

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2024-001227

RECEIVED

Jan 13 2025

S.C. SUPREME COURT

League of Women Voters of South Carolina.....Petitioner,

v.

Thomas Alexander, in his official capacity as President of the South Carolina Senate;
Murrell Smith, in his official capacity as Speaker of the South Carolina House of
Representatives; **Howard Knapp**, in his official capacity as Director of the South Carolina
State Election Commission Respondents,

and

Henry McMaster, in his official capacity as the Governor of South Carolina...Intervenor

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE ISSUES.....	ix
INTRODUCTION	1
STATEMENT OF THE CASE.....	5
STATEMENT OF THE FACTS	5
A. The General Assembly Adopted The Enacted Plan Through An Open Process	5
B. The Enacted Plan Improved Compliance With Traditional Districting Principles, Achieved The General Assembly’s Political Objective, Relied Upon The Clyburn Plan, And Outperformed All Alternatives On Traditional Criteria.....	9
C. The Plan’s Sponsor Repeatedly Denied Partisan Gerrymandering Allegations	11
D. LWVSC And Its Counsel Supported Unsuccessful Litigation Denying Political Objectives And Alleging That The Enacted Plan Is A Racial Gerrymander	12
STANDARD OF REVIEW	13
ARGUMENT	14
I. PARTISAN GERRYMANDERING CLAIMS PRESENT A NONJUSTICIABLE POLITICAL QUESTION UNDER THE SOUTH CAROLINA CONSTITUTION	14
A. The Constitution Commits Congressional Redistricting To The General Assembly.....	19
B. The Constitution Provides No Judicially Discernible Or Manageable Standards For Adjudicating Partisan Gerrymandering Claims.....	22
1. The Constitution does not address partisan gerrymandering.....	22
2. Courts have rejected LWVSC’s various proposed approaches to adjudicating partisan gerrymandering claims	24
3. LWVSC’s other arguments fail to establish justiciability	31
II. LWVSC FAILS TO STATE A CAUSE OF ACTION UNDER THE SOUTH CAROLINA CONSTITUTION.....	33
A. Partisan Gerrymandering Claims Fail Under The Free And Open Elections Clause.....	34
B. Partisan Gerrymandering Claims Fail Under The Equal Protection Clause.....	40
C. Partisan Gerrymandering Claims Fail Under The Free Speech Clause.....	43

D.	Partisan Gerrymandering Claims Fail Under Article VII, Section 13	44
III.	THE COURT MAY NOT GRANT LWVSC’S REQUESTED RELIEF	47
A.	LWVSC’s Record Is Incomplete, One-Sided, And Misleading	47
B.	Granting Relief Would Raise A Significant Issue Under The Elections Clause.....	49
CONCLUSION.....		50

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Abbeville Cnty. Sch. Dist. v. State</i> , 410 S.C. 619, 767 S.E.2d 157 (2014)	2, 32
<i>Alexander v. S.C. State Conf. of NAACP</i> , 602 U.S. 1 (2024).....	<i>passim</i>
<i>Backus v. South Carolina</i> , 857 F. Supp. 2d 553 (D.S.C.).....	<i>passim</i>
<i>Bailey v. S.C. State Elec. Comm’n</i> , 430 S.C. 268, 844 S.E.2d 390 (2020)	20, 43
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	15, 20
<i>Baten v. McMaster</i> , 967 F.3d 345 (4th Cir. 2020)	35
<i>Beaufort Cnty. v. S.C. State Election Commission</i> , 395 S.C. 366, 718 S.E.2d 432 (2011)	20, 21
<i>Blackburn & Co., Inc. v. Dudley</i> , 289 S.C. 415, 338 S.E.2d 151 (1985)	45
<i>Brown v. Sec’y of State</i> , 313 A.3d 760 (N.H. 2023)	<i>passim</i>
<i>Burriss v. Anderson Cnty. Board of Education</i> , 369 S.C. 443, 633 S.E.2d 482 (2006)	41, 42
<i>Burton on Behalf of Republican Party v. Sheheen</i> , 793 F. Supp. 1329 (D.S.C. 1992).....	2, 46
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	50
<i>Campbell v. Theodore</i> , 508 U.S. 968 (1993).....	2

<i>Carter v. Chapman</i> , 270 A.3d 444 (Pa. 2022)	30, 31
<i>Charleston Joint Venture v. McPherson</i> , 308 S.C. 145, 417 S.E.2d 544 (1992)	43
<i>City of Mobile v. Bolden</i> , 446 U.S. 55 (1980).....	35, 36, 41
<i>Clarke v. S.C. Pub. Serv. Auth.</i> , 177 S.C. 427, 181 S.E. 481 (1935)	20
<i>Colleton Cnty. Council v. McConnell</i> , 201 F. Supp. 2d 618 (D.S.C. 2002).....	<i>passim</i>
<i>Cornelius v. Oconee Cnty.</i> , 369 S.C. 531, 633 S.E.2d 492 (2006)	23
<i>Cothran v. W. Dunklin Pub. Sch. Dist. No. 1-C</i> , 189 S.C. 85, 200 S.E. 95 (1938)	34, 35, 38
<i>Creswick v. Univ. of S.C.</i> , 434 S.C. 77, 862 S.E.2d 706 (2021)	47
<i>Fraternal Order of Police v. S.C. Dep’t of Revenue</i> , 352 S.C. 420, 574 S.E.2d 717 (2002)	45
<i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973).....	17, 21, 22
<i>Gainey v. Gainey</i> , 279 S.C. 68, 301 S.E.2d 763 (1983)	45
<i>Gardner v. Blackwell</i> , 167 S.C. 313, 166 S.E. 338 (1932)	36, 37
<i>Gaud v. Walker</i> , 214 S.C. 451, 53 S.E.2d 316 (1949)	46
<i>Gilstrap v. S.C. Budget & Control Bd.</i> , 310 S.C. 210, 423 S.E.2d 101 (1992)	20
<i>Graham v. Adams</i> , 684 S.W.3d 663 (Ky. 2023)	<i>passim</i>

<i>Grisham v. Van Soelen</i> , 539 P.3d 272 (N.M. 2023)	27, 38, 42, 43
<i>Harkenrider v. Hochul</i> , 204 A.D.3d 1366 (N.Y. App. Div. 2022)	31
<i>Harper v. Hall</i> , 886 S.E.2d 393 (N.C. 2023).....	<i>passim</i>
<i>Hunt v. Cromartie</i> , 526 U.S. 541 (1999).....	17
<i>Jacobellis v. Ohio</i> , 378 U.S. 184 (1964).....	1, 24
<i>Japan Whaling Ass’n v. Am. Cetacean Soc’y</i> , 478 U.S. 221 (1986).....	15
<i>Karcher v. Daggett</i> , 462 U.S. 725 (1983).....	10
<i>Kenai Peninsula Borough v. State</i> , 743 P.2d 1352 (Alaska 1987).....	42
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	38, 39
<i>League of Women Voters v. Ohio Redistricting Comm’n</i> , 192 N.E.3d 379 (Ohio 2022).....	31
<i>McLeod v. Starnes</i> , 396 S.C. 647, 723 S.E.2d 198 (2012)	41
<i>McLure v. McElroy</i> , 211 S.C. 106, 44 S.E.2d 101 (1947)	45
<i>Moore v. Harper</i> , 600 U.S. 1 (2023).....	49, 50
<i>NLRB v. Fruit & Vegetable Packers & Warehousemen, Loc. 760</i> , 377 U.S. 58 (1964).....	48
<i>Perry v. Perez</i> , 565 U.S. 388 (2012).....	21

<i>Planned Parenthood S. Atl. v. State</i> , 440 S.C. 465, 892 S.E.2d 121 (2023)	<i>passim</i>
<i>Powell v. Keel</i> , 433 S.C. 457, 860 S.E.2d 344 (2021)	14
<i>Rivera v. Schwab</i> , 512 P.3d 168 (Kan. 2022)	<i>passim</i>
<i>Rucho v. Common Cause</i> , 588 U.S. 684 (2019)	<i>passim</i>
<i>Ruggles v. Padgett</i> , 240 S.C. 494, 126 S.E.2d 553 (1962)	23
<i>Rutherford v. Rutherford</i> , 307 S.C. 199, 414 S.E.2d 157 (1992)	23
<i>S.C. Conf. of State NAACP v. Alexander</i> , 649 F. Supp. 3d 177 (D.S.C. 2023)	49
<i>S.C. Pub. Interest Found. v. Judicial Merit Selection Comm’n</i> , 369 S.C. 139, 632 S.E.2d 277 (2006)	<i>passim</i>
<i>S.C. State. Conf. of NAACP v. Riley</i> , 533 F. Supp. 1178 (D.S.C. 1982)	46
<i>Segars-Andrews v. Judicial Merit Selection Comm’n</i> , 387 S.C. 109, 691 S.E.2d 453 (2010)	<i>passim</i>
<i>Sojourner v. Town of St. George</i> , 383 S.C. 171, 679 S.E.2d 182 (2009)	41
<i>S.C. State Conference of NAACP v. Alexander</i> , No. 3:21-cv-03302 (D.S.C. 2022)	7, 13
<i>State v. Huntley</i> , 167 S.C. 476, 166 S.E. 637 (1932)	37
<i>Thomas v. Macklen</i> , 186 S.C. 290, 195 S.E. 539 (1938)	13
<i>Vieth v. Jubelirer</i> , 541 U.S. 267 (2004)	26

<i>Weinschenk v. State</i> , 203 S.W.3d 201 (Mo. 2006)	42
<i>Zivotofsky v. Clinton</i> , 566 U.S. 189 (2012)	15

CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const., Article I, § 2	34, 43
U.S. Const., Article I, § 4, cl. 1	19, 49
Colo. Const., Article V, § 44	23
Fla. Const., Article III, § 20	23
Iowa Const., Article III, § 37	45
Md. Const., Article III, § 4	23, 44
Mich. Const., Article IV, § 6	23
Mo. Const., Article III, § 3	23
Ohio Const., Article XI, § 6	23
S.C. Const., Article I, § 2	22, 43
S.C. Const., Article I, § 3	22, 40
S.C. Const., Article I, § 5	<i>passim</i>
S.C. Const., Article I, § 8	14
S.C. Const., Article II, § 10	19
S.C. Const., Article III, § 1	19, 20
S.C. Const., Article VII, § 9	45
S.C. Const., Article VII, § 13	<i>passim</i>
Tenn. Const., Article II, § 6	45

OTHER AUTHORITIES

Rule 12, SCRCF.....33

Senate Floor Debate Video (Jan. 20, 2022)11

EXHIBITS

Ex. 1, 10/6/22 Trial Tr. (Teague).....7, 11, 12

Ex. 2, Senate Guidelines7

Ex. 3, House Guidelines.....7

Ex. 4, List of Written Testimony8, 48

Ex. 5, LWVSC Map.....8

Ex. 6, Clyburn Map.....8

Ex. 7, 10/12/22 Trial Tr. (Roberts)9, 10, 11

Ex. 8, Report, Political Subdivision Splits Between Districts, Benchmark
Congressional with 2020 Data (Jan. 13, 2022)9

Ex. 9, Report, Political Subdivision Splits Between Districts, House Plan 2 Senate
Amendment 1 (Jan. 11, 2022).....9

Ex. 10, 10/13/22 Trial Tr. (Campsen).....9, 11, 12, 30

Ex. 11, Opperman LWV Stats10

Ex. 12, Report, Core Constituencies, LWV Plan.....10

COUNTERSTATEMENT OF THE ISSUES

- I. Do partisan gerrymandering claims present a nonjusticiable political question under the South Carolina Constitution?
- II. Is the Enacted Plan an unconstitutional partisan gerrymander under the South Carolina Constitution?
- III. May the Court grant Petitioner's requested relief?

INTRODUCTION

Petitioner League of Women Voters of South Carolina (“LWVSC”) asks the Court to do what numerous other courts have declined to do: police the inherently political redistricting process for “deliberate and extreme partisan gerrymandering” by a General Assembly constitutionally entrusted to conduct redistricting. LWVSC Brief (“Br.”) 18; *id.* at 23, 36, 41; LWVSC Complaint (“Compl.”) ¶ 4; *compare, e.g., Rucho v. Common Cause*, 588 U.S. 684, 718 (2019) (“[P]artisan gerrymandering claims present” nonjusticiable “political questions”); *Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023); *Brown v. Sec’y of State*, 313 A.3d 760 (N.H. 2023); *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022). LWVSC invites the Court to wade into this political thicket even though the Constitution not only entrusts redistricting to the General Assembly but also says nothing about partisan gerrymandering. LWVSC even *disclaims* offering the Court any standard to distinguish between constitutional politically-motivated redistricting and unconstitutional “extreme partisan gerrymandering,” Br. 18, suggesting that the Court can “know it when [the Court] see[s] it,” *id.* at 43 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

LWVSC’s Complaint thus presents a textbook political question that the South Carolina judiciary cannot, and should not, address. Even if LWVSC had presented a justiciable claim, the Court still should reject it, along with LWVSC’s request that the Court invalidate the General Assembly’s Enacted Plan on the flawed and one-sided version of events presented in its brief.

