

## PARTISAN GERRYMANDERING CASES IN STATE SUPREME COURTS IN THE 2020 REDISTRICTING ROUND

*Jonathan Cervas,\* Bernard Grofman,\*\* Scott Matsuda,\*\*\*  
& Justine Kawa\*\*\*\**

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

—William J. Brennan<sup>1</sup>

### ABSTRACT

*After the U.S. Supreme Court opted out of policing partisan gerrymandering in its 2019 decision, Rucho v. Common Cause, if a redistricting plan was alleged to be a partisan gerrymander, that challenge needed to be brought in state courts. There are three*

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\* Ph.D., Assistant Teaching Professor, Carnegie Mellon Institute for Strategy & Technology, Carnegie Mellon University. The authors extend their sincere gratitude to the editorial staff of the *Albany Law Review*. Their invaluable assistance significantly improved earlier drafts and spared us the embarrassment of elementary arithmetic errors and incorrect legal citations. Additionally, they identified further references that bolstered our analysis. We would like to extend our special thanks to Kyle Durkee for his editorial support, as well as to Marie-Therese Witte and Noah Chase for their tireless efforts in ensuring accurate citations, formatting, and additional assistance.

\*\* Ph.D., Distinguished Professor, University of California, Irvine. Bernie Grofman would like to thank Dan Lowenstein, then on the law faculty at UCLA, for his first invitation (1985) to publish in a law review.

\*\*\* J.D., New York Law School. Scott graduated in 2022 and is currently working as a Research Attorney in the Hawaii State Senate Majority Research Office.

\*\*\*\* J.D., New York Law School.

<sup>1</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

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

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## I. INTRODUCTION

State courts can become involved in the redistricting process (a) when those with primary redistricting authority fail to enact a plan in a timely fashion or (b) when they are the site of litigation challenging a plan as violating requirements of the state’s own constitution or other elements of state law.<sup>2</sup> If they cannot motivate the primary redistricting authority to draw a constitutional map under specified time constraints, state courts can decide to draw their own map.<sup>3</sup> However, courts may do so only reluctantly, and they may allow the principal redistricting authority a second chance (or additional time) to provide a constitutional map before a court seeks to provide a map of its own.<sup>4</sup>

In this Essay, we limit ourselves to redistricting cases that came before state courts challenging plans for U.S. Congressional districts;<sup>5</sup> we are most interested in cases brought after the 2020

<sup>2</sup> Jonathan Cervas, Bernard Grofman & Scott Matsuda, *The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections*, 21 U.N.H. L. REV. 421, 423 (2023).

<sup>3</sup> See Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1131 (2005).

<sup>4</sup> See *Grove v. Emison*, 507 U.S. 25, 33 (1993) (“In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself.”); see also *Connor v. Finch*, 431 U.S. 407, 414 (1977) (“We have repeatedly emphasized that ‘legislative reapportionment is primarily a matter for legislative consideration and determination,’ . . . .” (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964))). See generally Persily, *supra* note 3 (providing guidelines for when courts should develop their own redistricting plans); Jeffrey M. Wice & Leonard M. Kohen, *Court Deference to State Legislatures in Redistricting After Perry v. Perez*, 11 ELECTION L.J. 431 (2012) (discussing how courts should handle legislative redistricting impasse).

<sup>5</sup> The issues in partisan gerrymandering challenges to state legislative maps are very similar to those for congressional maps, except for differences in specific provisions of state law regarding legislative redistricting. For example, in Missouri, in addition to the traditional redistricting criteria required for both legislative and congressional redistricting, legislative maps are further required to create districts that are proportional to the political party power in the state and are competitive. See MO. CONST. art. III, §§ 3, 7. Both Kentucky (congressional but not legislative) and North Carolina (legislative but not congressional) must further consider the preservation of communities of interest. *Redistricting Criteria*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/redistricting-and-census/redistricting-criteria> [<https://perma.cc/LCV8-JU87>] (July 16, 2021). Related issues arise in local redistricting, but most local elections are formally non-partisan in nature in that party labels are not on the ballot. *Nonpartisan Elections*, BALLOTEDIA, [https://ballotpedia.org/Nonpartisan\\_elections](https://ballotpedia.org/Nonpartisan_elections) [<https://perma.cc/EK2N-J2FR>]. Of course, even in non-partisan elections, the partisan orientations of many candidates may be known—at least to the more sophisticated voters. For example, in the City of Irvine, California, candidates for mayor in the twenty-first century have

census and decided before the November 2022 elections, but we will also provide some background on cases brought in the prior decade.<sup>6</sup> Most importantly, we focus on decisions about partisan gerrymandering.<sup>7</sup> Because of the Supreme Court's 2019 abdication

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included someone who sought the Democratic Party nomination for President, and another who was a Republican Party leader in the California Senate. See CITY OF IRVINE, MUNICIPAL ELECTION HISTORY 1971 TO PRESENT (Jan. 11, 2023), <https://legacy.cityofirvine.org/civica/filebank/blobload.asp?BlobID=17609> [<https://perma.cc/TFY8-J34B>]. However, we are not aware of any partisan gerrymandering challenges to districted maps drawn for non-partisan elections.

<sup>6</sup> Limitations in the time remaining to hold a trial and then to draw a new constitutional map may result in a court accepting the use of a challenged map for one election only, even though the evidence suggests the map is unconstitutional, and may later be proven unconstitutional. See *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). Under the *Purcell* principle, courts are, in effect, prohibited from interfering with an ongoing election process or one where the court concludes that there is not sufficient time to draw a remedial constitutional map with an adequate review of its properties. See *id.* Under the *Purcell* principle, decisions on some congressional redistricting cases brought in 2021 or 2022 were postponed until after the November 2022 election. This happened with several cases involving race-based challenges, e.g., *Merrill v. Milligan*, 142 S. Ct. 879, 879–82 (2022) (Kavanaugh, J., concurring) (citing *Purcell*, 549 U.S. at 5) (granting Alabama's motion to stay a lower court order to redraw a second majority-Black congressional district and allowing a likely unconstitutional map to be used for the 2022 election); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1233–34 (N.D. Ga. 2022) (finding that some parts of Georgia's legislative redistricting plans were unconstitutional racial gerrymanders, yet allowing the maps to be used for the 2022 election); *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 766–67 (M.D. La. 2022) (concluding “that Plaintiffs are substantially likely to prevail on the merits of their claims brought under Section 2 of the Voting Rights Act” and would require the drawing of a second Black-opportunity district). We do not discuss these or similar racial cases in any detail given our focus on cases that produced a final state court decision on whether a plan was an unconstitutional partisan gerrymander prior to the November 2022 election.

<sup>7</sup> See *infra* Table 3. We believe that cases involving claims about racial gerrymandering are at least equally important, and the implications of such claims are often overlapping with partisan gerrymandering claims. However, for federal elections and statewide elections most of these claims are held in federal court, not state court. See, e.g., *Allen v. Milligan*, 599 U.S. 1, 9 (2023) (reviewing a decision by “a three-judge [Federal] District Court sitting in Alabama” to “preliminarily enjoin[] the State [of Alabama] from using the districting plan it had recently adopted”); *S.C. State Conf. of the NAACP v. Alexander*, 649 F. Supp. 3d 177, 182 (D.S.C. 2023). After the Supreme Court held the coverage formula in Section 4(b) of the Voting Rights Act (VRA) unconstitutional in *Shelby County v. Holder*, 570 U.S. 529, 557 (2013), and essentially nullified the preclearance provisions of Section 5, federal courts have three primary avenues to deal with claims of race-related Constitutional violations: (a) race-based voter dilution claims brought under Section 2 of the VRA, as amended, see, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 34, 44–46 (1986) (laying out factors that must be proved before courts can consider the totality of the circumstances to determine whether electoral structure was discriminatory in results); (b) racial vote dilution claims brought directly under the 14th or 15th Amendments, see, e.g., *Mobile v. Bolden*, 446 U.S. 55, 58, 67, 70 (1980) (requiring discriminatory impact and intent); *Rogers v. Lodge*, 458 U.S. 613, 615 (1982); and (c) racial gerrymandering claims brought under the Equal Protection Clause of the 14th Amendment, where the claim is that race is the predominant factor used by mapmakers (a line of jurisprudence originating in *Shaw v. Reno*, 509 U.S. 630, (1993)), see, e.g., *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 258 (2015). As of July 2023, six states had Section 2 congressional challenges: Alabama, Arkansas, Georgia, Louisiana, Ohio, and Texas. Racial gerrymandering claims were brought in six states: Alabama, Arkansas, Georgia, Missouri, South Carolina, and Texas. See *Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our->

