equal Protection Clause or the First Amendment as a partisan gerrymander. Instead, such claims presented nonjusticiable political questions that were insulated from federal court review, thus insulating the state legislature's redistricting from federal scrutiny. Chief Justice Roberts in turn noted that while partisan gerrymandering claims were nonjusticiable in federal courts despite the fact that they were "incompatible with democratic principles," the doors to the state legislatures could be thrown wide open for judicial review of blatant partisan gerrymanders under state constitutional or statutory laws.

Moore v. Harper

North Carolina's redistricting saga would not end with *Rucho*. After Republican legislators redrew the North Carolina congressional maps following the 2020 census, Democrats and others challenged the maps as violative of the state constitution. Under the North Carolina Constitution, that state has long understood that the state constitution's promise that "[a]ll elections shall be free" means that every vote must count equally. N.C. Const. art. I, § 10. *Harper v. Hall*, infra at 509. The North Carolina legislature in turn asserted its autonomy to define such districts free of the taint of partisan gerrymandering, and a majority of the North Carolina Supreme Court held that the maps could not be used in the primary elections and must be withdrawn. In a 4-3 split decision, Justice Robin Hudson speaking for the majority said that question before the Court was whether the North Carolina constitution recognized that

> the people of this state have the power to choose those who govern us, by giving each of us an equally powerful voice through our vote? Or does our constitution give to members of the General Assembly, as they argue here, unlimited power to draw electoral maps that keep themselves and our members of Congress in office as long as they want, regardless of the will of the people, by making some votes more powerful than others? . . . We hold that our constitution's Declaration of Rights guarantees the equal power of

> each person's voice in our government through voting in elections that matter.

Harper v. Hall, 868 S.E. 2d 499, 509, 2022 NCSC 17 (N.C. Feb. 4, 2022). Dissenting Chief Justice Newby argued that the court was straying into the exclusive province of the state's legislative branch:

> I dissent from the decision of this Court which violates separation of powers by effectively placing responsibility for redistricting with the judicial branch, not the legislative branch as expressly provided in our constitution. As predicted by the Supreme Court of the United States, this Court's decision results in "an unprecedented expansion of judicial power."
> framed a completely different perspective on the posture of the General Assembly and "the people." Instead of usurping the individual's rights, the legislature was in fact expressing those rights: Since the General Assembly serves as the "agent of the people for enacting laws, a restriction on the General Assembly is in fact a restriction on the people themselves. Therefore, this court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly *must be express and proven beyond a reasonable doubt*.

When North Carolina's Republican lawmakers appealed to the United States Supreme Court, filing a petition for certiorari, they also sought an emergency stay of the state supreme court's order. Thus, with the case in this posture, the United States Supreme Court declined to issue a stay, *Moore v. Harper*, 142 S.Ct. 1089 (2022), and the redrawn map was used in North Carolina's May 2022 primaries while the petition for writ of certiorari was still pending.

Justices Alito, Thomas, and Gorsuch dissented from the denial of the application for stay, asserting that the "independent legislature doctrine" required analysis by the

Court. The ISL theory is grounded on the elections clause that holds state legislatures determine the "Times, Places and Manner" of federal elections, and that state legislatures under the presidential electors clause decide how to appoint electors to send to the Electoral College. Justice Alito urged the Court to grant certiorari to determine "the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections," id. at 1089, and maintained that "there must be some limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections," id. at 1091.

Timothy Moore, the Speaker of the North Carolina House of Representatives, filed for a writ of certiorari. Review was granted by the Court on June 30, 2022, ushering in *Moore v. Harper* for argument in the upcoming October 2022 term.

The threat posed in *Moore* is that the Court will remove the only real hurdle remaining after *Rucho* to legislative redistricting which co-opts federal elections—the state courts. That result is called for, according to proponents of the independent state legislature theory, because under the Constitution's election clause in Article I, only the legislature has the power to regulate federal elections, without interference from state courts. The ISL theory, in short, could cripple state courts in their efforts to protect voting rights in federal elections by eliminating state constitutional protections in those elections

A hard-right absolutist interpretation and maximalist version of the ISL theory could result in nullifying provisions in state constitutions which restrain state legislatures from interfering in federal elections. State courts would have no authority to intervene, regardless of the overreach, and the state's executive branch would be similarly proscribed, preventing a governor, who might otherwise have the power to veto newly proposed election laws. Virtually all gerrymandering, unless falling within the prohibitions against racially-driven redistricting under the Voting

Rights Act, could avoid challenge. The maximalist version if the ISL theory would be destabilizing, overturning the way in which federal elections have been conducted in states for decades, and eliminating the ability of voters to change the structure of elections through voter-initiated constitutional amendments or voter-initiated legislation.