Regrettably, LWVSC’s brief makes multiple misstatements and omissions of controlling legal authority and material fact. Once corrected, the governing law and facts demonstrate that LWVSC’s claims fail.

On the law, LWVSC invokes article VII, section 13 of the Constitution, *see* Br. 23, 41, but does not mention that provision’s operative term. Article VII, section 13 provides in its entirety:

“The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts, including the County of Saluda, *as it may deem wise and proper*, and may establish or alter the location of voting precincts in any County.” (Emphasis added).

This operative “as it may deem wise and proper” term alone demonstrates that LWVSC’s suit presents a nonjusticiable political question. The term “delegates authority to the General Assembly” to perform congressional redistricting and to make the “policy choices and value determinations” attendant to that task. *S.C. Pub. Interest Found. v. Judicial Merit Selection Comm’n*, 369 S.C. 139, 142-43, 632 S.E.2d 277, 278-79 (2006) (“*SCPIF*”). It also contains no criteria at all—let alone “satisfactory criteria”—“for a judicial determination” that the General Assembly exceeded that authority in drawing congressional district lines. *Segars-Andrews v. Judicial Merit Selection Comm’n*, 387 S.C. 109, 122, 691 S.E.2d 453, 460 (2010).

LWVSC, however, does not mention this term in its Complaint or brief. It therefore makes no attempt to explain its allegation that the Enacted Plan violates the very Constitution that authorizes the General Assembly to conduct congressional redistricting “as it may deem wise and proper.” S.C. Const., art. VII, § 13.

This is not LWVSC’s only omission of pertinent legal authority. For example, LWVSC cites at least two cases that have been vacated or reversed without discussing—and in one instance even disclosing—that subsequent history to the Court. *See* Br. 48-49 (relying on *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 767 S.E.2d 157 (2014) (“*Abbeville IP*”), *overruled by* Order, *Abbeville Cnty. Sch. Dist. v. State*, Appellate Case No. 2007-065159 (Nov. 17, 2017)); *id.* at 40-41 (relying on *Burton on Behalf of Republican Party v. Sheheen*, 793 F. Supp. 1329, 1341 (D.S.C. 1992), *vacated sub nom. Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968 (1993), and *vacated sub nom. Campbell v. Theodore*, 508 U.S. 968 (1993)). It also cites cases

from state courts upholding partisan gerrymandering claims, but does not acknowledge cases from state supreme courts rejecting such claims.

On the facts as well, L WVSC's presentation to the Court is incomplete—and even misleading. Most egregiously, L WVSC misleads the Court when it (repeatedly) states that Respondents and proponents of the Enacted Plan have “admitted” that the Plan is “a partisan gerrymander.” Br. 7, 18. There has been no such admission at any time. To the contrary, the Plan's proponents have consistently *denied* that allegation both in pre-enactment floor statements and in testimony during the post-enactment *SC NAACP v. Alexander* litigation.

L WVSC, however, makes no mention of those denials. Moreover, it attempts to impute to Respondents statements they never made—including a statement made by an opponent of the Plan. L WVSC highlights a quotation to Respondent Alexander's U.S. Supreme Court merits brief and suggests that he admitted the Plan “pack[ed] Democratic voters into District 6 to make District 1 more electable” for Republican candidates. *See* Br. 1 (citing Br. of Appellants at *14-15, *Alexander v. S.C. NAACP*, No. 22-807, 2023 WL 4497083 (U.S. 2023)). That portion of Respondent's brief, however, was quoting a floor statement of Democratic Senator Margie Bright Matthews, who was explaining her *opposition* to the Plan in the very colloquy in which the Plan's sponsor, Senator Chip Campsen, denied the allegation of a partisan gerrymander. *See* Br. of Appellants at *14-15.

L WVSC's flawed presentation of the facts does not end there. For one thing, L WVSC fails to mention that Democratic Congressman Jim Clyburn proposed his own draft plan and made various requests regarding his District 6. L WVSC thus never discloses that the General Assembly granted Congressman Clyburn's requests and even derived the Enacted Plan from his proposed map. Nor does it reconcile these facts with its allegation that the Enacted Plan is an “extreme

partisan gerrymander[.]” to benefit Republicans. Br. 18.

For another thing, L WVSC never discusses the various and obvious non-political explanations for the Plan, including its compliance with the traditional districting principles of preserving district cores, maintaining communities of interest, and providing constituent consistency. It also fails to discuss the open and robust public process that the General Assembly used to draft the Plan—a process that L WVSC’s own Vice President for Issues and Action specifically commended—or the substantial public support for the Plan.

All of these facts, as well as other relevant facts not presented in L WVSC’s Complaint and brief, are well known to L WVSC and its counsel. L WVSC neglects to mention that its Vice President for Issues and Action testified in support of the plaintiffs at the *SC NAACP* trial, or that a cohort of its counsel of record here was also counsel of record to those plaintiffs. And L WVSC does not mention that those plaintiffs (and their counsel) *denied* that the General Assembly considered politics when it drew the Enacted Plan, and makes no effort to reconcile that denial with its new allegation that the Plan is an “extreme partisan gerrymander[.]” Br. 18.

In the end, L WVSC invites the Court to divine a right that does not exist in the Constitution or on the governing law and facts. L WVSC asks the Court to claim “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 [its] decisions.” *Rucho*, 588 U.S. at 718. L WVSC thus invites the Court to abandon “judicial discipline,” “act[] as a super-legislature,” and override “the plenary authority of the ... General Assembly” in congressional redistricting. *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 484, 892 S.E.2d 121, 132 (2023).

Accepting this audacious invitation would have far-reaching consequences. It “would place [the] court in conflict with [the] coequal” General Assembly, *Segars-Andrews*, 387 S.C. at

122, 691 S.E.2d at 460, open the South Carolina courts to a deluge of litigation challenging legislative actions all across the State, and drag the judiciary into superintending the inherently political redistricting process at every level of government. The Court should decline to ensnare South Carolina’s voters and courts in this political morass. It should deny the requested relief and dismiss the Complaint.

STATEMENT OF THE CASE

LWVSC filed its Complaint and asked the Court to exercise original jurisdiction on July 29, 2024. The Complaint named as Respondents Thomas Alexander in his official capacity as President of the Senate, Murrell Smith in his official capacity as Speaker of the House of Representatives, and Howard Knapp in his official capacity as executive director of the South Carolina State Election Commission. It alleges that the Enacted Plan is an “extreme partisan gerrymander” and seeks an order enjoining use of the Plan and requiring the General Assembly to adopt a new congressional districting map. *See, e.g.*, Compl. ¶¶ 4, 185.

Each Respondent consented to this Court’s original jurisdiction. The Court granted Governor McMaster’s motion to intervene and the request to exercise original jurisdiction. LWVSC filed its opening brief on November 22, 2024.

STATEMENT OF THE FACTS

A. The General Assembly Adopted The Enacted Plan Through An Open Process.

The General Assembly adopted the Enacted Plan’s predecessor, the Benchmark Plan, in 2011. *Backus v. South Carolina*, 857 F. Supp. 2d 553, 557 (D.S.C.), *aff’d*, 568 U.S. 801 (2012). In ensuing litigation, the General Assembly defeated a series of legal challenges to the Benchmark Plan by “demonstrating” that it “adhered to traditional [redistricting] principles.” *Id.* at 560.

Over the next decade, the Benchmark Plan “consistently yielded a 6-to-1 Republican-Democratic” split in South Carolina’s Congressional delegation “with one exception.” *Alexander v. S.C. State Conf. of NAACP*, 602 U.S. 1, 12 (2024). Each election, Districts 2 through 5 and 7 elected Republicans, and District 6 elected long-tenured Democratic Congressman Clyburn. By contrast, District 1 elected a Republican until 2018, when “the Democratic candidate, with 50.7% of the votes, narrowly won.” *Id.* “But in 2020 ... the Republican congressional candidate retook District 1 by a slender margin, winning 50.6% of the votes.” *Id.*

The 2020 Census revealed population shifts in the State that required the General Assembly to adopt new district lines “to comply with the principle of one person, one vote.” *Id.* When drawing a new districting plan, “[l]awmakers do not typically start with a blank slate; rather, they usually begin with the existing map and make alteration to fit various districting goals.” *Id.* at 27. The General Assembly followed that course here, and with good reasons. For one, the General Assembly had “demonstrat[ed]” that the Benchmark Plan “adhered to traditional [redistricting] principles” and had successfully defeated all legal challenges to it. *Backus*, 857 F. Supp. 2d at 560. For another, starting with the Benchmark Plan allowed the General Assembly to preserve the “cores” of the Benchmark Districts. *Id.* Preserving district cores is an important traditional principle all on its own under South Carolina law. *See id.* It also advances the General Assembly’s compliance with other traditional principles: It both is “the clearest expression” possible of respect for “communities of interest,” *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 649 (D.S.C. 2002), and facilitates constituent consistency by “keeping incumbents’ residences in districts with their core constituents,” *Backus*, 857 F. Supp. 2d at 560.

The legislative process leading to the Enacted Plan was “highly visible,” open, and robust. *Alexander*, 602 U.S. at 25. In fact, LWVSC’s Vice President for Issues and Action, Lynn Teague,

applauded the Senate’s process in her testimony in the *SC NAACP* trial. *See* 10/6/22 Trial Tr. 743 (Ex. 1) (Teague).¹ According to Ms. Teague, redistricting “[a]bsolutely” “received a lot of process,” and she “[could not] recall anything that received as much process” in the General Assembly. *Id.* She also “commended the senate staff for their responsible professional work.” *Id.*

The Senate and the House each formed special committees to conduct that process and adopted written criteria for drawing the Enacted Plan. *See Alexander*, 602 U.S. at 12-13; *see also* Senate Guidelines (Ex. 2); House Guidelines (Ex. 3). Those criteria “explain[ed] that traditional districting principles, such as respect for contiguity and incumbency protection,” preserving district cores, and maintaining communities of interest “would guide the mapmaking process along with the strict equal population requirement.” *Alexander*, 602 U.S. at 12-13; Senate Guidelines §§ I.A, II-III (Ex. 2); House Guidelines §§ IV-IX (Ex. 3). The House Guidelines specifically acknowledged “political beliefs” and “voting behavior” as “factors” that may create a community of interest. House Guidelines § VII (Ex. 3).

The Senate and the House also actively facilitated public participation in, and input regarding, the Enacted Plan. Each chamber established dedicated websites regarding redistricting.² Those websites provided information about redistricting, including information about the Benchmark Plan, Census data, and each chamber’s guidelines; hearing and meeting information; draft plans; and archives of information from past redistricting cycles.³

¹ This Brief uses “Trial Tr.” to refer to the trial transcript in *South Carolina State Conference of NAACP v. Alexander*, No. 3:21-cv-03302 (D.S.C. 2022). Relevant pages are attached as exhibits.

² *See* <https://redistricting.scsenate.gov/index.html>; <https://redistricting.schouse.gov/>.

³ *See* <https://redistricting.scsenate.gov/index.html>; <https://redistricting.schouse.gov/>.

The Senate and the House also each held a series of public hearings around the State to solicit public input and comments on redistricting.⁴ Members of the public were invited to participate in these hearings in person or online, and they had the opportunity to provide input and comments through dedicated email addresses accessible through the websites.⁵ Members of the public voiced both support and opposition to the Enacted Plan. *See* List of Written Testimony (Ex. 4).

Moreover, interested parties had the opportunity to propose draft plans for the General Assembly's consideration. Proposed plans could be submitted through the websites, and the Senate and the House provided technical assistance to facilitate those submissions.⁶

LWVSC took advantage of these opportunities. It provided extensive testimony and comments throughout the redistricting process and proposed its own draft congressional redistricting plan. *See, e.g.*, LWVSC Map (Ex. 5). Congressman Clyburn also proposed a plan. *See* Clyburn Map (Ex. 6); *Alexander*, 602 U.S. at 13-15.

Senator Campsen “spearheaded the mapmaking process” that led to the Enacted Plan. *Alexander*, 602 U.S. at 14. Will Roberts, “a nonpartisan [Senate] staffer with 20 years of experience in state government,” drew the Enacted Plan. *Id.* at 13. Mr. Roberts specifically relied upon “political data from the 2020 Presidential election along with traditional districting criteria and input from various lawmakers, including Representative Jim Clyburn,” to draw the Plan. *Id.*

⁴ *See* Meeting Information, <https://redistricting.scsenate.gov/index.html>; Public Hearing, <https://redistricting.schouse.gov/>.

⁵ *See* Contact, <https://redistricting.scsenate.gov/index.html>; Contact, <https://redistricting.schouse.gov/>.

⁶ *See* Plan Submission, <https://redistricting.scsenate.gov/index.html>; Public Submission, <https://redistricting.schouse.gov/>.