in *Rucho v. Common Cause* of any federal court responsibility to police partisan gerrymandering,<sup>8</sup> claims of partisan gerrymandering have become the exclusive domain of state courts.<sup>9</sup> In *Rucho*, a case on appeal from a North Carolina federal court, the U.S. Supreme Court definitively abdicated any *federal* responsibility for policing partisan gerrymandering, claiming, *inter alia*, that no judicially manageable standard allowed for courts to distinguish unconstitutional partisan gerrymandering from politics as usual, and, therefore, partisan gerrymandering claims presented a non-justiciable political question.<sup>10</sup> In the subsequent thirty-three

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work/research-reports/redistricting-litigation-roundup-0\ [https://perma.cc/5H96-ZDXV] (July 7, 2023). Intentional race discrimination claims were brought in seven states: Alabama, Arkansas, Florida, Georgia, Ohio, South Carolina, and Texas. *See id.* Other miscellaneous race-based claims were brought in six states: Arkansas, Florida, Kansas, Michigan, North Carolina, and Ohio. *See id.* While there was once doubt that Section 2 of the VRA would have its constitutionality upheld in future challenges, in *Allen* (decided on June 8, 2023), a 5-4 opinion written by Chief Justice Roberts affirmed the *Gingles* standards. *See Allen*, 143 S. Ct. at 1510. However, Justice Kavanaugh's concurrence suggests that all the issues related to the standards for enforcing Section 2 are not yet permanently settled. *See id.* at 1517–19 (Kavanaugh, J., concurring in part). While the various race-related cases are not directly about partisan gerrymandering, because minority voters are disproportionately Democratic, any plan that packs or cracks minority voters has partisan implications. Race-linked challenges were, for the most part, brought in federal courts. *See, e.g., id.* at 1498 (majority opinion); *Gingles*, 478 U.S. at 34; *Mobile*, 446 U.S. at 58; *Rogers*, 458 U.S. at 615. Challenges to congressional plans as partisan gerrymanders were exclusively litigated in state court, given that no claimant would have standing in federal court post-*Rucho*. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019). Thus, while racial claims are clearly relevant in terms of partisan outcome in congressional elections, we resist the urge to include them in our present Essay.

<sup>8</sup> *See Rucho*, 139 S. Ct. at 2506–07. The Supreme Court's decision in the *Rucho* case, though specifically dealing with North Carolina, reversed other lower federal court decisions about maps created during the 2010 redistricting round which had struck down congressional or legislative plans as egregious partisan gerrymanders. *See, e.g., Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016) (finding the redistricting plan enacted by the Wisconsin Legislature constituted an unconstitutional partisan gerrymander), *vacated*, 138 S. Ct. 1916 (2018), *remanded* No. 15-CV-421, 2019 U.S. Dist. LEXIS 111625, at \*3 (W.D. Wis. July 2, 2019) (dismissing the lawsuit in light of *Rucho*); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498 (D. Md. 2018) (concluding that “plaintiffs have sufficiently demonstrated that Maryland's 2011 redistricting law violates the First Amendment by burdening both the plaintiffs' representational rights and associational rights based on their party affiliation and voting history”), *vacated, Rucho*, 139 S. Ct. 2484.

<sup>9</sup> *See, e.g., Black Voters Matter Capacity Bldg. Inst., Inc. v. Fla. Sec'y of State*, No. SC2023-1671 (Fla. Jan. 24, 2024) (Fla. Cts. ACIS); *Rivera v. Schwab*, 512 P.3d 168 (Kan. 2022); *Graham v. Adams*, 684 S.W.3d 663 (Ky. 2023); *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 Md. Cir. Ct. LEXIS 9 (Mar. 25, 2022); *In re Cong. Dists. by N.J. Redistricting Comm'n*, 268 A.3d 299 (N.J. 2022); *Republican Party of N.M. v. Oliver*, No. D-506-CV-20220041, (N.M. Dist. Ct. Oct. 6, 2023) (Am. Redistricting Proj.); *Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. 2022); *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *overruled by* 886 S.E.2d 393 (N.C. 2023); *Adams v. DeWine*, 195 N.E.3d 74 (Ohio 2022); *Clarno v. Fagan*, No. 21CV40180, 2021 WL 5632371 (Or. Cir. Ct. Nov. 24, 2021); *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712, 2022 WL 21745734 (Utah Dist. Ct. Nov. 22, 2022).

<sup>10</sup> *See Rucho*, 139 S. Ct. at 2506–07 (concluding that “[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of

years after *Bandemer*, the Supreme Court neither agreed to any more specific and judicially manageable standards with which to decide partisan gerrymandering cases<sup>11</sup>—though some Justices enunciated proposed metrics,<sup>12</sup> nor has ever held a redistricting map to be unconstitutional.<sup>13</sup>

Prior to *Rucho*, state courts had largely been uninvolved with the issue of partisan gerrymandering.<sup>14</sup> While some states have direct language in their constitutions forbidding partisan gerrymandering (often language recently added via the initiative process), most states do not.<sup>15</sup> For such states, plaintiffs would have to bring a claim based on language in the state constitution (*e.g.*, about “free and open” elections) as a legal justification for court intervention.<sup>16</sup> Indeed, Justice Brennan argued in a 1977 law review article that individual rights could be protected to greater degrees in state courts and through state constitutions than under the federal constitution.<sup>17</sup>

While there has been work on the role of state courts as a check on partisan gerrymandering in the 2020 redistricting round, both in terms of an overview and in examining what happened in individual states (such as North Carolina, Virginia, and New York),<sup>18</sup> our

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authority in the Constitution, and no legal standards to limit and direct their decisions”). The Court’s abdication of responsibility for policing partisan gerrymandering came over thirty years after the Supreme Court had declared, in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering was justiciable in federal courts. *Id.* at 113. In *Bandemer*, however, the lower court’s finding of a partisan gerrymander was reversed because the Court’s majority held it necessary to show that the disfavored party was “shut out of the political process” and this showing was not made in the challenge to Indiana’s legislative map. *Id.* at 139–40, 143.

<sup>11</sup> See *Rucho*, 139 S. Ct. at 2491; *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004); see also League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 413–14 (2006).

<sup>12</sup> Compare *Bandemer*, 478 U.S. at 127–37 (plurality opinion), with *id.* at 161–62, 165–66 (Powell, J., concurring in part and dissenting in part).

<sup>13</sup> See *Rucho*, 139 S. Ct. at 2491.

<sup>14</sup> See *id.* at 2524 (Kagan, J., dissenting). However, an important exception is Florida. See League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 370 (Fla. 2015).

<sup>15</sup> See Cervas et al., *supra* note 2, at 453–54; see also *infra* Table 1.

<sup>16</sup> See Cervas et al., *supra* note 2, at 425. Litigants have brought novel arguments based on language in a state’s constitution dating back to a state’s founding documents, which often provide robust voting protections not found in the U.S. Constitution. See *id.* at 435; see also Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 233 (2019); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 94 (2014).

<sup>17</sup> Brennan, Jr., *supra* note 1, at 503 (“Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.”).