Other Versions of the ISL Theory

Yet another version of the ISL theory would curtail the power of state courts to interpret their own constitutions, so that if a state court applied "general" provisions to hold unconstitutional state election laws regulating federal elections, the state court could be found to have violated the United States Constitution. This is more than a possibility, but is something that Justices Alito and Thomas embraced in *Republican Party of Pennsylvania v. Bookvar*, 141 S. Ct. 1 (2021)(Alito, J., statement)(stating that the U.S. Constitution would be violated if state courts could override state laws for federal elections by claiming that a state constitutional provision required such a result), and *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732 (2021)(Thomas, dissenting from denial of cert.) (criticizing the court's reliance on a "vague clause" in the state's constitution). This kind of view advocated by Justices Alito and Thomas would pave the way for a a highly subjective judgment and holding by the U.S. Supreme Court that when state courts act in effect as rule-makers, they are not acting in a judicial capacity but in a legislative capacity, something prohibited by the Elections Clause and the Presidential Electors Clause.

The implications of *Moore v. Harper* for federal elections, including the determination of the nation's next president, are obvious. As a Brennan Center commentary notes, a holding in favor of the North Carolina General Assembly's extreme interpretation of the Constitution "could make it easier for state legislatures to suppress the vote, draw unfair election districts, enable partisan interference in ballot counting." Brennan Center for Justice, Twitter Web App, June

30, 2022, accessible at https://twitter.com/brennancenter/status/1542525093984833536?lang=en; see generally Brennan Center, *Redistricting: A Mid-Cycle Assessment* (Jan. 19, 2022)

The prospects for reversal of the North Carolina decision by the Supreme Court seem considerable. Justices Alito, Thomas and Gorsuch have all subscribed to various versions of the ISL theory in prior opinions, and their dissent from the earlier denial of review signals that they will vote in this case to overturn previous legal precedent which considered such cases to be beyond the purview of the High Court, and will weigh in on the merits of a legislature's exclusive authority over partisan gerrymandering. The state's ability to protect voting rights is very much in the crosshairs.

When the U.S. Supreme Court's conservative supermajority added *Moore v. Harper* to its docket for the term beginning October 2022, many court observers asked whether the majority may be on the verge of adopting a radical theory that only state "legislatures" can make decisions about federal elections and how to appoint electors, and that those decisions are insulated from review by state courts.

The ISL theory was weaponized in former President Donald Trump's relentless efforts in literally scores of failed cases to undercut the validity of the results of the 2020 election. Among the decisions that state lawmakers may want to make without anyone in state government to check them would be making it more difficult to register, reducing the number of polling places, eliminating early voting and reducing or even eliminating voting by mail. Contrary to Chief Justice John Roberts assurance in the 2019 decision in *Rucho v. Common Cause* that the Supreme Court had no role in deciding questions about partisan gerrymandering and that state courts could still police those issues and protect the fundamental rights of voters from partisan overreach, the stage may now be set for a majority of the Court, led by Justices Alito, Thomas and Gorsuch, to enlist at least two more

Justices and adopt the independent state legislature theory, barring both federal and state judges from policing partisan gerrymandering and opening the door to allowing state legislatures – rather than American voters - to decide which electors are sent to the Electoral College under the Electoral Count Act. *Moore v. Harper* is a ticking time bomb that will likely be decided in plenty enough time for the 2024 Presidential Election.

On July 28, 2022, Professor Richard H. Pildes testified before the House Committee on Administration in a Hearing on "The Independent State Legislature Theory and its Potential to Disrupt our Democracy." He focused on the ramifications of the ISL theory and assessed the historical record for or against its existence, as well as its potential scope. According to Pildes, the ISL theory "would not mean that state legislators could choose to ignore the popular vote in their state and appoint presidential electors themselves." Id. at 1, accessible online at https://docs.house.gov/meetings/HA/HA08/20220727/115040/HHRG-117-HA08-Wstate-PildesR-20220727.pdf

Professor Pildes found strong support in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) for the argument that state legislatures have historically had unique independence, and that the Constitution arguably creates a more "independent" Congress or state legislature for some functions and not others, as when these entities are engaged in the function of lawmaking, such as the regulation of federal elections. Moreover, Pildes found no evidence that the Framers of the Constitution "understood the Constitution to create an independent state legislature with respect to the power to regulate national elections." Id. at 3.