Throughout the legislative process, “the Republican-controlled legislature ... made it clear that it would aim to create a stronger Republican tilt” in District 1 while “honoring” other “traditional districting criteria.” *Id.* Members of the Senate and the House confirmed as much during the legislative process and later at the *SC NAACP* trial. *See id.* at 12-14.

B. The Enacted Plan Improved Compliance With Traditional Districting Principles, Achieved The General Assembly’s Political Objective, Relied Upon The Clyburn Plan, And Outperformed All Alternatives On Traditional Criteria.

The Enacted Plan complies with traditional districting principles. It preserves between 77.41% and 99.51% of the core of the Benchmark Districts. *See* 10/12/22 Trial Tr. 1445-46 (Ex. 7) (Roberts). By preserving such a large percentage of district cores, the Enacted Plan is “the clearest expression” possible of respect for “communities of interest,” *Colleton Cnty.*, 201 F. Supp. 2d at 649, and facilitates constituent consistency, *Backus*, 857 F. Supp. 2d at 560.

The Enacted Plan even performs better on traditional principles than the Benchmark Plan, which “adhered to traditional ... principles.” *Id.* The Enacted Plan decreased the number of county splits from 12 to 10 and the number of Voter Tabulation District (“VTD”) splits from 65 to 13 compared to the Benchmark Plan. *Compare* Report, Political Subdivision Splits Between Districts, Benchmark Congressional with 2020 Data (Jan. 13, 2022) (Ex. 8), *with* Report, Political Subdivision Splits Between Districts, House Plan 2 Senate Amendment 1 (Jan. 11, 2022) (Ex. 9). The Enacted Plan also effectuates a “minor increase” of 1.36 percentage points in District 1’s Republican vote share. *See* 10/13/22 Trial Tr. 1907 (Ex. 10) (Campsen).

Moreover, Mr. Roberts relied “heavily” upon Congressman Clyburn’s proposed map in deciding which changes to the Benchmark District lines to make in the Enacted Plan. *See* 10/12/22 Trial Tr. 1419 (Ex. 7) (Roberts). Congressman Clyburn’s staffer, Dalton Tresvant, provided that map to Mr. Roberts. *See id.* at 1404. Mr. Tresvant verbally conveyed that Congressman Clyburn

wanted only minimal changes to, and more of Sumter County added to, his District 6. *See id.* at 1407. Congressman Clyburn’s proposed map maintained county splits in Charleston, Richland, and Sumter. *See id.* at 1409-10. The Enacted Plan relied upon and honored these requests: It preserved 77.41% of the core of District 6 and made changes requested by Congressman Clyburn in Charleston, Richland, Sumter, and other counties. *See id.* at 1415, 1445.

LWVSC points to alternative plans that were proposed to and considered by the General Assembly, but the Enacted Plan outperforms all of those plans on traditional criteria—and is the *only* plan in the record that “keeps District 1 majority-Republican and maintains the 6-1 partisan composition in the congressional delegation.” Br. 15 (quoting Juris. Stat. at 4, *Alexander v S.C. NAACP*, 2023 WL 2265678 (U.S. 2023) (No. 22-807)). For example, LWVSC’s proposed plan, which Democratic Senator Richard Harpootlian introduced as Senate Amendment 3, violates the one-person, one-vote requirement because it has a total population deviation of 5. *See* Opperman LWV Stats (Ex. 11); *see also Karcher v. Daggett*, 462 U.S. 725 (1983). The LWVSC plan also preserves less of the Benchmark District cores than the Enacted Plan, *see* Report, Core Constituencies, LWV Plan (Ex. 12), so it does not uphold communities of interest or constituent consistency as well as the Enacted Plan, *see Colleton Cnty.*, 201 F. Supp. 2d at 649; *Backus*, 857 F. Supp. 2d at 560. In fact, it preserves only 50.7% of District 6’s core, so nearly 50% of Congressman Clyburn’s constituents would be new to him under that plan. *See* 10/12/22 Trial Tr. 1462 (Ex. 7) (Roberts). And it does not achieve the General Assembly’s political goal in District 1, where it reduces the Republican vote share to 48.25%. *See id.* at 1463.

Indeed, Ms. Teague admitted that LWVSC did not consider core retention in drafting its plan, that its plan split three rural counties—Marlboro, Edgefield, and Barnwell—that had not been

previously split, and that its plan split more VTDs than the Enacted Plan and did not achieve the General Assembly’s political goal in District 1. *See* 10/6/22 Trial Tr. 716-26 (Ex. 1) (Teague).

LWVSC also points to Senate Amendment 2a, another plan offered by Senator Harpootlian. *See* Br. 13, 19. The Enacted Plan outperforms Amendment 2a on traditional criteria as well. Amendment 2a makes “dramatic modifications” to the Benchmark Districts and “does not respect the cores of the existing districts.” 10/12/22 Trial Tr. 1457 (Ex. 7) (Roberts). It preserves only 54.34% of District 6, meaning that more than 45% of Congressman Clyburn’s constituents would have been new to him. *See id.* at 1458. It does not achieve the General Assembly’s political goal because it reduces District 1’s Republican vote share to 48.17 percent. *See id.* at 1459.

C. The Plan’s Sponsor Repeatedly Denied Partisan Gerrymandering Allegations.

The Senate convened a floor debate on the Enacted Plan on January 20, 2022, during which Senator Campsen specifically and repeatedly denied allegations that the Enacted Plan is a partisan gerrymander. *See* Senate Floor Debate Video at 2:22:10-2:23:11 (Jan. 20, 2022), <https://www.scstatehouse.gov/video/archives.php>. Senator Campsen explained that the Plan increased District 1’s Republican vote share by only 1.36 percentage points and outperformed Senator Harpootlian’s Amendment 2a on core preservation and constituent consistency. *See id.*

Later in the floor debate, Senator Bright Matthews leveled allegations of partisan gerrymandering during a colloquy with Senator Campsen. *See id.* at 2:57:30-3:22:11. Senator Campsen again denied those allegations. He explained that gerrymandering requires “changing” existing district lines, but the Enacted Plan “hardly change[s] them at all.” *Id.* at 3:15:00-3:15:08; *see also id.* at 3:17:00-3:17:46.

After the General Assembly adopted the Enacted Plan, the South Carolina State Conference of the NAACP and an individual voter challenged Districts 1, 2, and 5 as racial gerrymanders in

federal court. *See Alexander*, 602 U.S. at 15. The case proceeded to a bench trial before a three-judge district court. Senator Campsen testified at trial and reiterated that the Enacted Plan is not a partisan gerrymander. As he explained, the Plan “honor[s]” rather than “subordinate[s]” traditional “districting principles.” 10/13/22 Trial Tr. 1847 (Ex. 10) (Campsen). He recounted that, in drawing the Enacted Plan, he complied with traditional principles—such as respecting “geographic boundaries,” maintaining “communities of interest,” and preserving district “cores”—in a way that made the Enacted Plan *less* favorable to Republican candidates than it could have been. *Id.* at 1848-49. Moreover, the Plan resulted in only a “minor increase” of 1.36 percentage points in District 1’s Republican vote share. *Id.* at 1907.

Senator Campsen also explained that he maintained the split in his home county of Charleston at least in part because he wanted Congressman Clyburn to continue to represent Charleston. He believes “it’s better to have two advocates than one”—and in particular, “a Republican and a Democrat”—to “benefit ... the local community” on “bread-and-butter things,” including matters where “influence with the incumbent [presidential] administration” can make a difference. *Id.* at 1842-43. He further expressed that “Jim Clyburn has more influence with the Biden Administration perhaps than anyone in the nation, because he probably wouldn’t be president if it weren’t for Jim Clyburn.” *Id.* at 1843. Senator Campsen is “tickled to death that Jim Clyburn represents Charleston County.” *Id.* at 1878.

D. LWVSC And Its Counsel Supported Unsuccessful Litigation Denying Political Objectives And Alleging That The Enacted Plan Is A Racial Gerrymander.

Ms. Teague testified in support of the plaintiffs at the *SC NAACP* trial. *See* 10/6/22 Trial Tr. (Ex. 1) (Teague). Those plaintiffs were represented by a cohort of the same counsel that represents LWVSC in this case. The district court ultimately rejected those plaintiffs’ challenges to Districts 2 and 5 but upheld the challenge to District 1. *See Alexander*, 602 U.S. at 15. On

appeal, the U.S. Supreme Court reversed the holding with respect to District 1 and upheld the Enacted Plan. *See id.* at 7.

The *SC NAACP* plaintiffs and their counsel represented to the U.S. Supreme Court that they were “unaware of the legislature’s partisan concerns” and goal “during the mapmaking process.” *Id.* at 25. The U.S. Supreme Court thought that representation “implausible” in light of pre-enactment floor statements of Democratic opponents alleging political motivation in the Enacted Plan. *Id.* at 25-26. LWVSC and its counsel now cite some of those statements in support of its partisan gerrymandering claim. *See* Br. 12-13, 19.

The U.S. Supreme Court remanded the *SC NAACP* case for further proceedings on the plaintiffs’ remaining intentional-discrimination claim. The plaintiffs filed a stipulation of voluntary dismissal of that claim on Friday, July 26, 2024. *See* Dkt. No. 527, *S.C. State Conf. of NAACP v. Alexander*, No. 3:21-cv-03302 (D.S.C.). LWVSC filed this Complaint the next business day, Monday, July 29, 2024.

STANDARD OF REVIEW

“[T]he General Assembly’s authority to legislate is plenary: the South Carolina Constitution grants power to the legislature to enact any act it desires to pass, if such legislation is not expressly prohibited by the Constitution of this state, or the Constitution of the United States.” *Planned Parenthood S. Atl.*, 440 S.C. at 475, 892 S.E.2d at 127 (quotation marks omitted). Thus, “it is a grave matter to overturn ... an enactment of the General Assembly.” *Thomas v. Macklen*, 186 S.C. 290, 195 S.E. 539, 545 (1938). For that reason, “when the constitutionality of a statute is challenged, every presumption [is] made in favor of its validity.” *Segars-Andrews*, 387 S.C. at 118, 691 S.E.2d at 458. “That presumption is a weighty one and can be overcome only by a showing of unconstitutionality beyond a reasonable doubt.” *Planned Parenthood S. Atl.*, 440 S.C.

at 476, 892 S.E.2d at 127. This is “the highest possible burden of proof to satisfy,” *id.*, and falls on the party challenging the statute, *Powell v. Keel*, 433 S.C. 457, 461, 860 S.E.2d 344, 346 (2021).

ARGUMENT

LWVSC falls far short of showing the Enacted Plan is unconstitutional beyond a reasonable doubt. That is so, first and foremost, because partisan gerrymandering claims, including challenges to alleged “extreme partisan gerrymandering,” Br. 18, present a nonjusticiable political question. But even if the Court concludes that this suit is justiciable, LWVSC is not entitled to relief because the Enacted Plan does not violate any provision of the Constitution. Finally, in all events, the Court cannot grant LWVSC its requested relief on the current incomplete record or without raising a serious question under the U.S. Constitution that could trigger U.S. Supreme Court review. The Court should dismiss the Complaint.

I. PARTISAN GERRYMANDERING CLAIMS PRESENT A NONJUSTICIABLE POLITICAL QUESTION UNDER THE SOUTH CAROLINA CONSTITUTION.

Article I, section 8 of the South Carolina Constitution provides that “the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other.” To uphold the Constitution’s separation of powers and the constitutional authority of the coequal branches of government, the Court has developed a robust rule against adjudicating “political questions.” *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460. That “political question doctrine” precludes South Carolina courts from adjudicating issues that “are exclusively or predominantly political in nature rather than judicial” because to do so “would place a court in conflict with a coequal branch of government.” *Id.* at 122, 691 S.E.2d at 460.

This Court thus has routinely “declined to opine on issues where the Constitution delegates authority to the General Assembly.” *SCPIF*, 369 S.C. at 143, 632 S.E.2d at 278-79; *see also id.* at 142, 632 S.E.2d at 278 (“political question doctrine ... excludes from judicial review those

controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch” (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986))). And it has stressed that a question is nonjusticiable when the Constitution fails to provide “satisfactory criteria for a judicial determination.” *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460. In such cases, the lodestar is “whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 198 (1962)). The upshot is that South Carolina’s political question doctrine, like its federal equivalent, forecloses judicial review when (1) the issue is textually committed to another branch of government or (2) there are no judicially discernible and manageable standards for resolving the issue. *Compare id.* at 122, 691 S.E.2d at 460, *with Baker*, 369 U.S. at 217; *see also Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

Applying that standard, courts across the country have held that partisan gerrymandering claims—including claims brought under constitutional provisions and proposed standards substantially similar to those LWVSC offers here—present nonjusticiable political questions.

After “45 years” of attempting to discover a judicially manageable standard for adjudicating partisan gerrymandering claims, the U.S. Supreme Court—for its part—held in *Rucho* that “partisan gerrymandering claims present political questions beyond the reach of the” U.S. Constitution. *Rucho*, 588 U.S. at 718. At the threshold, the U.S. Supreme Court held that the Elections Clause of the U.S. Constitution commits the question of partisan gerrymandering in congressional redistricting to state legislatures and Congress, and grants federal courts “[no] role to play” on that question. *Id.* at 699. Courts thus lack any “constitutional directive” to police partisan gerrymandering under the U.S. Constitution. *Id.* at 721.