<sup>18</sup> See, *e.g.*, Cervas et al., *supra* note 2, at 426; Chad M. Oldfather, *Rucho in the States: Districting Cases and the Nature of State Judicial Power*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 111, 111 (2023); Aroosa Khokher, Note, *Free and Equal Elections: A New State Constitutionalism for Partisan Gerrymandering*, 52 COLUM. HUM. RTS. L. REV. 1, 1 (2020); Brett Graham, “Free and Equal”: James Wilson’s Elections Clause and Its Implications for Fighting

approach in this Essay is distinctive in being explicitly empirically focused on the types of evidence used by state courts, including social science evidence.<sup>19</sup> For the 2020 congressional redistricting round, we go beyond merely identifying the highest-level state court resolution of the challenge to look at the partisan decision breakdown on that court, as well as the differences in judicial reasoning and evaluation of empirical evidence found across justices both within and across states.<sup>20</sup> We are primarily interested in three issues:

- 1) How did state courts faced with a redistricting challenge based on a claim of a denial of equal treatment and *excessive* partisanship decide whether state law allowed them to address the actual aspects of the claim, rather than following the U.S. Supreme Court and treating the claim as non-justiciable? In seeking to answer this question, we distinguish between those states that had some direct prohibition on partisan gerrymandering from those where a prohibition must be inferred from long-existing provisions of the state constitution.<sup>21</sup>
- 2) The concept of partisan gerrymandering and appropriate metrics for its measurement remain controversial.<sup>22</sup> When state court justices did choose to

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*Partisan Gerrymandering in State Courts*, 85 ALB. L. REV. 799, 801 (2021); Richard Briffault, *Epic Fail: Harkenrider v. Hochul and New York's 2022 Misadventure in "Independent" Redistricting*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 251, 255 (2023); see also David Imamura, *The Rise and Fall of Redistricting Commissions: Lessons from the 2020 Redistricting Cycle*, 48 HUM. RTS. MAG. 14, 14 (2022); Alex Keena, *2021 Redistricting in Virginia: Evaluating the Effectiveness of Reforms*, 26 RICH. PUB. INT. L. REV. 85, 87 (2022).

<sup>19</sup> While we have most to say about direct challenges to maps as partisan gerrymanders, we also take notice of activities of a state court triggered by the failure of the principal redistricting authority to enact a new map in time for elections, since any court-drawn map will also have partisan consequences.

<sup>20</sup> See *infra* Table 3.

<sup>21</sup> See *infra* Table 1.

<sup>22</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019); see also Bernard Grofman, *Tests for Unconstitutional Partisan Gerrymandering in a Post-Gill World*, 18 ELECTION L.J. 93, 96 (2019); Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1508–10 (2018) (discussing the academic debate and contentions regarding the utility of the efficiency gap metric, partisan bias, and the mean-median difference metric). In *Rucho*, Chief Justice Roberts, writing for the majority, opined that “[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral” that would allow federal courts to determine partisan gerrymandering. *Rucho*, 139 S. Ct. at 2500. Most election law experts in the social sciences and related areas strongly dispute this. See Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELECTION L.J. 2, 4 (2007). And, although no agreement exists on the best metric, there is a widely shared view that egregious partisan gerrymanders will raise red flags for most proposed metrics. *Id.* at 22.

confront claims of partisan gerrymandering on the merits, what definition of partisan gerrymandering was used? We are particularly interested in what kind of empirical evidence was cited by the majority when it did find partisan gerrymandering—*e.g.*, measuring the extent of gerrymandering via metrics based on election data, and/or evaluating maps in terms of the degree to which traditional good government criteria were satisfied, and/or considering the process of map drawing and what it implied about partisan intent?<sup>23</sup>

- 3) Is there indirect evidence that the partisan predilections of the justices affected their decision about the presence of unconstitutional partisan gerrymandering in a map drawn by the state majority party? Namely, is this evidence in the form of apparent differences between the voting choices of justices who are sympathetic to that party as compared to justices who are sympathetic to the minority party?<sup>24</sup>

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

Table 1, incorporating data compiled in a 2023 study titled *The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections* by Jonathan Cervas, Bernard Grofman, and Scott Matsuda,<sup>25</sup> along with additional information collected by the present authors, reports on a state-by-state basis some basic data about the 2020 redistricting process collected in and around November 2022. The information in that table includes:

- 1) the number of Congressional Seats in the state;
- 2) what type of entity oversaw districting in each state;

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<sup>23</sup> See, *e.g.*, *America's Congressional Maps Are a Bit Fairer than a Decade Ago, but Even Fewer Seats in Congress Will Be Competitive*, ECONOMIST (June 2, 2022), <https://www.economist.com/graphic-detail/2022/06/02/americas-congressional-maps-are-a-bit-fairer-than-a-decade-ago> [<https://perma.cc/LC8F-BCDW>] (showing a graph comparing share of vote to predicted share of seats as a percent); Michael Li, *Anti-Gerrymandering Reforms Had Mixed Results*, BRENNAN CTR. FOR JUST. (Sept. 19, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/anti-gerrymandering-reforms-had-mixed-results> [<https://perma.cc/JP6J-ZHTN>] (considering the process of map drawing and what occurs with or without partisan influence); Cervas et al., *supra* note 2, at 449 (analyzing the extent to which gerrymandering affected a U.S. House vote). In this Essay we do not try to provide an independent evaluation of the features of initial or remedial congressional maps used in the 2022 election in terms of their partisan or other consequences.

<sup>24</sup> See *infra* Table 4.

<sup>25</sup> See Cervas et al., *supra* note 2, at 446–47 tbl.1, 456–57 tbl.4.



- 3) whether there was unified party control over redistricting and, if so, in favor of which party;
- 4) the states where partisan and racial gerrymandering claims *vis-à-vis* congressional districting were made;
- 5) which entity drew the congressional map;
- 6) whether the state had indirect language prohibiting partisan gerrymandering; and
- 7) whether the state had direct prohibitions on partisan gerrymandering in the law.

In the cases where a partisan gerrymandering challenge or a race-related challenge with *partisan* implications was brought, we distinguish between cases where the highest state court has already issued a ruling and those still pending.<sup>26</sup> For the partisan gerrymandering cases with a definitive court opinion, we indicate whether there was a ruling on the merits versus a finding by the state court that partisan gerrymandering was not a justiciable offense under that state's constitution. Where a court determined that partisan gerrymandering is justiciable, we identify whether that ruling favored plaintiffs.<sup>27</sup> To locate within a single table information for easy access to multiple factors that affected whether a partisan challenge was successful, we also include within this table some important information about the nature of the state constitutional provisions relevant to partisan gerrymandering. We show whether the state constitution provides either direct language prohibiting partisan gerrymandering (*e.g.*, a requirement that a plan neither favor nor disfavor any political party) or an indirect check in terms of language like that relied upon by the Pennsylvania Supreme Court when it overturned a congressional map under a state constitutional requirement for "free and equal" elections.<sup>28</sup>

**Table 1. Potential Partisan Gerrymanders and State Law**

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<sup>26</sup> See *infra* Table 1. In ten states (Alabama, Arkansas, Florida, Georgia, Louisiana, Michigan, North Carolina, Ohio, South Carolina, and Texas) there are still pending claims of racial gerrymandering as of July 2023. See *Redistricting Litigation Roundup*, *supra* note 7.

<sup>27</sup> See *infra* Table 1. Of course, new challenges might still be brought now that election outcomes are known, and there is a non-trivial chance that, in states under clear partisan control, new maps may be proposed for the 2024 election to improve the dominant party's expected seat margins. For a historical account of mid-decade redistricting, see ERIK J. ENGSTROM, *PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY* (Univ. of Mich. Press 2013).

<sup>28</sup> League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018).