Other notable historians on different sides of the political aisle have conceded that "it appears that the Framers neither expressly considered the independent state legislature doctrine nor addressed the potential significance of their use of the term

"legislature" in the Elections Clause or the Presidential Electors Clause." See, e.g., Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections and State Constitutions*, 55 Ga. L. Rev. 1 (2020) and Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J.2022. See also Jason Marisam, *The Dangerous Independent State Legislature Theory*, forthcoming 2022 Mich. St. L. Rev. ("If the U.S. Supreme Court adopted this theory, it would effectively remove state constitutions as a safeguard for voting rights. Our constitutional system provides two sources of protection for civil rights – the federal constitution and state constitutions. The independent state legislature theory would eliminate the second level of protection and, in this way, make voting rights the least protected civil right. This Article exposes the flaws and dangers of the independent state legislature theory.")

These and other election law scholars make a compelling argument that the ISL theory, if foisted in the American Republic at this juncture in our hyperpolarized condition as a democracy that barely survived a well-organized coup, would make the fundamental right to vote would *the least protected civil right*. Given the damage already done to the VRA by *Shelby County v. Holder* and *Brnovich*, this is far more than a theoretical danger. It is an extraordinary danger that voting rights groups are clear-eyed about: Underenforcement in the federal courts is not a well-kept secret these days, and civil rights advocates know that state constitutions can provide greater protections. That is why they often select state courts as their forum.

The *Growe* Barrier to the ISL Theory

A formidable barrier to the ISL theory also arises under existing United States Supreme Court precedent, primarily in the Court's unanimous opinion in *Growe v. Emison*, 507 U.S. 25 (1993), which clearly supported state court jurisdiction in congressional redistricting cases.

Growe v. Emison

As the New Hampshire Supreme Court recently observed in *Norelli v. Secretary of State*, (N.H. May 12, 2022), accessible at https://casetext.com/case/norelli-v-secy-of-state-a, the *Growe* court recognized that

"state courts have a significant role in [congressional] redistricting." *Growe*, 507 U.S. at 33, 34. In *Growe,* plaintiffs brought their challenge in state court, claiming that the 1990 census results rendered the existing congressional districts unconstitutionally malapportioned. The Minnesota Supreme Court appointed a special redistricting panel to preside over the case, and different plaintiffs sued in federal district court, raising a similar challenge to the congressional districts. The state legislature by January 1992 had not enacted a lawfully valid congressional redistricting plan, prompting the Minnesota Supreme Court to start the process to develop its own redistricting plan. Id. at 29-30. Two days after the state court held hearings on the redistricting plans submitted by the parties, the United States District Court entered an order adopting its own congressional redistricting plan and permanently enjoining any state judicial or legislative interference with that plan. In early March, the state court indicated it was "fully prepared" to release a congressional plan but was prevented from doing so by the federal injunction.

On appeal, the United States Supreme Court held that, because the state court was "fully prepared" to adopt a congressional plan in time for the primary elections, the federal district court "erred in not deferring to the state court's timely consideration of congressional reapportionment." *Growe*, 507 U.S. at 37. It reasoned that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." Id. at 33. Further, a post-*Growe* decision in *Branch v. Smith*, 538 U.S. 254 (2003) endorsed the role of state courts in congressional redistricting pursuant to a still-effective federal statute that provided for the "`establish[ment] by law [of] a number of districts equal to the number of Representatives to which such State is so

entitled.'" *Branch*, 538 U.S. at 267. The *Branch* Court explained that while the federal statutory language "assuredly envisions legislative action, it also embraces action by state and federal courts when the prescribed legislative action has not been forthcoming" Id. at 272, and concluded that "[the statutory language] is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—federal or state—as it is on legislatures".

The New Hampshire Supreme Court found this interpretation of *Growe* was consistent with numerous state court decisions addressing congressional redistricting, and that within the past year, at least five state supreme courts had decided congressional redistricting cases after legislative efforts were unsuccessful. This led the New Hampshire Supreme Court to conclude that its involvement was not foreclosed by Article 1, Section 4 of the U.S. Constitution, citing *Branch*, 538 U.S. at 266-67, 272 ("Federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). Those laws are made the Supreme Law of the Land by the Supremacy Clause, which charges state courts with a coordinate responsibility to enforce that law. Here, the Supreme Court had determined that the state legislature's "power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). And further, as the Court reasoned in *Wesberry, v. Sanders*, "nothing in the language of Art. I, § 4 gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Wesberry*, 376 U.S. at 6-7.