Moreover, because redistricting is inherently political and legislative, “it is vital” that courts review such claims “only in accord with especially clear standards.” *Id.* at 704. Otherwise, “intervening courts ... would risk assuming political, not legal, responsibility for a process that often produces ill will and mistrust.” *Id.*

But no such standards exist in the U.S. Constitution. *See id.* at 704-18. Plaintiffs in partisan gerrymandering cases fundamentally ask courts to impose on redistricting legislatures some concept of “fairness”: They “inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end.” *Id.* at 705. “But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they [a]re authorized to do so.” *Id.*

Among other problems, “the initial difficulty in settling on a ‘clear, manageable, and politically neutral’ test for fairness is that it is not even clear what fairness looks like in this context” because “[t]here is a large measure of ‘unfairness’ in any winner-take-all system.” *Id.* at 706. “Fairness” might “mean a greater number of competitive districts,” but that conception “could be a recipe for disaster for the disadvantaged party” in election years in which “even a narrow statewide preference for either party would produce an overwhelming majority for the winning party.” *Id.* “Fairness” might also mean creating a certain number of “safe seats” for each party, but that notion “comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.” *Id.* “Or perhaps fairness should be measured by adherence to ‘traditional’ districting criteria,” but those criteria may “enshrine[] a particular partisan distribution” and “lead to inherently packed districts.” *Id.* at 706-07.

“Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal.” *Id.* at 707. The U.S. Constitution provides no “legal standards ... for making such judgments, let alone ... clear, manageable, and politically neutral” standards, so “[a]ny judicial decision on what is ‘fair’ in this context [lies] beyond the competence of the federal courts.” *Id.*

Identifying a workable standard of “fairness” is only the beginning of the problem. “[I]t is only after determining how to define fairness that you can even begin to answer the determinative question: ‘How much [partisanship] is too much?’” *Id.* Indeed, because “[p]olitics and political considerations are inseparable from districting and apportionment,” *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), “a jurisdiction may engage in constitutional political gerrymandering,” *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *see also Rucho*, 588 U.S. at 701. Claims that a legislature has engaged in “excessive” or extreme partisan gerrymandering, *see Rucho*, 588 U.S. at 691, thus require courts to determine “when political gerrymandering has gone too far,” *id.* at 701. But the U.S. Constitution prescribes no “standard that can reliably differentiate unconstitutional from ‘constitutional political gerrymandering.’” *Id.* at 704 (quoting *Cromartie*, 526 U.S. at 551).

Accordingly, the U.S. Supreme Court held that partisan gerrymandering claims present nonjusticiable political questions. *Id.* at 718. It therefore rejected arguments that “excessive” or extreme partisan gerrymandering is cognizable under, and violates, the Equal Protection Clause, the free speech and free association guarantees of the First Amendment, the Elections Clause, and the Guaranty Clause. *See id.* at 710-18.

Several state supreme courts—in decisions LWVSC fails to address—have adopted *Rucho*’s reasoning and held that partisan gerrymandering claims brought under state constitutions also present nonjusticiable political questions. *See, e.g., Harper*, 886 S.E.2d 393; *Brown*, 313 A.3d

760; *Rivera*, 512 P.3d 168. The North Carolina Supreme Court’s decision in *Harper* is particularly instructive. Initially, that court held that partisan gerrymandering claims are justiciable. *See* 886 S.E.2d at 403. But when the case reached that court for the third time, it reversed its prior holdings and held that “partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution.” *Id.* at 401. It rested that reversal both on the *Rucho*’s “insightful and persuasive ... analysis” and its own experience attempting to craft and apply a judicially manageable standard for adjudicating such claims. *Id.*

At the threshold, the North Carolina Supreme Court noted that its state constitution “expressly assigns the redistricting authority to the General Assembly subject to explicit limitations in the text.” *Id.* at 400. But “[t]hose limitations do not address partisan gerrymandering,” and “[i]t is not within the authority of this Court to amend the Constitution to create such limitations.” *Id.* Moreover, the North Carolina Constitution contains “no judicially discoverable or manageable standard for adjudicating [partisan gerrymander] claims.” *Id.*

Furthermore, wading into such claims would drag the court into “policy decisions” that “belong to the legislative branch, not the judiciary.” *Id.* And constitutionalizing some notion of partisan fairness “would embroil the judiciary in every local election in every county, city, and district across the state,” as it would require courts “to ensure that each of these elections provides each member of the relevant local electorate” equal political weight in electing representatives. *Id.* at 427; *see id.* (“This process would involve endless litigation that would task our judges with ensuring that the political makeup of every city council, county commission, or local board of education adequately reflected the distribution of Republicans and Democrats in the corresponding locality.”).

For all these reasons, the North Carolina Supreme Court held that partisan gerrymandering claims brought under that state’s Free Elections, Equal Protection, and Free Speech and Freedom of Assembly Clauses are nonjusticiable. *See id.* at 432-43. The New Hampshire Supreme Court and the Kansas Supreme Court have likewise adopted *Rucho* and held that partisan gerrymandering claims are nonjusticiable under their respective state constitutions. *See Brown*, 313 A.3d at 770-82 (rejecting partisan gerrymandering claims brought under Free and Equal Elections, Equal Protection, and Free Speech and Association Clauses); *Rivera*, 512 P.3d at 178-87 (rejecting partisan gerrymandering claims brought under Equal Protection, Right to Vote, and Free Speech and Association Clauses).

This Court should follow suit. The South Carolina Constitution “delegates authority” to conduct congressional redistricting “to the General Assembly,” *SCPIF*, 369 S.C. at 143, 632 S.E.2d at 278-79—a point LWVSC *concedes*, *see* Br. 41 (“redistricting” is “constitutionally assigned to the Legislature”). It also provides no “satisfactory criteria for a judicial determination,” *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460, of claims of “extreme partisan gerrymandering,” Br. 18. Thus, its suit is nonjusticiable, and the Court should dismiss. *SCPIF*, 369 S.C. at 143, 632 S.E.2d at 278-79; *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460.

A. The Constitution Commits Congressional Redistricting To The General Assembly.

The South Carolina Constitution provides: “The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts, including the County of Saluda, *as it may deem wise and proper.*” S.C. Const. art. VII, § 13 (emphasis added). Section 13 thus “delegates authority to the General Assembly” to draw congressional districts. *SCPIF*, 369 S.C. at 143, 632 S.E.2d at 278-79; *see* S.C. Const. art. II, § 10; *id.* art. III, § 1; *id.* art. VII, § 13; *see also* U.S. Const., art. I, § 4, cl. 1. Or stated another way, the Constitution textually

commits the State’s districting authority—and in particular the authority to draw congressional districts—to the General Assembly as “it may deem wise and proper.” S.C. Const. art. III, § 1; *id.* art. VII, § 13; *SCPIF*, 369 S.C. at 142, 623 S.E.2d at 278; *Baker*, 369 U.S. at 217.

This Court’s decision in *Beaufort County v. South Carolina State Election Commission* underscores that partisan gerrymandering claims are nonjusticiable for this reason. 395 S.C. 366, 718 S.E.2d 432 (2011). There, the Court dismissed on political question grounds a challenge that the funds appropriated for conducting a 2012 presidential primary were inadequate. The Court reasoned that because “the appropriation of public funds is a legislative function,” *id.* at 377, 718 S.E.2d at 438 (citing *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 423 S.E.2d 101 (1992)), “the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation,” without being subjected to the Court’s review, *id.* (citing *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 181 S.E. 481 (1935)); *see also Bailey v. S.C. State Elec. Comm’n*, 430 S.C. 268, 275, 844 S.E.2d 390, 394 (2020) (Because the Constitution vests in the General Assembly the “obligation to ensure that elections are carried out in such a manner as to allow all citizens the right to vote,” “any change ... to the law” of absentee voting “is a political question for the Legislature”).

So too here. Districting is “a legislative function,” and “the General Assembly has full authority to” draw congressional districts “*as it deems wise.*” *Beaufort County*, 395 S.C. at 377, 718 S.E.2d at 438 (emphasis added); *see* S.C. Const. art. VII, § 13 (“as it may deem wise and proper”). That is particularly true here for two reasons. In the first place, drawing congressional district lines—and, in particular, weighing partisan politics as part of that exercise—inherently “revolve[s] around policy choices and value determinations” within the ambit of legislation, not adjudication. *SCPIF*, 369 S.C. at 142, 632 S.E.2d at 278; *see Harper*, 886 S.E.2d at 403; *Brown*,

313 A.3d at 770-82; *Rivera*, 512 P.3d at 178-87; *see also Rucho*, 588 U.S. at 701 (“To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities.”); *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam) (Redistricting “ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment.”); *Gaffney*, 412 U.S. at 753 (“Politics and political considerations are inseparable from districting and apportionment.”).

Moreover, unlike its counterparts in other states, the South Carolina Constitution contains no “specific constitutional prohibition” on the General Assembly’s consideration of partisan politics in congressional redistricting, let alone on partisan gerrymandering. *Beaufort County*, 395 S.C. at 377, 718 S.E.2d at 438. The “absence” of such a prohibition confirms that the General Assembly retains “full authority” to determine whether, and to what extent, to consider politics when it draws congressional districts. *Id.*; *see also Harper*, 886 S.E.2d at 423; *Brown*, 313 A.3d at 771; *Rivera*, 512 P.3d at 186-87.

LWVSC concedes that “redistricting” is “a task constitutionally assigned to the Legislature.” Br. 41. It nonetheless contends that the Court should read article VII, section 13 as a *limitation* on the General Assembly’s redistricting authority. *See* Compl. ¶¶ 202-09; Br. 32-34. That contention rests on an omission: Nowhere in its Complaint or brief does LWVSC mention—much less explain away—the operative “as it may deem proper” phrase. S.C. Const. art. VII, § 13. That phrase’s “clear meaning” “impose[s]” no “limitation[.]” whatsoever on the General Assembly’s congressional redistricting authority, but instead commits that authority and any consideration of politics in exercising it exclusively to the legislative process. *Segars-Andrews*, 387 S.C. at 118, 691 S.E.2d at 458. Thus, far from *limiting* the General Assembly’s redistricting

authority, article VII, section 13 *grants* it plenary authority to consider politics when conducting congressional redistricting. For this reason alone, the Court should dismiss.

B. The Constitution Provides No Judicially Discernible Or Manageable Standards For Adjudicating Partisan Gerrymandering Claims.

Partisan gerrymandering claims present a nonjusticiable political question for another reason as well: The Constitution does not provide “satisfactory criteria for a judicial determination” that the General Assembly engaged in an unconstitutional partisan gerrymander. *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460.

1. The Constitution does not address partisan gerrymandering.

The Constitution’s only explicit reference to congressional redistricting appears in article VII, section 13, which, as discussed above, vests the General Assembly with plenary authority over the matter. *See supra* Part I.A. The Constitution says precisely nothing about partisan gerrymandering or even consideration of politics when the General Assembly exercises that authority. *See id.* That is true of the *entire* Constitution, including the four Clauses—Free and Open Elections, Equal Protection, Free Speech, and article VII, section 13—LWVSC invokes. *See* Br. 23-42; S.C. Const., art. I § 5; *id.* art. I § 3; *id.* art. I § 2; *id.* art. VII § 13.

The Constitution therefore prescribes no criteria *at all*, let alone “satisfactory criteria,” *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460, for South Carolina courts to determine when the General Assembly has crossed the line from the constitutional “political consideration[] [that is] inseparable from districting and apportionment,” *Gaffney*, 412 U.S. at 753, and into the allegedly unconstitutional “extreme partisan gerrymandering” LWVSC purports to target, *see* Br. 18. In other words, nothing in the Constitution identifies a “‘clear, manageable, and politically neutral’ test for [political] fairness” in the inherently political redistricting process, *Rucho*, 588 U.S. at 706, or for determining “when political gerrymandering has gone too far,” *id.* at 701; *see*

also id. at 704 (courts adjudicating partisan gerrymandering claims must be armed with a “standard that can reliably differentiate unconstitutional from ‘constitutional political gerrymandering’”).