State	Seats	Primary Authority for Drawing the Lines <sup>29</sup>	Party Control	Partisan or Racial Challenge <sup>30</sup>	Who Drew the 2022 Map	Free and Equal/Open	Direct Partisan Neutrality Requirement
AL	7	Leg	GOP	R	Leg		
AK <sup>31</sup>	1	-	-	-	-		
AZ	9	Comm.	SPLIT		Comm.	x	x
AR	4	Leg	GOP	R	Leg	x	
CA	52	Comm.	SPLIT		Comm.	x	x
CO	8	Comm.	SPLIT		Comm.	x	x
CT	5	Leg(C)	SPLIT	F	Court	x	
DE	1	-	-	-	-	x	
FL	28	Leg	GOP	P, R	Leg		x
GA	14	Leg	GOP	R	Leg		
HI	2	Comm.	SPLIT		Comm.		x
ID	2	Comm.	SPLIT		Comm.	x	x
IL	17	Leg	DEM		Leg	x	
IN	9	Leg(C)	GOP		Leg	x	
IA	4	Leg	GOP		Leg		x
KS	4	Leg	GOP	U	Leg		
KY	6	Leg	GOP	P	Leg	x	
LA	6	Leg	GOP	R	Leg		
ME	2	Leg	SPLIT		Leg		
MD	8	Leg	DEM	S	Leg (Court) <sup>32</sup>	x	
MA	9	Leg	DEM		Leg	x	
MI	13	Comm.	SPLIT		Comm.		x
MN	8	Leg	SPLIT	F	Court		
MS	4	Leg	GOP		Leg		
MO	8	Leg	GOP		Leg	x	
MT	2	Comm.	SPLIT		Comm.	x	x
NE	3	Leg	GOP		Leg	x	x
NV	4	Leg	DEM		Leg		
NH	2	Leg	SPLIT <sub>33</sub>	F	Court	x	
NJ	12	Comm.	SPLIT	U	Comm.		
NM	3	Leg	DEM	P	Leg	x	
NY	26	Comm. (Leg)	DEM <sup>34</sup>	S, P	Court		x
NC <sup>35</sup>	14	Leg	GOP	S	Court <sup>36</sup>	x	
ND	1	-	-	-	-		
OH	15	Leg (Comm.) <sup>37</sup>	GOP	S	Leg <sup>38</sup>		x
OK	5	Leg	GOP		Leg	x	
OR	6	Leg	DEM	U	Leg	x	x
PA	17	Leg	SPLIT	F	Court	x	
RI	2	Leg	DEM		Leg		
SC	7	Leg	GOP	R	Leg	x	
SD	1	-	-	-	-	x	
TN	9	Leg	GOP	R	Leg	x	
TX	38	Leg	GOP	R	Leg	x	
UT	4	Leg	GOP	P <sup>39</sup>	Leg	x	x
VT	1	-	-	-	-	x	

<sup>29</sup> Leg = Legislature; Comm. = Commission; Comm. (Leg) = Commission with Legislative Backup; - = One district; Leg(C) = Legislature with Commission Backup. In some states (Connecticut, Indiana, and Ohio), commissions may also be used as backup if there is no political agreement on a congressional plan.

<sup>30</sup> R = race-based challenge; S = successful partisan gerrymander challenge; U = unsuccessful partisan gerrymandering challenge; P = pending partisan gerrymandering challenge as of November 2022; F = litigation based on failure to draw a map in a timely fashion; N = no relevant litigation or state court action.

<sup>31</sup> In a state court challenge to the state legislative redistricting maps decided after the pre-November 2022 election cutoff we have been using, the Alaska Supreme Court expressly recognized that partisan gerrymandering is unconstitutional under the Alaska Constitution's equal protection doctrine. See *In re 2021 Redistricting Cases Matanuska-Susitna Borough*, 528 P.3d 40, 118 (Alaska 2023) (citing *Hickel v. Se. Conf.*, 846 P.2d 38, 45 & n.11 (Alaska 1992); *In re 2011 Redistricting Cases*, 274 P.3d 466, 468 (Alaska 2012)); see also Sean Maguire, *Alaska Supreme Court, in Landmark Ruling, Says Partisan Gerrymandering Violates State Constitution*, ANCHORAGE DAILY NEWS, <https://www.adn.com/politics/2023/04/21/alaska-supreme-court-in-landmark-decision-rules-that-partisan-gerrymandering-is-unconstitutional> [<https://perma.cc/TD2U-A27J>] (Apr. 22, 2022).

<sup>32</sup> Maryland's plan was initially struck down by the state court, and under its supervision, the legislature passed a replacement. See *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 Md. Cir. Ct. LEXIS 9, at \*126 (Mar. 25, 2022); *Redistricting Litigation Roundup*, *supra* note 7. On April 1, 2022, the Maryland Court of Appeals assumed jurisdiction over the appeal from the Court of Special Appeals, and on April 4, 2022, both parties voluntarily dismissed the appeal after the governor agreed to sign the new congressional redistricting plan into law. See *Lamone v. Szeliga*, 478 Md. 241 (2022) (granting motion to transfer to regular docket on April 1, 2022; dismissing case "by parties" on April 4, 2022).

<sup>33</sup> Party control in New Hampshire is listed as "SPLIT" because, although the governor and legislative majority are of the same party, the governor vetoed the legislature's plan. See Holly Ramer, *Sununu to Veto Congressional Map, Letting Court Take Over*, AP NEWS (May 26, 2022, 3:56 PM), <https://apnews.com/article/gun-politics-legislature-new-hampshire-supreme-court-congress-358f0dc0da2b1f6de1b5158e01272168> [<https://perma.cc/Y8MJ-922R>]. The court appointed a special master to oversee creation of a new map, which the court eventually adopted. Justin Levitt, *New Hampshire*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/state/new-hampshire/> [<https://perma.cc/3KQK-U72J>].

<sup>34</sup> New York is considered one-party control because the commission's maps must be approved by the legislature, which had supermajorities controlled by Democrats in both chambers. See *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, 234 N.E.3d 1002, 1008 (N.Y. 2023) (citing N.Y. Const. art. III, § 4(b)); *id.* at 1022–24 (Cannataro, J., dissenting). In December 2023, New York's highest court held that the maps needed to be redrawn and approved using the channels outlined in the state constitution before the 2024 election season to avoid court-redistricted maps, which the majority considers an intervention of last resort. See *id.* at 1016, 1021–21 (majority opinion).

<sup>35</sup> In 2023, the new Republican majority on the North Carolina Supreme Court reversed the opinion issued by the previous Democratic majority on the court that partisan gerrymandering was justiciable under the North Carolina Constitution. See *Harper v. Hall*, 886 S.E.2d 393, 401 (N.C. 2023); Zach Montellaro, Josh Gerstein & Ally Mutnick, *North Carolina Supreme Court Clears Way for Partisan Gerrymandering*, POLITICO, <https://www.politico.com/news/2023/04/28/north-carolina-supreme-court-clears-way-for-partisan-gerrymandering-00094433> [<https://perma.cc/9RMX-7U6R>] (Apr. 28, 2023, 3:10 PM). Thus, even absent the constitutional provision limiting the use of a court-drawn map, North Carolina would be drawing a new congressional map for 2024 use. See *North Carolina Congressional District Plan*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/Redistricting/DistrictPlanMap/C2023E> [<https://perma.cc/X8QH-RV6U>].

<sup>36</sup> This map was to be used for the 2022 election only. Montellaro et al., *supra* note 35.

<sup>37</sup> Under the Ohio Constitution, the Ohio Legislature first can draw congressional lines by a three-fifths supermajority, including votes of half of each major party in each chamber. See

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OHIO CONST. art. XIX, § 1(A). If that fails, the process goes to a seven-member backup commission, comprised of the governor, state auditor, secretary of state, and one commissioner chosen by each of the two parties' legislative leaders in each chamber. *See id.* art. XIX, § 1(B); *id.* art. XI, § 1(A). The plan must pass with votes from at least two members affiliated with each major party. *See id.* art. XIX, § 1(B). If the commission fails to pass a plan, the state legislature may then pass a congressional plan via a simple majority subject to gubernatorial veto. *See id.* art. XIX, §§ 1(C)(1), (3); *Redistricting in Ohio*, BALLOTPEDIA, [https://ballotpedia.org/Redistricting\\_in\\_Ohio](https://ballotpedia.org/Redistricting_in_Ohio) [<https://perma.cc/V5C4-DXMJ>]. Maps that are passed by a supermajority of the legislature or by bipartisan approval of the commission are valid for ten years, whereas maps passed by legislation are valid for only two general elections. *See* Justin Levitt, *Ohio*, ALL ABOUT REDISTRICTING, <https://redistricting.lls.edu/state/ohio/> [<https://perma.cc/PXZ3-HW77>]. In the 2020 redistricting cycle, the Ohio Legislature and the Redistricting Commission ran out the clock by repeatedly proposing a map either very similar to or identical to a map that the state court had previously rejected as an unconstitutional partisan gerrymander; every one of its maps, including its last proposed map, was held to be unconstitutional. *See* Cervas et al., *supra* note 2, at 466–69. But Ohio's recent redistricting amendment forbids state courts from imposing their own maps, even if the legislature or commission repeatedly fails to offer a constitutional map. *See id.* at 466–67. To provide a congressional plan for the 2022 election, a federal court mandated use of the third map offered to the Ohio Supreme Court by the legislature. *See* *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 646–47 (S.D. Ohio 2022). The federal court held that there was insufficient time to create a new map and have it reviewed by the state court. *See id.* at 646.