Alabama Racial Gerrymandering Cases: Question Presented

Several racial gerrymandering challenges from Alabama have been scheduled for oral argument on October 4, 2022. In each case, Alabama contends that § 2 is unconstitutional as applied to single-member districts.

Caster v. Merrill addressed challenges to the Alabama congressional map on statutory grounds under the Section 2 vote dilution standard. Under the vote dilution standard of §2, the courts focus on whether the plaintiff has established that the three threshold conditions of *Gingles* are satisfied, beginning with the first precondition that "the minority group is sufficiently large and geographically compact to constitute a majority in a . . . district." *Gingles*, 478 U.S. at 50. In evaluating a §2 vote dilution claim under the compactness precondition, federal courts often consider traditional districting principles such as maintaining communities of interest and traditional boundaries in order to confirm whether a proposed district is sufficiently "compact." *Abrams v. Johnson*, 521 U.S. 74, 92 (1997); *Bush v. Vera*, 517 U.S. 952, 977 (1996). The compactness inquiry serves §2's ultimate goal to provide equal opportunity by examining the issues that motivate actual voters. In that regard, identifying communities of interest is relevant both in evaluating the *Gingles* compactness precondition and in conducting a separate analysis of the "totality of the circumstances." *Gingles,* 478 U. S. a 47-51).

Merrill v. Milligan was a Three-Judge Court decision that involved challenges to the Alabama congressional map on constitutional grounds under the Equal Protection Clause and statutory grounds under Section 2. Upon consolidation, both *Caster v. Merrill* and *Merrill v Milliganb* initially presented the question as whether the lower courts "correctly found a violation of section 2 of the Voting Rights Act, 52 U.S.C. § 10301." After a motion was filed to modify or amend the question presented, the Court amended the question presented to "whether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated section 2 of the Voting Rights Act, 52 U.S.C. § 10301."

The lower court in *Caster* was a single district court judge, Anna M. Monasco, J., who held that plaintiffs were substantially likely to prevail on their Section 2 claim, and that the appropriate remedy was a congressional districting plan that included either an additional majority-black congressional district in which Black voters have an opportunity to elect a representative of their choice. Under U.S. Supreme Court precedent, chiefly *North Carolina v. Covington*, 138 S. St. 2548, 2554 (2018), the lower court in *Caster* concluded that the Alabama legislature should have the first opportunity to draw that plan, and that it "should be mindful of the practical reality, based on the ample evidence of intensely racially polarized voting adduced during the preliminary injunction proceedings, that any remedial plan will need to include two districts in which Black voters either comprise a voting age majority or something quite close to it."

Alabama's Race-Blind Proposed Framework

In a frontal assault on § 2, Alabama is proposing a framework for a race-blind approach that could eliminate § 2's protection against minority vote dilution. Its position could open the door for states to dismantle a many majority-minority and minority-opportunity districts, and would cripple many section 2 suits that seek to form new opportunity districts would fail, resulting in a further restriction of minority voting rights nationwide. In effect, it is asking the Supreme Court to overrule *Gingles*. First, as the first step, instead of the geographical compactness precondition under *Gingles*, Alabama would require Section 2 plaintiffs to submit "comparator map[s]" that do not account for race. Second, instead of the "totality-of-the-circumstances" inquiry, Alabama would have the court make a one-circumstance inquiry of whether "the State's enacted map compares favorably to neutrally drawn plans." Thus, in order to prove a § 2 violation under Alabama's new race-blind test, plaintiffs would need to submit computer-generated districting simulations and show that the state's enacted plan "substantially deviates from plans that could have been generated through a race-neutral districting process." Alabama's test would gut § 2's protection of equal minority voting opportunities and

allow states to dismantle large numbers of majority-minority and minority-opportunity districts. Its test is at odds with the VRA, racial equality, and democratic values.

In the American Bar Association's Amicus Brief in *Merrill*, the ABA argues that the VRA is necessary to prevent a regression to "the sad reality" of racial discrimination in voting, that Alabama's position threatens such a regression, and that "the Supreme Court should reject Alabama's position, adhere to the Court's longstanding interpretation of § 2, and reaffirm the VRA's promise of equal voting opportunity for all Americans." Taking a contrary position, Alabama attacks § 2 as a decades-long unconstitutional experiment with court-mandated racial segregation in redistricting, arguing that it has "involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of political apartheid." *Shelby County v. Holder*, 512 U.S. at 905 (Thomas, J., concurring in judgment).