This absence of an explicit prohibition on extreme partisan gerrymandering alone dooms L WVSC’s case. *See, e.g., Planned Parenthood S. Atl.*, 440 S.C. at 475, 892 S.E.2d at 127 (“[T]he South Carolina Constitution grants power to the legislature to enact any act it desires to pass, if such legislation is not expressly prohibited by the Constitution of this state, or the Constitution of the United States.” (quotation marks omitted)). L WVSC’s attempt to read an *implicit* limitation on excessive partisan gerrymandering into the Constitution likewise fails: Any such general and implicit limitation cannot override the Constitution’s specific and explicit entrusting to the General Assembly of the task of drawing congressional districts “as it may deem wise and proper.” S.C. Const. art. VII, § 13; *see Cornelius v. Oconee Cnty.*, 369 S.C. 531, 538, 633 S.E.2d 492, 496 (2006) (“general constitutional provision does not overrule specific constitutional clause” (citing *Rutherford v. Rutherford*, 307 S.C. 199, 414 S.E.2d 157 (1992))); *see also Ruggles v. Padgett*, 240 S.C. 494, 506-07, 126 S.E.2d 553, 559 (1962) (“It is of course an accepted principle, well established by our decisions, that the [general constitutional prohibition on special laws] ha[s] no application to statutes which are specifically authorized by other specific provisions of the Constitution.”).

The South Carolina Constitution is hardly unique in declining to address partisan gerrymandering. While some states have adopted constitutional provisions outlawing various forms of partisan gerrymandering, *see, e.g., Rucho*, 588 U.S. at 719; *see also* Colo. Const. art. V, § 44; Fla. Const. art. III, § 20; Mich. Const. art. IV, § 6; Mo. Const. art. III, § 3; N.Y. Const. art. III, § 4; Ohio Const. art. XI, § 6, the majority of states, including South Carolina, have not. This absence is telling. Because partisan gerrymandering existed “in the Colonies prior to

Independence,” the Framers of the South Carolina Constitution were aware of it. *See Rucho*, 588 U.S. at 696. They chose, however, not to forbid or even regulate it. To the contrary, they did precisely the opposite: They committed congressional redistricting, including the weighing of partisan politics, to the General Assembly “as it may deem wise and proper.” S.C. Const. art. VII, § 13; *compare also Harper*, 886 S.E.2d at 422-23; *Brown*, 313 A.3d at 771.

Accordingly, like its counterparts at the federal level and in North Carolina, New Hampshire, and Kansas, the South Carolina Constitution contains no “satisfactory criteria for a judicial determination” of L WVSC’s claim. *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460. For this reason as well, the Court should dismiss the Complaint. *See id.*; *see also Rucho*, 588 U.S. at 699; *Harper*, 886 S.E.2d at 423; *Brown*, 313 A.3d at 771; *Rivera*, 512 P.3d at 186-87.

2. Courts have rejected L WVSC’s various proposed approaches to adjudicating partisan gerrymandering claims.

L WVSC points to nothing in the Constitution laying out *any* criteria, let alone “satisfactory criteria for a judicial determination,” *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460, to identify “extreme partisan gerrymandering,” Br. 18. To the contrary, it suggests that such a standard is *unnecessary*: It says that “the Court need not develop *per se* rules” or standards, *id.* 36 n.27, and instead invites the Court simply to “know” extreme partisan gerrymandering when it “sees it,” *id.* at 43 (quoting *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring)).

This suggestion alone demonstrates that L WVSC’s suit is nonjusticiable. A “know-it-when-the-Court-sees-it” approach to “extreme partisan gerrymandering” claims is a wholly inadequate basis for the Court to wade into the inherently political and policy-infused redistricting process. Such an eye-of-the-beholder approach can never suffice to establish “unconstitutionality beyond a reasonable doubt.” *Planned Parenthood S. Atl.*, 440 S.C. at 476, 892 S.E.2d at 127. It also cannot supply the General Assembly with *any* meaningful guidance regarding how to draw a

compliant plan. As a result, the General Assembly would be exposed to potentially costly partisan gerrymandering litigation—and the possibility of a finding from this Court that it has violated the Constitution—every time it draws a redistricting plan. The Court should decline L WVSC’s invitation to abandon “judicial discipline,” “act[] as a super-legislature,” and override or even chill the exercise of “the plenary authority of the South Carolina General Assembly” to conduct congressional redistricting. *Id.* at 484, 892 S.E.2d at 132.

L WVSC gestures to various other approaches for identifying alleged excessive partisan gerrymandering, but all fail to provide a workable and judicially manageable standard. In fact, the U.S. Supreme Court—and the North Carolina, New Hampshire, and Kansas Supreme Courts in the decisions L WVSC fails to address—have rejected those approaches.

First, L WVSC intimates that the Court should examine redistricting plans to ensure proportional representation—*i.e.*, that “groups with a certain level of political support ... enjoy a commensurate level of political power and influence.” *Rucho*, 588 U.S. at 704; *see* Br. 2 (“Republicans, despite comprising about 55% of South Carolina voters, now have an unassailable advantage in 86% of the State’s congressional seats.”), 16 (arguing that the Enacted Plan “creates extreme and disproportionate electoral advantage for South Carolina Republicans”), 47-48 (arguing that “the state must ensure citizens are afforded ‘equal influence’ over elections”).

But the South Carolina Constitution, like the U.S. Constitution and other state constitutions, does not require proportional representation. *See Rucho*, 588 U.S. at 704; *Harper*, 886 S.E.2d at 410-411, 424; *Brown*, 313 A.3d at 771; *Rivera*, 512 P.3d at 185-86. Indeed, a claim to proportional representation “is based on a norm that does not exist in our electoral system—statewide elections for representatives along party lines.” *Id.* (cleaned up). In a “winner-take-all district system” such as ours, “there can be no guarantee, no matter how the district lines are drawn,

that a majority of party votes statewide will produce a majority of seats for that party.” *Vieth v. Jubelirer*, 541 U.S. 267, 289 (2004) (plurality op.).

LWVSC may (wrongly) deny that it seeks proportional representation. In all events, however, LWVSC would still have the courts of this State guarantee all voters “equal influence” over election outcomes, Br. 47-48, and “rearrange the challenged districts to achieve that end,” *Rucho*, 588 U.S. at 705. But simply put, South Carolina “courts are not equipped to apportion political power” among voters and political parties. *Id.*; see also *Harper*, 886 S.E.2d at 410-411, 424; *Brown*, 313 A.3d at 771; *Rivera*, 512 P.3d at 185-86.

Second, LWVSC points to “the three-part test ... from Justice Kagan’s *Rucho* dissent,” Br. 35, but the *Rucho* majority obviously rejected that test, see *Rucho*, 588 U.S. at 710-13, as have the North Carolina and New Hampshire Supreme Courts, see *Harper*, 886 S.E.2d at 410-411; *Brown*, 313 A.3d at 780. And with good reason: That test was borrowed from inapposite “racial gerrymandering” cases, *Rucho*, 588 U.S. at 710, which do not provide “an appropriate standard for assessing partisan gerrymandering,” *id.* at 709. “Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails.” *Id.* “It asks instead for the elimination of a racial classification.” *Id.* By contrast, “[a] partisan gerrymandering claim cannot ask for the elimination of partisanship” from the inherently political redistricting process. See *id.* at 710.

Moreover, even on its own, Justice Kagan’s proposed test fails to provide a workable standard for identifying “extreme” partisan gerrymandering. See *id.* at 710-13. The first prong inquires whether the legislature’s “predominant purpose” was to “entrench” the redistricting party “in power.” *Id.* at 735 (Kagan, J., dissenting). That prong, however, fails to advance the analysis because “determining that lines were drawn on the basis of partisanship does not indicate that the

districting was improper.” *Id.* at 711 (maj. op.). Moreover, “[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent ‘predominates.’” *Id.*

Justice Kagan’s second prong inquires whether the votes of the rival party’s voters were “substantially diluted by the challenged map.” Br. 35 (quoting *Grisham v. Van Soelen*, 539 P.3d 272, 293 (N.M. 2023)); *see also Rucho*, 588 U.S. at 735 (Kagan, J. dissenting). But it is unclear *how*—and at what point in time—courts can properly measure such dilution. That is a particularly fraught exercise because attempting to measure dilution under a new redistricting plan requires “prognostications as to the outcome of future elections,” an enterprise in which “neither judges nor anyone else can have any confidence.” *Rucho*, 588 U.S. at 711 (maj. op.). “[A]ccurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time.” *Id.* at 712. Election outcomes may turn on newly important issues, “the quality of the candidates, the tone of the candidates’ campaigns, the performance of an incumbent, national events or local issues that drive voter turnout” or split-ticket voting, the preferences and behavior of voters not “register[ed] with a political party,” and other factors. *See id.* “For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.” *Id.* at 712-13.

Justice Kagan’s third prong asks whether the legislature can demonstrate a “legitimate, non-partisan justification” for the plan. *Id.* at 735 (Kagan, J., dissenting). But since the first prong “already requires the plaintiff to prove that partisan advantage predominates,” this prong adds nothing to the inquiry and merely underscores the test’s flaws. *Id.* at 713 (maj. op.).

Third, LWFSC suggests that unconstitutional partisan gerrymandering can be shown where traditional districting principles are “subordinated, in whole or in part,” to “gerrymandering for unfair partisan political advantage.” Br. 30. Once again, the U.S. Supreme Court and the North Carolina, New Hampshire, and Kansas Supreme Courts have rejected that approach. *See Rucho*, 588 U.S. at 715-16; *Harper*, 886 S.E.2d at 404; *Brown*, 313 A.3d at 764-65; *Rivera*, 512 P.3d at 184-85. In the first place, it is unclear how courts should select *which* traditional principles to examine in this subordination inquiry. *See Rucho*, 588 U.S. at 715. After all, there are “myriad” such principles, and selecting which to employ and striking a “balance” between them is inherently a policy question for the “legislature.” *Alexander*, 602 U.S. at 24. Moreover, these criteria are not politically neutral and can have a dramatic effect on the plan’s “partisan distribution[.]” *Rucho*, 588 U.S. at 715. Thus, under LWFSC’s proposed test, a redistricting plan “could be constitutional or not depending solely on what mapmakers said they set out to do” or how courts select or balance traditional principles by which to review the plan. *Id.* “That possibility illustrates” that this proposed approach “is indeterminate and arbitrary.” *Id.*

Furthermore, adopting this approach would simply return courts to “the original unanswerable question (How much political motivation and effect is too much?).” *Id.* at 716. In other words, courts would have to determine how much deviation from whichever traditional principles they selected for judicial review would suffice to prove unconstitutional partisan gerrymandering. *See id.* That unsolvable problem underscores that this approach fails “to articulate a standard or rule” courts can consistently and neutrally apply. *Id.*

Fourth, LWFSC offers a variety of political science-based metrics and redistricting simulations, *see* Br. 17-18, 31, but those metrics and simulations provide no “satisfactory criteria for a judicial determination,” *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460, as North

Carolina’s experience proves. In particular, the North Carolina Supreme Court initially adopted two of the metrics L WVSC invokes, “the Mean-Median Difference and Efficiency Gap metrics,” as its “bright-line standards” for identifying unconstitutional partisan gerrymandering. *Harper*, 886 S.E.2d at 429; *compare* Br. 17. But it later abandoned that approach when those metrics proved unworkable. For one thing, “utilization of these two tests ... requires a host of policy determinations” because the results change when “different redistricting software, partisan election data, and calculation methods” are used as inputs in them. *Harper*, 886 S.E.2d at 429. Thus, these metrics allow legislatures, litigants, and putative expert witnesses to calculate scores on these metrics “in whatever way [they] s[ee] fit.” *Id.* at 430.

That is precisely what happened in North Carolina, where the General Assembly, technical advisors, litigants, and even the courts “calculated slightly different scores” on these metrics for the same redistricting plans. *Id.* at 429. “These varying results prove that the use of two seemingly straightforward fairness metrics actually involves a multitude of policy choices” beyond the competence of courts. *Id.* at 430. In fact, adopting any of these metrics as a standard of judicial decision—with or without prescribing which software, election data, or calculation methods—runs roughshod over “the well-established presumption” that a legislature’s enactments are constitutional and improperly “replace[s] the [legislature’s] discretionary policymaking authority” with the courts’ policy judgment. *Id.* at 431. The North Carolina Supreme Court therefore gave up on those metrics and held that partisan gerrymandering claims are “nonjusticiable.” *Id.* at 430-31; *see also Rucho*, 588 U.S. at 711-12 (rejecting proposed “sensitivity testing” as a metric of partisan gerrymandering); *Brown*, 313 A.3d at 773-76; *Rivera*, 512 P.3d at 176.

The “simulation” and “ensemble” analyses that L WVSC references, *see* Br. 31 nn.23, 25; 40, are equally fraught and freighted with policy decisions outside the judicial province. In fact,

LWVSC fails to mention that in *Alexander*—which post-dates the cases LWVSC cites, *see id.* at 17-18; 31 nn.23, 25; 40—the U.S. Supreme Court rejected simulation and ensemble analyses related to the Enacted Plan as “flawed” and nonprobative, *see* 602 U.S. at 24. That was so because those analyses “ignored certain traditional districting criteria” and did “not replicate the myriad considerations that” the General Assembly “balance[d] as part of” the Plan. *Id.* (quotation marks omitted).