<sup>38</sup> This map was for the 2022 election only. *See* Cervas et al., *supra* note 2, at 453 n.151.

<sup>39</sup> In *League of Women Voters of Utah v. Utah State Legislature*, plaintiffs filed a complaint alleging that the Utah Legislature's 2021 congressional plan "violates multiple provisions of the Utah Constitution, including the Free Elections Clause, the Uniform Operation of Laws Clause, protections of free speech and association, and the right to vote" and that "the Legislature's repeal of Proposition 4 [a bipartisan citizen initiative that prohibited partisan gerrymandering] violated the people's constitutionally guaranteed lawmaking power and right to alter and reform their government." Complaint for Declaratory and Injunctive Relief at 2, *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712, 2022 WL 819923 (Utah Dist. Ct. Mar. 17, 2022). After the District Court denied defendants' motion to stay and motion to dismiss, the defendants appealed the case to the Utah Supreme Court. *LWV Utah v. Utah State Legislature*, LEAGUE OF WOMEN VOTERS (July 11, 2023), <https://www.lwv.org/legal-center/lwv-utah-v-utah-state-legislature> [<https://perma.cc/Q8GQ-TTSF>]. In January 2023, the Utah Supreme Court agreed to hear the plaintiffs' partisan gerrymandering claims. *Id.* The entry in Table 1 above reflects the situation in November 2022.

## 2023-2024] Gerrymandering Cases in State Supreme Courts

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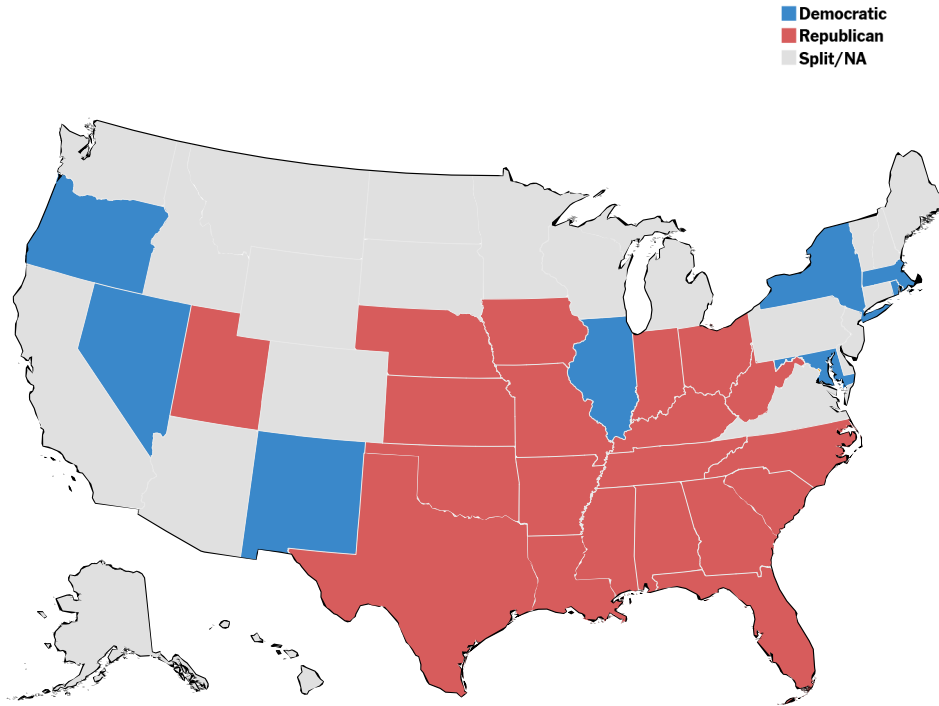
VA	11	Comm.	SPLIT	F	Court	x	
WA	10	Comm.	SPLIT		Comm. <sup>40</sup>	x	x
WV	2	Leg	GOP		Leg		
WI	8	Leg	SPLIT	F	Court <sup>41</sup>		
WY	1	-	-	-	-	x	

Note: States where there is full partisan control of the redistricting process are highlighted in gray. Party control and identification of redistricting authority is from *Elections and Redistricting Standing Committee*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/in-de/standing-committees/redistricting-and-elections> [<https://perma.cc/28TX-7VHF>]; Justin Levitt, *Redistricting Across States*, ALL ABOUT REDISTRICTING, <https://redistricting.lls.edu> [<https://perma.cc/735A-LH4K>]. Data on long-standing constitutional language on Free and Equal/Open is from Joshua A Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 61 (2014); see also *Free and Equal Election Clauses in State Constitutions*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/redistricting-and-census/free-and-equal-election-clauses-in-state-constitutions> [<https://perma.cc/FP9N-EH33>] (Nov. 4, 2019). Information on direct language in current constitutions regarding gerrymandering is from the National Conference of State Legislatures. See *Redistricting Criteria*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/redistricting-and-census/redistricting-criteria> [<https://perma.cc/FS4X-FJBV>] (July 16, 2021). By comparing who drew the map used in November 2022 with who had initial primary authority to draw the map, the involvement of state courts can be inferred. However, it is important to note that a number of state courts have maps constitutionally limited to the 2022 election only (North Carolina and Ohio); and others where state courts have postponed a decision on the merits until 2023 (Florida, New Mexico, Utah, and Kentucky); and other states where the U.S. Supreme Court has intervened to block final decisions by lower courts on redistricting challenges related to race (e.g., Alabama, Georgia); and in New York where the state court ordered a new congressional map be used for the next election season.

<sup>40</sup> The Commission missed the deadline for submission of its plan by only a few minutes; the state court held that the Commission was in substantial compliance with state requirements. Rachel La Corte, *WA Supreme Court Declines to Draw New Redistricting Plan*, AP NEWS (Dec. 3, 2021, 6:31 PM), <https://apnews.com/article/legislature-washington-redistricting-778cddb04e5684503d0c649a20731282> [<https://perma.cc/M6E5-4PJS>]. But the plan still had to be referred to the legislature, which adopted it with only minor changes. *Id.*; Jim Camden, *Washington Senate Passes Changes to New Districts, but Not Without Some Disagreement*, SPOKESMAN-REV., <https://www.spokesman.com/stories/2022/feb/08/washington-senate-passes-new-districts-with-minor/> [<https://perma.cc/878X-TERK>] (Feb. 8, 2022, 8:43 PM).

<sup>41</sup> In Wisconsin, while the court in *Johnson v. Wisconsin Elections Commission*, 972 N.W.2d 559 (Wis. 2022), chose a congressional plan, which was based on a plan that was considered a partisan gerrymander by many a decade earlier, though was submitted by the Democratic governor. See J. Miles Coleman, *Wisconsin Redistricting: Court Signs Off on (Mostly) Similar Map*, CTR. FOR POL. (Mar. 10, 2022), <https://centerforpolitics.org/crystalball/wisconsin-redistricting-court-signs-off-on-mostly-similar-map/> [<https://perma.cc/YE2F-44MT>]; Cervas et al., *supra* note 2, at 456 n.166. Thus, the claim has been made that the litigation simply ended up with a court-drawn gerrymander. See Cervas et al., *supra* note 2, at 475.