In the Amicus Brief of the Republican National Committee, the RNC asks the Court to adopt a new standard that "comports with the Court's jurisprudence that the *Gingles* preconditions are necessary but not sufficient conditions for a Section 2 claim, that race neutral line drawing is the default, that deviations from a race neutral approach must be reconciled with the Equal Protection Clause, and that States should enjoy substantial deference when they adhere to traditional redistricting principles, act in good faith, and do not hinder a minority group's ability to participate in the political process."

The RNC's argument is to throw the baby out with the bathwater, transforming *Gingles* and Section 2 into a paper tiger. Its extremist position is grounded the fact that (1) the VRA requires equality of opportunity, not proportionality of outcomes;

(2) the courts have misapplied the *Gingles* preconditions; (3) the courts have ignored the Supreme Court's rulings articulating the appropriate standard that gives states substantial deference to rely on traditional redistricting criteria; and (4) the Court now has the opportunity (read that "six Trump-appointed conservatives") to provide needed clarity to states for Section 2 map drawing.

CONCLUSION

Consider the combined impact of (1) a challenge to a decades-old constitutional standard for adjudicating vote dilution cases and (2) an uptick in election interference legislation and restrictive judicial interpretations of vote dilution laws that are redrawn to limit access to the vote. Many of those laws make it harder to vote and are already on the books in states post-2021. In some instances, these measures emanate from a stubborn insistence on widespread voter fraud, stolen elections and official wrongdoing – baseless claims rejected by 64 courts in the run-up to the January 6, 2021 insurrection. In other instances, these measures flow from an almost religious (and senseless) fervor that George Soros and Nancy Pelosi single-handedly enabled Joe Biden to win the Presidency in 2020 and deprived the Army of the Right of its fair day at the polls.

All of this does not undo the fact that our democracy that has been shaken to its core by the events now well documented by the January 6 Committee hearings. Added to this toxic brew are the election interference laws that open the door to tampering with how elections are run, draconian limits on access to mail voting, imposition of stricter Voter ID requirements, requirements for documentary proof of citizenship, and laws that make voter registration more and more difficult, a burden usually falling on minorities at a greater pace and with greater severity than the rest of the electorate.

These laws are also fixated in micromanaging how electoral results are determined. Such laws open the door to partisan interference in elections and threaten the

election workers and established processes that make the electoral process work, all in the name of combatting voter fraud, a baseless claim that was bought lock, stock and barrel by right wingnuts.

Democracy has always relied on the judiciary for protection. The courts are there to straighten out the process when politicians tilt the electoral playing field in their favor. The Independent State Legislature theory is a radical theory that could shake the foundations of federalism and would drastically alter the power of state legislatures to weaken democracy, restrict voting rights and whittle away at vital protections of the right of citizens to vote in free, fair and open elections. If this authority is removed in a way that eliminates a judicial check on hyper-partisan legislatures, they will be even more emboldened to trample on the rights of their citizens and undermine elections. As Michael Luttig, a Judge of the 4th Circuit Court of Appeals, recently put it, "Trump and the Republicans can only be stopped from stealing the 2024 election at this point if the Supreme Court rejects the Independent State Legislature Doctrine." As leading election law expert Marc Elias stated, Judge Luttig is right, and it is that simple. The Court will either empower the likes of John Eastman and Trump or it will stand behind the dozens of state court judges who protected our elections in the 28 state court cases that Trump and his allies lost, nine of which involved the Trump campaign itself.

Even if a majority of the Court declines to adopt the extremist version of the ISL theory advocated by the far right in *Moore v. Harper*, the consolidated *Merrill* cases expose our nation to a great risk. Democracy will be shaken to its core if the U.S. Supreme Court dismantles *Gingles* and hobbles Section 2 vote dilution litigation by creating a new race-blind framework that provides a hollow promise for the vindication of voting rights. Section 2 falls well within the authority of Congress to enforce the Fourteenth and Fifteenth Amendments. Both amendments were enacted to bring an end to political systems that systematically discriminate against racial minorities. Both were enacted to ensure equal political and electoral

access to the political system in America. Both sought to bring an end to invidiously discriminatory vote dilution that results in the political processes leading to nomination and election not being equally open to participation by minority voters. As a congruent and proportional mechanism for enforcing the broad mandate of both amendments, Section 2 remains closely tethered to the constitutional prohibitions it enforces by requiring that plaintiffs prove pervasive racially polarized voting, contemporary effects of discrimination, barriers to minority-candidate success, and other factors indicative of racially exclusionary political systems.