On LWVSC’s own description, Dr. Mattingly and Dr. Herschlag’s analysis related to the Enacted Plan suffers the same flaw. *See* Br. 17-18, 40. LWVSC represents that the analysis drew sample plans to comply with the criteria of “contiguity, equipopulation, county preservation, compactness, and adherence to the Voting Rights Act.” *Id.* at 18. But LWVSC makes no representation that these plans comported with *other* traditional criteria the General Assembly used to draw the Enacted Plan, such as preserving district cores, maintaining communities of interest formed around the Benchmark Districts, and constituent consistency. 10/13/22 Trial Tr. 1848-49 (Ex. 10) (Campsen); *see Colleton Cnty.*, 201 F. Supp. 2d at 649; *Backus*, 857 F. Supp. 2d at 560. Thus, Dr. Mattingly and Herschlag’s analysis, like the analyses offered by LWVSC’s counsel in *Alexander*, is unprobative and unpersuasive. *See Alexander*, 602 U.S. at 24-33.⁷

Finally, the four pre-*Alexander* cases LWVSC cites are of no moment. LWVSC’s own descriptions reveal that none of those cases treated those metrics as a standard of judicial decision, but instead considered them only as evidence that might bear on alleged partisan gerrymandering. *See* Br. 31 nn.22-25 (discussing *Carter v. Chapman*, 270 A.3d 444 (Pa. 2022); *Graham v. Adams*,

⁷ LWVSC also quotes Dr. Kosuke Imai, *see* Br. 9, without disclosing that he was one of the putative experts whose analysis the U.S. Supreme Court rejected in *Alexander* because it omitted “obvious step[s],” suffered from “conspicuous failure[.]” in its controls, “exhibited ... serious flaw[s],” and rested on “a blinkered view of the redistricting process,” 602 U.S. at 24-27.

684 S.W.3d 663 (Ky. 2023); *League of Women Voters v. Ohio Redistricting Comm’n*, 192 N.E.3d 379 (Ohio 2022); *Harkenrider v. Hochul*, 204 A.D.3d 1366 (N.Y. App. Div. 2022)). Moreover, two of those cases arose in states, Ohio and New York, where the state constitution explicitly outlaws partisan gerrymandering. *See League of Women Voters*, 192 N.E.3d 379; *Harkenrider*, 204 A.D.3d 1366. The third applied a judicially crafted rather than a constitutionally prescribed standard and, thus, would have violated this Court’s political question doctrine. *See Carter*, 270 A.3d 444; *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460. And the fourth also applied a judge-made standard but *rejected* the partisan gerrymandering claim on the merits. *See Graham*, 684 S.W.3d 663. Thus, if anything, these cases confirm that LWVSC’s “extreme partisan gerrymandering” claim, Br. 18, is nonjusticiable under this Court’s controlling precedent.

3. LWVSC’s other arguments fail to establish justiciability.

LWVSC offers a panoply of other arguments, but none suffices to establish that its suit is justiciable. *First*, LWVSC argues that “this Court is duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional.” Br. 42 (quoting *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460-61). But the very case it quotes confirms that the Court cannot review legislative actions where, as here, “the duty asserted can[not] be judicially identified and its breach judicially determined [and] the right asserted can[not] be judicially molded.” *Id.* at 43 (quoting *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460).

Second, LWVSC asserts that its suit is “not one of the[] ... narrow class of cases that present nonjusticiable political questions” under this Court’s jurisprudence. *Id.* at 44. It concedes, however, that “this Court’s political question doctrine prohibits the Court from encroaching on matters explicitly reserved to other branches of government.” *Id.* And it further concedes that “redistricting” is “constitutionally assigned to the Legislature.” *Id.* at 41.

It contends, however, that its suit does not implicate that “task” because it asks the Court to “review the constitutionality of the congressional redistricting plan,” not “to try its hand at redistricting.” *Id.* at 41-42. This contention is untenable: Even if it does not ask the Court to draw a plan, L WVSC *does* ask the Court to substitute its judgment for the General Assembly’s on the “policy choices and value determinations” attendant to that task. *SCPIF*, 369 S.C. at 142-43. The General Assembly, moreover, would be bound by whatever policy judgments the Court makes in this case whenever it conducts congressional redistricting in the future. Thus, whether the Court draws a plan or passes on the Enacted Plan’s constitutionality, any decision in this case necessarily substitutes the Court’s judgment for—and brings it into “conflict with”—the “coequal” General Assembly to whom the Constitution entrusts those policy judgments. *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460; S.C. Const., art. VII § 13.

Third, L WVSC argues that the lack of a clear standard for adjudicating excessive partisan gerrymandering claims does not make such claims nonjusticiable. *See* Br. 43. L WVSC relies upon the Court’s decision in *Abbeville II* for the proposition that “difficulty in defining the precise parameters of constitutionally acceptable behavior ... does not necessarily signify” nonjusticiability. *Id.* (quoting *Abbeville II*, 410 S.C. at 664, 767 S.E.2d at 181). L WVSC even goes so far as to argue that “this case is much simpler than the Education Clause claim that this Court recognized in *Abbeville*.” *Id.* at 48. L WVSC thus apparently missed this Court’s subsequent order *overruling* its decision in *Abbeville II* as “violative of separation of powers.” Order at 1, *Abbeville Cnty. Sch. Dist. v. State*, Appellate Case No. 2007-065159 (Nov. 17, 2017).

Fourth, L WVSC’s attempt to analogize its excessive partisan gerrymandering claim to lines of precedent applying “tests developed to assess adherence to important, if imprecise, principles,” Br. 47, falls flat. On L WVSC’s description, those lines of precedent involve judicial

“tests,” *id.*, whereas here it has failed to articulate a workable test, *see supra* Parts I.B.1-2. In particular, the questions of “voluntariness of confession[s],” constitutionality of “*Terry* stop[s],” and constitutionality of laws under the right to keep and bear arms, *see* Br. 47, all “involve constitutional ... provisions” and well-defined bodies of law “confining and guiding the exercise of judicial discretion.” *Rucho*, 588 U.S. at 716; *see also Brown*, 313 A.3d at 770 (concluding that a claim involving “the fundamental right to keep and bear arms” is justiciable but a claim of excessive partisan gerrymandering is not).

Finally, L WVSC argues that “declining review” here will lead to the “dire” consequence of “unchecked legislative tyranny” by the General Assembly. Br. 49. Unsurprisingly, it provides no support for this overheated allegation. None exists. Legislators “are ultimately accountable both to the voters and their own conscience.” *Rivera*, 512 P.3d at 181. “[D]emocratic accountability wielded by voters is woven into the very fabric of our government and will—undoubtedly—have its say in the matter.” *Id.* L WVSC identifies no “legislative tyranny” in North Carolina, *see Harper*, 886 S.E.2d at 393, New Hampshire, *see Brown*, 313 A.3d 760, or Kansas, *see Rivera*, 512 P.3d 168—not to mention *the entire Nation*, *see Rucho*, 588 U.S. 684—since courts of last resort there have held that partisan gerrymandering claims are nonjusticiable.

L WVSC’s bald allegation of “legislative tyranny” by the General Assembly is absurd. The Court should dismiss the Complaint.

II. L WVSC FAILS TO STATE A CAUSE OF ACTION UNDER THE SOUTH CAROLINA CONSTITUTION.

Even if L WVSC’s partisan gerrymandering claim were justiciable, the Court still should dismiss. L WVSC’s Complaint fails to state “a cause of action” under the Free and Open Elections Clause, the Equal Protection Clause, the Free Speech Clause, or article VII, section 13. Rule 12(b)(6), SCRPC.

A. Partisan Gerrymandering Claims Fail Under The Free And Open Elections Clause.

The Free and Open Elections Clause provides: “All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.” S.C. Const. art. I, § 5. As explained, the North Carolina Supreme Court and New Hampshire Supreme Court have held that partisan gerrymandering claims are nonjusticiable under their states’ election-related clauses. *See Harper*, 886 S.E.2d at 432-33 (Free Elections); *Brown*, 313 A.3d at 770 (Free and Equal Elections). The U.S. Supreme Court reached the same holding under the Elections Clause, Guarantee Clause, and article I, section 2 of the U.S. Constitution, *see Rucho*, 588 U.S. at 717-18, as did the Kansas Supreme Court under that state’s Right To Vote Clause, *Rivera*, 512 P.3d at 178-87. This Court should follow suit and hold that partisan gerrymandering claims are nonjusticiable under the Free and Open Elections Clause. *See supra* Part I.

In all events, L WVSC has failed to state a cause of action under the Free and Open Elections Clause because the Clause’s guarantee of “free” and “open” elections and an “equal right to elect officers,” S.C. Const., art. I, § 5, does not create a partisan gerrymandering claim. This Court has construed the Clause on only one occasion. *See Cothran v. W. Dunklin Pub. Sch. Dist. No. 1-C*, 189 S.C. 85, 200 S.E. 95 (1938). In *Cothran*, the Court held that the equal “right to vote” is the right to be “left in the untrammelled exercise” of the franchise free of any “impediment or restraint ... whereby he shall be hindered or prevented from participation at the polls.” *Id.* at 97 (quoted at Br. 29). Thus, the Court explained that “an election is free and equal” when:

it is public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Id. Applying that construction, the Court struck down a statute that restricted the right to vote in a local election to those “who return real or personal property for taxation in the school district” because it “takes from the qualified voter who does not return real or personal property for taxation the rights guaranteed by the Constitution.” *Id.*

LWVSC seeks to stretch the Clause and *Cothran* beyond this straightforward construction, but that effort fails. LWVSC points to the Court’s statement in *Cothran* that “the vote of every elector must be granted equal influence with that of every other elector.” *Id.* (quoted at Br. 29). It argues that this language conveys to all voters a right to equal “political influence” on the *outcome* of elections and that partisan gerrymandering violates this purported right to voters’ preferred “partisan outcome” in elections. Br. 27, 29.

LWVSC’s argument “runs headlong into the fundamental democratic principle that the one who receives the most votes wins, and the others lose, thus leaving them with no voice.” *Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020). The Clause’s guarantee of an “equal right to vote” (or, as construed in *Cothran*, “equal influence”), S.C. Const., art. I, § 5, is satisfied when every qualified voter has an unhindered *opportunity* to cast a ballot, *Cothran*, 189 S.C. at 97, 200 S.E. 95. In that scenario, every voter gets one vote and has an “equal influence with that of every other elector.” *Id.* The Enacted Plan fully upholds that right because it does not prevent *any* qualified voter from casting a ballot. *Id.*

Indeed, as the very case cited by LWVSC explains, the equal right to *vote* and to “the same influence as that of any other voter” is not a “right to have one’s chosen candidate *win*.” *Graham*, 684 S.W.3d at 684-85 (emphasis original) (cited at Br. 26); *see City of Mobile v. Bolden*, 446 U.S. 55, 77 n.24 (1980) (plurality op.) (explaining that the “right to participate in elections on an equal basis with other qualified voters does not entail a right to have one’s candidates prevail”). The

equal right to vote, therefore, is not a right to aggregate one's vote with the votes of like-minded voters and achieve a "partisan outcome" in the election. Br. 29; *see Bolden*, 446 U.S. at 77 ("[T]his right to equal participation in the electoral process does not protect any 'political group,' however defined, from electoral defeat."). The Free and Open Elections Clause protects an individual's right to vote; it does not create a right for political parties or their members to elect their preferred candidates. *See, e.g., Harper*, 886 S.E.2d at 439 (partisan gerrymandering "do[es] not implicate" Free Elections Clause); *id.* at 442 ("that a redistricting plan diminishes the electoral power of members of a particular political party do[es] not violate" constitution).

Moreover, LWVSC's notion of an equal right to "political influence" and "partisan outcome[s]," Br. 27-29, is "vague" and "not derived from any express provision in the constitution," *Harper*, 886 S.E.2d at 424. Rather, it "seem[s] to be grounded in a desire for some form of proportionality [and] 'fair' ... representation." *Id.* (overruling prior holding that Free Elections Clause confers right "to vote on equal terms and to substantially equal voting power," "the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views," and "right to aggregate votes on the basis of partisan affiliation" (quotation marks omitted)). "What matters for purposes" of the Free and Open Elections Clause, however, "is not *whose* preferred candidate wins, but rather that each voter's vote receives the same weight as each and every other vote." *Graham*, 684 S.W.3d at 685 (emphasis original). The Enacted Plan "in no way infringe[s] upon that right," *id.*, so it does not even implicate, let alone violate, the Clause.

The two other cases from this Court LWVSC cites confirm this textual reading. In *Gardner v. Blackwell*, which did not involve the Free and Open Elections Clause, the Court held that restricting ballot access to Democratic and Republican candidates violated "the free exercise of

the right of suffrage” because it denied voters “who are not members of the Democratic or Republican Parties” of the equal right to vote, not of some right to a particular outcome. 167 S.C. 313, 166 S.E. 338, 342 (1932). And in *State v. Huntley*, the Court struck down primary election rules that limited participation to voters whose names were included “upon the club roll of some political party” because it deprived qualified voters whose names were not so included of any opportunity to vote at all. 167 S.C. 476, 166 S.E. 637, 639-40 (1932).