**Figure 1. Control over Redistricting in 2022**





states;<sup>45</sup> in 2021, commissions drew—or attempted to draw—congressional maps in 11 states.<sup>46</sup>

Common sense and the empirical evidence tell us that the likelihood of partisan gerrymandering is highest in situations where one political party fully controls the redistricting process.<sup>47</sup> The most common way in which full party control occurs is with what is called trifecta control, where the map is legislatively drawn and both branches of the legislature and the governor are under the control of the same party,<sup>48</sup> but it can also occur even without trifecta control if the governor has no veto power over a redistricting map,<sup>49</sup> or if one party controls both branches of the legislature and the governor is of the opposite party but the majorities in each branch of the legislature are sufficiently large to override a gubernatorial veto.<sup>50</sup> Given the rise in partisan polarization operating at all levels of government,<sup>51</sup>

<sup>45</sup> See Levitt, *supra* note 42. Commissions in 2010: Arizona, California, Hawaii, Idaho, New Jersey, Washington. *Id.*

<sup>46</sup> See *id.* Commissions in 2020: Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, New York, Virginia, Washington. *Id.* In 2021, the Virginia Redistricting Commission released two statewide congressional map proposals but missed its deadline for approving the map proposals. See *Redistricting in Virginia After the 2020 Census*, BALLOTPEDIA, [https://ballotpedia.org/Redistricting\\_in\\_Virginia\\_after\\_the\\_2020\\_census](https://ballotpedia.org/Redistricting_in_Virginia_after_the_2020_census) [https://perma.cc/T4EA-WMFG]. Accordingly, the Virginia Supreme Court assumed authority over the process, and two special masters selected by the court released proposals for congressional districts which were subject to public comment and then revised and subsequently approved by the Virginia Supreme Court. *Id.* In 2014, the citizens of New York voted to adopt historic reforms to the redistricting process by establishing “an Independent Redistricting Commission (IRC) and by declaring unconstitutional certain undemocratic practices such as partisan and racial gerrymandering.” *Harkenrider v. Hochul*, 197 N.E.3d 437, 440 (N.Y. 2022). However, in 2021, after the IRC reached an impasse as to the design of its second set of constitutionally required maps, the Democrat-controlled legislature enacted its own set of maps without participation of the Republican minority party. *Id.* at 442. In *Harkenrider*, the New York Court of Appeals held that the legislature’s failure to follow the prescribed constitutional procedure warranted invalidation of the legislature’s congressional and state senate maps. *Id.* at 445. Subsequently, new congressional and state senate districts were drawn by the special master. *Id.* at 455–56.

<sup>47</sup> ANTHONY J. MCGANN, CHARLES ANTHONY SMITH, MICHAEL LATNER & ALEX KEENA, *GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY* 5 (2016).

<sup>48</sup> See FIONA KNIAZ & KRISTOFFER SHIELDS, *REDISTRICTING: THE ROAD TO REFORM* 28 (2021), <https://governors.rutgers.edu/wp-content/uploads/2021/08/Redistricting-Report-final.pdf> [https://perma.cc/5EYA-3QNV].

<sup>49</sup> See *id.* at 13, 28. In states with commissions, the governor has no veto power over state or federal maps because the legislature does not play a role in passing the maps. See *id.* at 13. “Finally, in North Carolina, while the legislature does pass both state and federal maps as regular legislation, the governor is expressly denied veto power over those maps.” *Id.*

<sup>50</sup> See *Veto Overrides in State Legislatures*, BALLOTPEDIA, [https://ballotpedia.org/Veto\\_overrides\\_in\\_state\\_legislatures](https://ballotpedia.org/Veto_overrides_in_state_legislatures) [https://perma.cc/DEY3-DAUG].

<sup>51</sup> See Kelsey L. Hinchliffe & Frances E. Lee, *Party Competition and Conflict in State Legislatures*, 16 *STATE POL. & POL’Y Q.* 172, 172–74, 189–90 (2016); see also Joel Sievert & Seth C. McKee, *Nationalization in U.S. Senate and Gubernatorial Elections*, 47 *AM. POL. RSCH.* 1055,



the number of states with trifecta control has increased since the 1980s, especially as states have realigned after the “Solid South” transitioned from Democratic control to Republican control.<sup>52</sup> However, although the total number of states where the redistricting process was wholly controlled by a single party increased from 2010 to 2020, the number of total *districts* in states under one party control decreased from 2010 to 2020.<sup>53</sup>

Although it is possible to have partisan gerrymandering even when it is not legislative decisions that determine the shape of the map,<sup>54</sup> reformers viewed replacing legislative control over the map-making process with a reapportionment commission of a bipartisan or non-partisan nature as a major goal.<sup>55</sup> Most of the state court cases

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1059 (2019); cf. Thomas L. Brunell & Bernard Grofman, *Explaining Divided U.S. Senate Delegations, 1788–1996: A Realignment Approach*, 92 AM. POL. SCI. REV. 391, 397 (1998).

<sup>52</sup> See *State Government Trifectas*, BALLOTPEDIA, [https://ballotpedia.org/State\\_government\\_trifectas](https://ballotpedia.org/State_government_trifectas) [https://perma.cc/N49L-ENL7]. See generally Robert N. Lupton & Seth C. McKee, *Dixie’s Drivers: Core Values and the Southern Republican Realignment*, 82 J. POL. 921 (2020); John R. Petrocik, *Realignment: New Party Coalitions and the Nationalization of the South*, 49 J. POL. 347 (1987).

<sup>53</sup> See *infra* note 74.

<sup>54</sup> This can happen for several reasons. Examples include when a court requires a map that is based on *least change* from the prior decade when the prior decade’s plan was excessively partisan, see *Johnson v. Wis. Elections Comm’n*, 972 N.W.2d 559, 586 (Wis. 2022), or when a commission with evenly balanced partisan affiliations and a tiebreaker who is ostensibly neutral adopts a map proposed by one of the parties that results in a partisan gerrymander, see *In re Cong. Dists. by N.J. Redistricting Comm’n*, 268 A.3d 299, 302 (N.J. 2022). In 2021, this latter situation was allegedly found in the State of New Jersey, where the tiebreaking Chair of the redistricting commission, John E. Wallace, Jr., a former state supreme court Justice and registered Democrat, was appointed by the New Jersey Supreme Court and was challenged as being partisan by state Republicans. *Id.* at 302–03; Matt Friedman, *New Jersey Supreme Court Asks Wallace to Elaborate on Redistricting Decision*, POLITICO (Jan. 4, 2022, 5:17 PM), <https://www.politico.com/states/new-jersey/whiteboard/2022/01/04/new-jersey-supreme-court-asks-wallace-to-elaborate-on-redistricting-decision-1404229>

[https://perma.cc/4QKK-UVGT]. In addition to New Jersey, states with constitutional provisions that also require a state supreme court to appoint a tiebreaking member include Hawaii, Pennsylvania, Idaho, Montana, and Washington. KNAZ & SHIELDS, *supra* note 48, at 11; *Redistricting in Montana*, BALLOTPEDIA, [https://ballotpedia.org/Redistricting\\_in\\_Montana](https://ballotpedia.org/Redistricting_in_Montana) [https://perma.cc/2MF3-XHHJ]; *Redistricting in Washington*, BALLOTPEDIA, [https://ballotpedia.org/Redistricting\\_in\\_Washington](https://ballotpedia.org/Redistricting_in_Washington) [https://perma.cc/KJ5G-GVVL]. Another potential way to get a partisan map from a commission is when there are state legislators or other elected officials as members whose selection rules leave open the possibility of one party having a majority of commission members. See KNAZ & SHIELDS, *supra* note 48, at 8–9.