LWVSC’s proposed construction of the Clause simply proves too much. If the Clause did convey a right to voters’ preferred electoral outcomes, South Carolina courts would be called upon to review *every* redistricting plan—and *every election*—across the State to ensure that every voter’s equal right to his or her preferred “partisan outcome” had been upheld. Br. 27; *see Harper*, 886 S.E.2d at 427. South Carolina courts would thus be “embroil[ed] ... in every county, city, and district” to “ensur[e] that the makeup of every city council, county commission, or local board of education adequately reflected the distribution of Republicans and Democrats in the corresponding locality.” *Harper*, 886 S.E.2d at 427; *see also Brown*, 313 A.3d at 780.

Merely to point out this untenable result is to refute LWVSC’s construction. And history confirms the point: That the Court has *not* been called upon to ensure that every districting plan and election in South Carolina comports with LWVSC’s notion of “equal influence” confirms that notion is wrong. *See, e.g., Harper*, 886 S.E.2d at 438 (“Although the free elections clause has been a part of our constitution since 1776, this Court has rarely been called upon to interpret this provision because its language is plain: it protects voters from interference and intimidation in the voting process,” not a right to particular electoral outcomes).

LWVSC cites three out-of-state cases, but none supports its reading of the Clause. The first is the Kentucky Supreme Court’s decision in *Graham*, *see* Br. 26, which, as discussed above,

refutes L WVSC’s reading. The second is the New Mexico Supreme Court’s decision in *Grisham*, 539 P.3d 272 (cited at Br. 26). That court’s construction of the New Mexico Free and Open Elections Clause to require that each “vote, when cast, shall have the same influence as that of any other voter,” 539 P.3d at 282, is unremarkable. As explained above, the South Carolina iteration of that guarantee is satisfied when every qualified voter has an opportunity to cast a ballot—an opportunity the Enacted Plan fully guarantees. *See, e.g., Cothran*, 189 S.C. at 97, 200 S.E. 95. And to the extent the New Mexico Supreme Court upheld a partisan gerrymandering claim, it did so under that state’s Equal Protection Clause for reasons that are unpersuasive and inapposite here. *See infra* Part II.B.

That leaves the Pennsylvania Supreme Court’s decision in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (cited at Br. 30, 32). That decision is also inapposite. At the threshold, to identify partisan gerrymandering, the Pennsylvania Supreme Court adopted a traditional-principles-subordination analysis that the U.S., North Carolina, New Hampshire, and Kansas Supreme Courts have all rejected. *Compare id.* at 814-17, *with Rucho*, 588 U.S. at 715-16; *Harper*, 886 S.E.2d at 404; *Brown*, 313 A.3d at 764-65; *Rivera*, 512 P.3d at 184-85; *see supra* Part I.B.2. Moreover, other state supreme courts have rejected attempts to analogize their respective state constitutions to Pennsylvania’s unique Free and Equal Election Clause and case law. *See, e.g., Brown*, 313 A.3d at 778-79; *Graham*, 684 S.W.3d at 685-86.

This Court should do the same. In the first place, the text of Pennsylvania’s Free and Equal Elections Clause “plainly is not ... analogous” to the text of the Free and Open Elections Clause. *Brown*, 313 A.3d at 778. The Pennsylvania Clause states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. On its face, therefore, it differs from the Free and Open Elections

Clause. *See* S.C. Const., art. I, § 5. For its part, “the Pennsylvania Supreme Court does not consider” the South Carolina Clause to be “analogous” to the Pennsylvania Clause, *Brown*, 313 A.3d at 779: When that court listed states that it considers to have analogous clauses, it did not include South Carolina, *see League of Women Voters*, 178 A.3d at 808 n.69, 813 n.71.

In fact, if anything, the Free and Open Elections Clause more closely resembles New Hampshire’s Free and Equal Elections Clause, which states: “All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.” N.H. Const. pt. I, art. 11. Thus, that the New Hampshire Clause does not give rise to a justiciable partisan gerrymandering claim, *see Brown*, 313 A.3d at 770, confirms that the Free and Open Elections Clause does not either.

Moreover, the Pennsylvania Supreme Court’s holding that the Pennsylvania Clause creates a partisan gerrymandering claim relied upon that state’s “centuries-old and unique history,” which “has influenced ... the evolution of the text of the ... Clause, as well as [the] Court’s interpretation of [it]” across many prior cases. *League of Women Voters*, 178 A.3d at 804. In particular, the Pennsylvania Clause arose “against the backdrop of ... intense and seemingly unending regional, ideological, and sectarian strife” and “must be understood then as a salutary effort ... to end ... the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered.” *Id.* at 808-09.

This unique history differentiates Pennsylvania from other states. *See Brown*, 313 A.3d at 779; *Graham*, 684 S.W.3d at 686. Indeed, even though Kentucky’s Free and Equal Elections Clause was borrowed “verbatim” from the Pennsylvania Clause—and Kentucky courts generally consider Pennsylvania cases construing constitutional rights “persuasive”—the Kentucky

Supreme Court rejected an analogy to Pennsylvania law and declined to uphold a partisan gerrymandering claim brought under the Kentucky Clause. *See Graham*, 684 S.W.3d. at 686.

The Free and Open Elections Clause is textually dissimilar from the Pennsylvania Clause; this Court has not previously construed it as the Pennsylvania Supreme Court has construed the Pennsylvania Clause; and L WVSC makes no argument that South Carolina shares Pennsylvania’s “unique history” (because it does not). L WVSC has no cause of action under the Clause.

B. Partisan Gerrymandering Claims Fail Under The Equal Protection Clause.

The Equal Protection Clause provides in relevant part that no person “shall ... be denied the equal protection of the laws.” S.C. Const. art. I, § 3. The U.S., North Carolina, New Hampshire, and Kansas Supreme Courts have all held that partisan gerrymandering claims brought under equal protection clauses are nonjusticiable. *See Rucho*, 588 U.S. at 710-18; *Harper*, 886 S.E.2d at 432-43; *Brown*, 313 A.3d at 770-82; *Rivera*, 512 P.3d at 178-187; *supra* Part I. The Kentucky Supreme Court has also rejected a partisan gerrymandering brought under that state’s Equal Protection Clause on the merits. *See Graham*, 684 S.W.3d at 687.

This Court should reject L WVSC’s equal protection theory as well. Partisan gerrymandering does not violate equal protection because it “has no impact upon the right to vote on equal terms.” *Harper*, 886 S.E.2d at 441. It “does not alter individual *voting power* so long as each voter is permitted to (1) vote for the same number of representatives as voters in other districts, and (2) vote as part of a constituency that is similar in size to that of the other districts.” *Id.* at 441. The Enacted Plan satisfies that standard: It allows every voter to cast a ballot for a congressional representative and draws each district to be “similar in” population “size.” *Id.*

If more were somehow needed, L WVSC has presented no argument under the appropriate level of scrutiny. Because political identity is not a suspect class and partisan motive is not an invidious purpose, classifying voters on the basis of partisan affiliation “survive[s] an equal

protection challenge so long as it rests on some rational basis.” *McLeod v. Starnes*, 396 S.C. 647, 655-56, 723 S.E.2d 198, 203 (2012); *see also Graham*, 684 S.W.3d at 687. Under that deferential standard, “a classification is presumed reasonable and will remain valid unless and until the party challenging it proves beyond a reasonable doubt that there is no admissible hypothesis upon which it can be justified.” *McLeod*, 396 S.C. at 656, 723 S.E.2d at 203 (quotation marks omitted).

LWVSC does not even attempt to show that the Enacted Plan fails rational basis scrutiny, *see* Br. 32-37, so its equal protection claim fails, *see McLeod*, 396 S.C. at 656, 723 S.E.2d at 203. LWVSC thus resorts to arguing that heightened scrutiny applies because, in its view, the Plan burdens the fundamental right to vote. *See* Compl. ¶¶ 189-90; Br. 32-33. To be sure, “[r]estrictions on the right to vote on grounds other than residence, age, and citizenship generally violate the Equal Protection Clause and cannot stand unless [they] promote a compelling state interest.” *Sojourner v. Town of St. George*, 383 S.C. 171, 176, 679 S.E.2d 182, 185 (2009). But, as explained above, the Enacted Plan does not restrict anyone’s right to vote. *See supra* Part II.A; *Harper*, 886 S.E.2d at 441-42.

LWVSC’s theory to the contrary again posits that some voters’ preferred candidate will not win and, thus, those voters will not receive their preferred “partisan outcome” under the Enacted Plan. Br. 27, 33. But the Constitution does not “guarantee such a right” to have one’s preferred candidate win, “nor logically could it.” *Graham*, 684 S.W.3d at 685; *Bolden*, 446 U.S. at 77 & n.24; *see supra* Part II.A. Thus, “that a redistricting plan diminishes the electoral power of members of a particular political party do[es] not violate” equal protection. *Harper*, 886 S.E.2d at 441-42.

LWVSC’s fallback reliance on this Court’s decision in *Burriss v. Anderson County Board of Education*, *see* Br. 33, is similarly misplaced. *Burriss* held that the Equal Protection Clause

prohibits the “debasement or dilution of the weight of a citizen’s vote,” which “is as nefarious as an outright prohibition on voting.” 369 S.C. 443, 451, 633 S.E.2d 482, 486 (2006). LWFSC omits that *Burriss* recited this unremarkable proposition while discussing the one-person, one-vote requirement. *See id.* In that context, “[v]ote dilution” simply “refers to the idea that each vote must carry equal weight,” that is, “each representative must be accountable to (approximately) the same number of constituents.” *Rucho*, 588 U.S. at 709. “It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.” *Id.* at 708; *Harper*, 886 S.E.2d at 410-12; *see also Brown*, 313 A.3d at 769 (one-person, one-vote claims justiciable but partisan gerrymandering claims are not).

LWFSC’s citations to out-of-state authorities, *see* Br. 34, fare no better. One did not involve redistricting. *See Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006). Another *rejected* a partisan gerrymandering claim; its holding that a “reapportionment plan violated [the] state, but not federal, equal protection clause,” Br. 34, addressed an inapposite claim of “geographic discrimination,” *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1367-72 (Alaska 1987).

That leaves the New Mexico Supreme Court’s decision in *Grisham*, but that decision is unpersuasive for several reasons. For one thing, it declined to resolve the fundamental question of how much partisan gerrymandering is too much. *See* 539 P.3d at 290; *compare supra* Part I.B. For another, it adopted Justice Kagan’s three-part test that the U.S., North Carolina, and New Hampshire Supreme Courts have rejected. *Compare* 539 P.3d at 289-90, *with Rucho*, 588 U.S. at 710-13; *Harper*, 886 S.E.2d at 410-411; *Brown*, 313 A.3d at 780; *supra* Part I.B.2.

Finally, LWFSC’s attempt to derive an equal protection claim from a cocktail of so-called “pro-democracy guarantees” in the Constitution, Br. 35-36, fails. Those other “guarantees” do not

prohibit partisan gerrymandering. As explained, the Free and Open Elections Clause does not do so. *See supra* Part II.A. LWVSC has never pled that the Popular Sovereignty Clause does so; in any event, it does not. *See Rucho*, 588 U.S. at 717-18 (rejecting partisan gerrymandering claim under federal popular sovereignty clause, article I, section 2 of the U.S. Constitution). Moreover, there is no precedent in this Court—let alone basis—to read the Equal Protection Clause to combine other constitutional provisions into granting rights they do not grant on their own.

And contrary to LWVSC’s representations, *see* Br. 35-36, the New Mexico Supreme Court did not hold otherwise. Instead, it noted that other provisions of that state’s constitution “support that the right to vote is of paramount importance.” *Grisham*, 539 P.3d at 282. There is no dispute in this case that the right to vote is important. *See, e.g., Bailey*, 430 S.C. at 271, 844 S.E.2d at 391-92 (acknowledging that “the right to vote is a cornerstone of our constitutional republic” but dismissing suit as nonjusticiable political question). The question is whether the Enacted Plan violates the Equal Protection Clause. It does not. LWVSC has no cause of action.

C. Partisan Gerrymandering Claims Fail Under The Free Speech Clause.

The Free Speech Clause directs that “[t]he General Assembly shall make no law ... abridging the freedom of speech or of the press; or the right of the people peaceably to assemble.” S.C. Const. art. I, § 2. Every court to have addressed partisan gerrymandering claims under free speech or free assembly clauses has rejected them. *See Rucho*, 588 U.S. at 518; *Harper*, 886 S.E.2d 393; *Brown*, 313 A.3d 760; *Rivera*, 512 P.3d 168; *Graham*, 684 S.W.3d at 688.

This Court should as well. *See, e.g., Charleston Joint Venture v. McPherson*, 308 S.C. 145, 151 n.7, 417 S.E.2d 544, 548 n.7 (1992) (construing Free Speech Clause as coextensive with First Amendment). Redistricting plans, including the Enacted Plan, place “no restrictions on speech, association, or any other First Amendment activities.” *Rucho*, 588 U.S. at 713. All individuals in South Carolina remain “free to engage in those activities no matter what the effect

of [the Enacted Plan] may be on their district.” *Id.* at 713-14; *see also Harper*, 886 S.E.2d at 443 (“Associational rights guarantee the freedom to *participate in* the political process; they do not guarantee a favorable outcome.”); *Graham*, 684 S.W.3d at 688.

Moreover, LWVSC’s allegation that the Enacted Plan constitutes viewpoint discrimination or retaliation, *see* Compl. ¶¶ 197-99; Br. 37-39, is baseless. It also does not give rise to a cause of action in any event. Oddly, LWVSC claims it was “well understood” before *Rucho* that partisan gerrymandering amounts to viewpoint discrimination, but the only support it can muster is a solo concurrence by Justice Kennedy and two opinions (a concurrence and a dissent) by Justice Kagan. Br. at 37-38. Regardless, the *Rucho* majority and the North Carolina Supreme Court have rejected this theory because it would ban *any* consideration of politics in redistricting, not just the “extreme” partisan gerrymandering to which LWVSC limits its challenge. *See* Br. 18; *see Rucho*, 588 U.S. at 714; *Harper*, 886 S.E.2d at 443. LWVSC has no cause of action under the Free Speech Clause.

D. Partisan Gerrymandering Claims Fail Under Article VII, Section 13.

As explained, article VII, section 13’s operative “as it may deem wise and proper” term forecloses LWVSC’s partisan gerrymandering claim. *See supra* Part I.A.

Ignoring that term, LWVSC’s asserts that the Enacted Plan *violates* article VII, section 13. Specifically, LWVSC argues that provision prohibits the General Assembly from splitting counties in congressional redistricting plans except “to the degree necessary to ensure compliance with the Fourteenth Amendment, the Voting Rights Act, or other state or federal law.” Compl. ¶ 209; *see also* Br. 40. But article VII, section 13 does not say that. In fact, it does not say anything about keeping whole, or not splitting, counties. *See* S.C. Const. art. VII, § 13. It therefore bears no resemblance to the whole-county provisions in other states’ constitutions, such as the Maryland provision LWVSC holds up as a model. *See* Md. Const. art. III, § 4 (“Due regard shall be given to natural boundaries and the boundaries of political subdivisions.”) (cited at Br. 40); *see also* N.C.

Const. art. II, §§ 3, 5 (“No county shall be divided in the formation of a [senate or representative] district.”); Tenn. Const. art. II, § 6 (providing that “no county shall be divided in forming ... a district” that is “composed of two or more counties”); Iowa Const. art. III, § 37 (providing that “no county shall be divided in forming a congressional district”).

LWVSC thus resorts to two external sources in an effort to recast article VII, section 13 as a whole-county provision, but those sources fail to do the trick. *First*, LWVSC contends that the Enacted Plan violates a different constitutional provision, article VII, section 9, which directs that “[e]ach County shall constitute one election district.” S.C. Const. art. VII, § 9; *see* Br. 39. LWVSC, however, did not plead a violation of article VII, section 9 in its Complaint, so the Court may not consider, let alone grant relief on, this new theory. *See* Compl. ¶ 208 (seeking only “a declaration that the congressional redistricting plan ... violates S.C. Const. art. VII, § 13”); *Fraternal Order of Police v. S.C. Dep’t of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002); *Blackburn & Co., Inc. v. Dudley*, 289 S.C. 415, 418, 338 S.E.2d 151, 152 (1985); *Gainey v. Gainey*, 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983).

In any event, the Enacted Plan does not even implicate, let alone violate, article VII, section 9. That provision applies to “election district[s],” S.C. Const., art. VII, § 9, which are state and local legislative districts, *not* the “Congressional Districts” whose drawing article VII, section 13 entrusts to the General Assembly, *id.* art. VII § 13; *see also* *McLure v. McElroy*, 211 S.C. 106, 112, 44 S.E.2d 101, 105 (1947) (discussing “Election District[s]” and “Congressional Districts” separately), *overruled on other grounds by* *Weaver v. Recreation Dist.*, 328 S.C. 83, 492 S.E.2d 79 (1997). Moreover, LWVSC is wrong that article VII, section 9 constrains the General Assembly from splitting counties except where “necessary to ensure compliance with the Fourteenth Amendment, the Voting Rights Act, or other state or federal law.” Compl. ¶ 209; *see*

also Br. 40. In fact, this Court upheld the General Assembly's action "dividing [a] county into five areas of representation" for the purpose of "electing members of the County Council" in the absence of any federal or state law mandate to do so. *Gaud v. Walker*, 214 S.C. 451, 476-77, 53 S.E.2d 316, 327-28 (1949).

Second, LWFSC cites two federal District of South Carolina decisions that, it suggests, elevate preservation of county boundaries above other traditional criteria as a matter of South Carolina law. See Br. 39-40. One of those decisions is not good law because the U.S. Supreme Court vacated it. See *Burton*, 793 F. Supp. 1329, *vacated* 508 U.S. 968. LWFSC, moreover, does not mention that both cases involved the federal court's articulation of criteria for court-drawn remedial plans, not for judicial review of General Assembly-drawn plans. And it also does not mention that the District of South Carolina has abandoned the suggestion that preserving county boundaries is the "preeminent" consideration even in court-conducted redistricting. See *Colleton County*, 201 F. Supp. 2d at 646-49 (discussing *Burton* and *S.C. State. Conf. of NAACP v. Riley*, 533 F. Supp. 1178, 1180 (D.S.C. 1982)).

Indeed, in *Colleton County*, that court noted "the trend of population movement ... from small rural counties to urban/suburban and coastal counties" and explained that "[d]ifferent parts of a county may also lack commonality of interest, most notably those counties located in coastal and metropolitan regions of the state which are now divided rather starkly upon rural/resort or rural/urban lines." *Id.* at 648. It therefore declined to "find that the preservation of county lines continues to enjoy a preeminent role in the court's redistricting task." *Id.* at 649.

Instead, it gave preeminence to "maintaining the cores of ... districts" both as an independent principle and because "cores in existing districts are the clearest expression of the legislature's intent to group persons on a 'community of interest' basis [and] are drawn with other

traditional districting principles in mind.” *Id.* at 649. As explained, the Enacted Plan performs *better* on this principle than all proposed alternatives, complies with the one-person, one-vote requirement (which L WVSC’s proposed plan does not), honors requests from Congressman Clyburn, and even reduces the number county splits compared to the constitutional Benchmark Plan. *See supra* at 9-11. It was well within the General Assembly’s broad discretion to “deem” the Enacted Plan “wise and proper” under article VII, section 13. It does not violate that provision.

III. THE COURT MAY NOT GRANT L WVSC’S REQUESTED RELIEF.

L WVSC asks the Court, on the basis of its Complaint and brief alone, to “strike down” the Enacted Plan, “enjoin future congressional elections under [it],” and “to order the General Assembly to draw a new congressional redistricting plan.” Br. 4. The Court may not grant any of that relief, especially now.

A. L WVSC’s Record Is Incomplete, One-Sided, And Misleading.

L WVSC presents as fact a flawed and even misleading record that has not been subjected to the crucible of discovery and even treats as fact allegations in L WVSC’s Complaint. *See* Br. 17-18, 41. Unsurprisingly, that record is faulty, and Respondent Alexander unequivocally disputes L WVSC’s version of events. Respondent identifies a few of the most obvious examples here, which more than amply illustrate that the Court may not grant L WVSC’s requested relief.

First, L WVSC points to post-enactment statements and asserts that Respondents have “openly and repeatedly insisted that” the Enacted Plan is “a partisan gerrymander.” *Id.* at 14-16. Any such post-enactment statements, however, would be irrelevant because they have no bearing on the General Assembly’s intent in adopting the Enacted Plan. *See Creswick v. Univ. of S.C.*, 434 S.C. 77, 83, 862 S.E.2d 706, 709 (2021). But no such statements exist: No Respondent or proponent of the Enacted Plan has *ever* stated that the Enacted Plan is a partisan gerrymander. Instead, they have consistently *denied* that allegation. *See supra* at 11-12.

Second, LWVSC’s reliance on statements of the Enacted Plan’s *opponents*, *see* Br. 19, sheds no light on the General Assembly’s intent either, *see NLRB v. Fruit & Vegetable Packers & Warehousemen, Loc. 760*, 377 U.S. 58, 66 (1964) (“caution[ing] against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents” and noting “[i]t is the sponsors that we look to”). Likewise, the stray statements from U.S. Supreme Court Justices, *see, e.g.*, Br. 2, are of no moment here. The U.S. Supreme Court could not have passed on whether the Enacted Plan is a partisan gerrymander because that question is not justiciable in federal court, *see Rucho*, 588 U.S. at 718, and was not presented in *Alexander*. Moreover, even the Justices whom LWVSC cites never referred to the Enacted Plan as an “extreme” partisan gerrymander, the only form that LWVSC believes is actionable. *See* Br. 18. And in all events, LWVSC never explains why the Court should treat these statements as dispositive, when it asks the Court to *reject* the U.S. Supreme Court’s holding that partisan gerrymandering claims are nonjusticiable.

Third, LWVSC again badly misstates the record when it states that the decision to “split” Charleston, Richland, and Sumter counties in the Enacted Plan “was driven entirely by an illegitimate goal of entrenching partisan advantage” for Republicans. Br. 4. Those counties, however, were already split in the constitutional Benchmark Plan, so maintaining them “adhered to traditional [redistricting] principles.” *Backus*, 857 F. Supp. 2d at 560. Furthermore, Congressman Clyburn’s plan—which had no interest in “entrenching” Republican “partisan advantage,” Br. 4—also maintained those splits.

Moreover, keeping Charleston split was the only way to carry out Senator Campsen’s policy of keeping two representatives, including Congressman Clyburn, for that county. *See supra* at 12. Contrary to LWVSC’s representation, *see* Br. 19, many members of the public supported keeping the Charleston split, *see* List of Written Testimony (Ex. 4). And as even the *Alexander*

district court recognized, maintaining the split and “hook” shape in Richland that LWVSC now complains of kept Fort Jackson in District 2—as both District 2 incumbent Congressman Joe Wilson and Congressman Clyburn requested—and keeping the split in Sumter preserved African-American voters’ opportunity to elect their preferred candidate in District 6. *See S.C. Conf. of State NAACP v. Alexander*, 649 F. Supp. 3d 177, 194-96 (D.S.C. 2023), *reversed on other grounds* 602 U.S. 1 (2024); *see also* Br. 18-21.

Fourth, LWVSC does not even *mention* the traditional principle of preserving district cores, much less address the Enacted Plan’s compliance with that principle and resulting preservation of communities of interest and constituent consistency. *See supra* at 9-10.

Finally, LWVSC relies upon Dr. Mattingly and Dr. Herschlag’s analysis, which has not been disclosed to Respondents beyond LWVSC’s description in its Complaint. *See* Br. 17-18. According to LWVSC’s own description, that analysis suffers the same fatal flaw that doomed the putative expert analyses LWVSC’s counsel presented in *Alexander*. *See supra* Part I.B.2.

LWVSC’s record is woefully inadequate. The Court should reject its request for relief.

B. Granting Relief Would Raise A Significant Issue Under The Elections Clause.

The Elections Clause of the U.S. Constitution directs: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” U.S. Const. art. I, § 4, cl. 1. This “Clause expressly vests power to carry out its provisions in ‘the Legislature’ of each State, a deliberate choice that this Court must respect.” *Moore v. Harper*, 600 U.S. 1, 34 (2023). Thus, “state courts do not have free rein” in interpreting or applying state constitutions to election laws, including congressional redistricting plans, passed by state legislatures. *Id.*; *accord id.* at 38 (Kavanaugh, J., concurring).

In particular, “state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.” *Id.* at 36 (maj. op.). This means, among other things, that state courts cannot “impermissibly distort[]” state law “beyond what a fair reading require[s].” *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring); *accord Moore*, 600 U.S. at 39 (Kavanaugh, J., concurring) (endorsing this standard); *id.* at 34-36 (maj. op.) (holding that federal courts must review state courts’ treatment of state legislatures’ laws regulating federal elections).

As established, there is no support in the South Carolina Constitution’s text or history, this Court’s case-law, or any apposite authority for invalidating the Enacted Plan on LWVSC’s partisan gerrymandering theory. And there certainly is no defensible basis for doing so now on the misleading record LWVSC has presented to the Court. Simply stated, upholding LWVSC’s partisan gerrymandering theory and granting its requested relief would “transgress the ordinary bounds of judicial review” in violation of the U.S. Constitution. *Moore*, 600 U.S. at 36. At a minimum, it would raise a significant issue under the Elections Clause that may invite U.S. Supreme Court review. *See Brown*, 313 A.3d at 779 n.3 (“[I]n congressional redistricting cases, the Supreme Court has ‘an obligation to insure that state court interpretations of [state] law do not evade federal law.’” (quoting *Moore*, 600 U.S. at 34)).

CONCLUSION

The Court should reject LWVSC’s requested relief and dismiss the Complaint.

Respectfully submitted,

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