<sup>55</sup> See Yuriy Rudensky & Annie Lo, *A Better Way to Draw Districts*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/policy-solutions/better-way-draw-districts> [https://perma.cc/QF62-QZ25]. For example, the Brennan Center for Justice published and advocated for model legislation that would establish “independent redistricting commissions [to] promote[] independence, inclusivity, and transparency in the map-drawing process.” See BRENNAN CTR. FOR JUST., MODEL LEGISLATION FOR INDEPENDENT REDISTRICTING COMMISSIONS 1 (Dec. 12, 2019), <https://www.brennancenter.org/media/5390/download> [https://perma.cc/BU83-S26F]. In addition, Common Cause, “a nonpartisan grassroots organization dedicated to upholding the core values of American democracy,” was also a forceful advocate for redistricting reform via independent commissions. See *Common Cause*, ACTION

we consider from the 2020 redistricting round involved states where the legislature is the primary redistricting authority.<sup>56</sup> The belief in the need for institutional reform of the redistricting process only increased after the Supreme Court's decision in *Rucho*.<sup>57</sup>

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

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NETWORK, <https://actionnetwork.org/groups/common-cause> [<https://perma.cc/U4EF-Z8TD>]; see also *Fair Maps, Fair Representation, and a Fair Say*, COMMON CAUSE, [https://www.commoncause.org/our-work/redistricting\\_and\\_representation/gerrymandering-redistricting/](https://www.commoncause.org/our-work/redistricting_and_representation/gerrymandering-redistricting/) [<https://perma.cc/9TBS-6BEK>]. Since 2010, four additional states (Colorado, Michigan, New York, and Virginia) have established commissions to conduct redistricting more independently. See SARAH J. ECKMAN, CONG. RSCH. SERV., IN11053, REDISTRICTING COMMISSIONS FOR CONGRESSIONAL DISTRICTS 1 (Nov. 17, 2021), <https://crsreports.congress.gov/product/pdf/IN/IN11053> [<https://perma.cc/7XWE-HQ35>]. In addition, in 2020, Montana used a commission to draw its congressional maps after the state gained a second congressional seat (in 2010, Montana's one congressional seat did not require the state to establish a commission to draw its congressional map). *Redistricting in Montana After the 2020 Census*, BALLOTPEdia, [https://ballotpedia.org/Redistricting\\_in\\_Montana\\_after\\_the\\_2020\\_census](https://ballotpedia.org/Redistricting_in_Montana_after_the_2020_census) [<https://perma.cc/EP29-2NJS>]. New York's implementation for the use of a commission is only advisory since the legislature can amend any proposal. See ECKMAN, *supra*, at 2.

<sup>56</sup> See ECKMAN, *supra* note 55, at 1; see also *supra* Table 1; *infra* Table 2.

<sup>57</sup> See, e.g., Kevin Morris, *Partisan Gerrymander Review After Rucho: Proof Is in the Procedure*, 105 MARQ. L. REV. 787, 797–98, 808 (2022); see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019). Not all commissions are equal in terms of their likelihood of directly acting as a check on partisan gerrymandering. For example, Hawaii, New Jersey, and Virginia have commissions that may include current officeholders. *Reapportionment Commission*, STATE OF HAW. OFF. OF ELECTIONS, <https://elections.hawaii.gov/about-us/boards-and-commissions/reapportionment/> [<https://perma.cc/JN7F-DRS7>] (Mar. 7, 2022); *New Jersey Redistricting and Apportionment*, OFF. SITE OF THE STATE OF N.J., <https://nj.gov/redistricting/apportionment/faqs/> [<https://perma.cc/PN8T-KZR2>]; VA. CODE ANN. § 30-391 (2020). Moreover, several of the new commissions created prior to the 2020 redistricting round were severely flawed, either in creating a high likelihood of deadlock (e.g., commissions with an equal number of members affiliated with each party and without any tie-breaker mechanism, such as the one in Virginia, VA. CONST. art. II, § 6-A, or with rules, such as those in Ohio, OHIO CONST. art. XIX, § 1, that allowed the legislature to repeatedly override the court and that prevented the state court from imposing a plan of its own). See, e.g., *Adams v. DeWine*, 195 N.E.3d 74, 99 (Ohio 2022).

compared to the number of partisan gerrymandering challenges in state courts in the 2020 redistricting round. But in making comparisons between 2010 round partisan gerrymandering litigants and 2020 round partisan gerrymandering litigants, we also need to take into account the partisan gerrymandering challenges filed in federal courts in the 2010 redistricting round, including Pennsylvania, Maryland, North Carolina, and Wisconsin, since such federal challenges were not yet ruled out, and indeed the challenges in three of these four states—all but Pennsylvania—were successful in the lower federal courts. The next most important point to make about this table is that we can see that while state chapters of the League of Women Voters and groups such as Common Cause remain important in partisan gerrymandering litigation in state courts in the 2020 redistricting round, they were more important in state and federal courts in the previous round. Although groups of individual plaintiffs were also found in the 2010 round, redistricting challenges of the 2020 round were more likely to have the lawyers for such groups of “individuals” as key players. It does not seem unduly cynical to believe that partisan actors recruited members of the public to serve as named plaintiffs, so that what may appear to be civic-minded complaints about neutrality or fairness have partisan underpinnings, and the evidence here to that effect is clear.<sup>58</sup> Of course, it is very difficult to infer “true” motivations. Interest groups that are ostensibly non-partisan may have been “captured” by a political interest, or racial groups may recognize a kind of common

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<sup>58</sup> For example, in Florida, Ohio, and Pennsylvania, the citizen plaintiffs were supported by the National Democratic Redistricting Committee (“NDRC”) or an affiliate, such as the National Redistricting Foundation or National Redistricting Action Fund. The NDRC was established to fight for fairer maps and is chaired by former Attorney General Eric Holder and supported by Democratic Party leaders such as President Barack Obama, former House Speaker Nancy Pelosi, and others. See *Our Work*, NAT’L DEMOCRATIC REDISTRICTING COMM., <https://democraticredistricting.com/our-work/> [<https://perma.cc/LP6K-LA4D>]; Jena Doyle, *NRF-Supported Voters File Petition to Florida Supreme Court*, NAT’L REDISTRICTING FOUND., <https://redistrictingfoundation.org/news/nrf-supported-voters-file-petition-to-florida-supreme-court> [<https://perma.cc/3M3B-EJ8P>]; Brooke Lillard, *Supreme Court Blocks Republican Attempt to Overturn Pennsylvania’s Fair Congressional Map*, NAT’L REDISTRICTING ACTION FUND (Oct. 3, 2022), <https://redistrictingaction.org/news/supreme-court-blocks-republican-attempt-to-overturn-pennsylvanias-fair-congressional-map> [<https://perma.cc/52LM-DBXT>]; Brooke Lillard, *Supreme Court Blocks Extreme Republican Efforts to Absolve Checks and Balances Within State Governments*, NAT’L REDISTRICTING ACTION FUND, <https://redistrictingaction.org/news/scotus-blocks-extreme-republican-efforts-to-absolve-checks-and-balances-within-state-govs> [<https://perma.cc/FYE8-FSB6>]. In Kansas, Kentucky, Maryland, New Mexico, New Jersey, New York, and Oregon, at least one of the individually named plaintiffs was a partisan elected official or candidate for elected office in 2022. See *infra* Table 2. For North Carolina and Utah, the individual plaintiffs were largely led by good-government groups, such as Common Cause or the Campaign Legal Center and Mormon Women for Ethical Government. See *infra* Table 2.

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

**Table 2. Who Challenges in State Courts? The Plaintiffs Identified in Partisan Gerrymandering Lawsuits**

Redistricting Cases in State Court	Plaintiffs
<b>FLORIDA</b>	
<i>League of Women Voters of Fla. v. Detzner</i> , 172 So. 3d 363 (Fla. 2015)	League Plaintiffs: The League of Women Voters of Florida, Common Cause, Citizens registered to vote in Florida. Romo Plaintiffs: Citizens registered to vote in Florida.
<i>Black Voters Matter Capacity Bldg. Inst., Inc. v. Fla. Sec'y of State</i> , No. SC2023-1671 (Fla. Jan. 24, 2024) (Fl. Cts. ACIS) (outcome pending)	Black Voters Matter Capacity Building Institute, Inc., Equal Ground Education Fund, Inc., League of Women Voters of Florida, Inc., League of Women Voters of Florida Education Fund, Inc., Florida Rising Together, Citizens registered to vote in Florida.
<b>KANSAS</b>	
<i>Rivera v. Schwab</i> , 512 P.3d 168 (Kan. 2022) (consolidated with <i>Alonzo v. Schwab</i> , No. 2022-CV-90 (Kan. Dist. Ct. Feb. 14, 2022); and <i>Frick v. Schwab</i> , No. 2022-CV-71 (Kan. Dist. Ct. Mar. 1, 2022))	Rivera Plaintiffs: Citizens registered to vote in Kansas. Alonzo Plaintiffs: Citizens registered to vote in Kansas. Frick Plaintiffs: Citizens registered to vote in Kansas.
<b>KENTUCKY</b>	
<i>Graham v. Adams</i> , 684 S.W.3d 663 (Ky. 2023)	Kentucky Democratic Party, Citizens registered to vote in Kentucky.
<b>MARYLAND</b>	
<i>Lamone v. Benisek</i> , 348 F. Supp. 3d 493 (D. Md. 2018) (consolidated with <i>Rucho v. Common Cause</i> )	Citizens registered to vote in Maryland.
<i>Szeliga v. Lamone</i> , No. C-02-CV-21-001816, 2022 Md. Cir. Ct. LEXIS 9 (Mar. 25, 2022)	Szeliga Plaintiffs: Citizens registered to vote in Maryland. Parrott Plaintiffs: Citizens registered to vote in Maryland.
<b>NEW MEXICO</b>	
<i>Republican Party of N.M. v. Oliver</i> , No. D-506-CV-20220041, (N.M. Dist. Ct. Oct. 6, 2023) (Am. Redistricting Proj.)	Republican Party of New Mexico, Citizens registered to vote in New Mexico.
<b>NEW JERSEY</b>	
<i>In re Congressional Districts by New Jersey Redistricting Comm'n</i> , 268 A.3d 299 (N.J. 2022)	New Jersey Redistricting Commission members.
<b>NEW YORK</b>	

<i>Harkenrider v. Hochul</i> , 197 N.E.3d 437 (N.Y. 2022)	Citizens registered to vote in New York.
NORTH CAROLINA	
<i>Harper v. Lewis</i> , No. 19-CVS-012667, 2019 N.C. Super. LEXIS 122 (Super. Ct. Oct. 28, 2019)	Harper Plaintiffs: Citizens registered to vote in North Carolina. NCLCV Plaintiffs: North Carolina League of Conservation Voters, Inc., Citizens registered to vote in North Carolina.
<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019)	Common Cause, North Carolina Democratic Party, Citizens registered to vote in North Carolina.
<i>Harper v. Hall</i> , 868 S.E.2d 499 (N.C. 2022), <i>overruled by</i> 886 S.E.2d 393 (N.C. 2023)	Harper Plaintiffs: Citizens registered to vote in North Carolina. NCLCV Plaintiffs: North Carolina League of Conservation Voters, Inc., Citizens registered to vote in North Carolina.
OHIO	
<i>Adams v. DeWine</i> , 195 N.E.3d 74 (Ohio 2022)	Citizens registered to vote in Ohio.
OREGON	
<i>Clarno v. Fagan</i> , No. 21CV40180, 2021 WL 5632371 (Or. Cir. Ct. Nov. 24, 2021).	Citizens registered to vote in Oregon.
PENNSYLVANIA	
<i>League of Women Voters of Pa. v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	League of Woman Voters of Pennsylvania, Citizens registered to vote in Pennsylvania.
<i>Corman v. Sec’y of Pa.</i> , 751 Fed. App’x 157 (3d Cir. 2018) (per curiam)	Legislators/citizens registered to vote in Pennsylvania.
<i>Carter v. Chapman</i> , 270 A.3d 444 (Pa. 2022)	Carter Petitioners: Citizens registered to vote in Pennsylvania. Gressman Petitioners: Citizens registered to vote in Pennsylvania, “leading professors of mathematics and science.” <i>Carter</i> , 270 A.3d at 452.
UTAH	
<i>League of Women Voters of Utah v. Utah State Legislature</i> , No. 220901712, 2022 WL 21745734 (Utah Dist. Ct. Nov. 22, 2022) (outcome pending)	League of Women Voters of Utah, Mormon Women for Ethical Government, Citizens registered to vote in Utah.
WISCONSIN	
<i>Baldus v. Members of the Wis. Gov’t Accountability Bd.</i> , 849 F. Supp. 2d 840 (E.D. Wis. 2012)	Voces de la Frontera, Inc., Citizens registered to vote in Wisconsin.

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

(1) Full partisan control is not a sufficient condition for a legislature to choose to impose a partisan gerrymander (or to maintain one already in place). The removal of any possibility of a federal lawsuit to restrain gerrymandering led many legislatures under one party control in the 2020 round to offer congressional plans that were labeled as partisan gerrymanders (or as racial gerrymanders with important partisan implications<sup>59</sup>) by journalists in the state (and/or by academics). Ten of the twenty-eight<sup>60</sup> states under one party control (where the majority party could control redistricting without influence of the minority party) had an actual partisan gerrymandering challenge in state court to that congressional map prior to November 2022, although not all were resolved prior to the 2022 election.

(2) Full partisan control of the redistricting process is *not* a necessary condition to implement a map with partisan advantage. States like Arizona, which have an independent commission with a tiebreaker, can still end up with maps that give one of the major parties an advantage. Additionally, courts can impose maps that have partisan bias. The Wisconsin Supreme Court ordered a “least change” map derived from the previous decade's gerrymander.<sup>61</sup> A federal court ordered Ohio to implement a plan to be used for the 2022 midterm election that was determined by the state court to violate the state constitution.<sup>62</sup>

(3) State courts were far more involved in redistricting in the 2020 round than in any previous redistricting round, with the most important cases involving challenges to congressional maps as partisan gerrymanders. However, the anticipation of a successful state court challenge to a map was reduced in deterrent impact because of the uncertainty about whether state courts would choose to act on partisan gerrymandering challenges, and further reduced

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<sup>59</sup> As noted earlier, there were also legal challenges to some congressional maps brought on race-related grounds in a federal court. *See supra* notes 6–7 and accompanying text.

<sup>60</sup> *See supra* Table 1 (Florida, North Carolina, Maryland, Kansas, Kentucky, New Mexico, New York, Ohio, Oregon, and Utah out of the highlighted states therein).

<sup>61</sup> *See* WZIM Staff, *Evers' Statement on Wisconsin Supreme Court Decision to Accept Governor's Redistricting Maps*, WIZM NEWS TALK (Mar. 3, 2022), <https://www.wizmnews.com/2022/03/03/evers-statement-on-wisconsin-supreme-court-decision-to-accept-governors-redistricting-maps/> [<https://perma.cc/H63Q-NRLN>].

<sup>62</sup> *See* Mac Brower, *The Ohio Redistricting Mess*, DEMOCRACY DOCKET (June 13, 2022), <https://www.democracydocket.com/analysis/the-ohio-redistricting-mess/> [<https://perma.cc/FB7H-Q8PK>].

by the delay in obtaining the census data needed for redistricting, thus creating a greater potential for stretching out the redistricting process to the point that a legislative map might be used in 2022 even if later found to be an unconstitutional gerrymander.<sup>63</sup>

(4) There was a high proportion of states where partisan gerrymandering challenges were initiated before the first election but were left unresolved in the 2020 redistricting round (five of eleven),<sup>64</sup> and with other plans permitted for use in the 2022 election only.<sup>65</sup>

<sup>63</sup> See *Census Bureau Statement on Redistricting Data Timeline*, U.S. CENSUS BUREAU (Feb. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html> [<https://perma.cc/UP7K-EGDZ>]. Given the delay in the delivery of the census data needed for redistricting in 2021, see *id.*, even if state courts did accept a partisan gerrymandering challenge (or where there was litigation in a federal court involving a challenge to racial gerrymandering whose resolution almost certainly would have partisan consequences), legislators were aware that court action might come too late to prevent legislative plans from going into effect in the critical 2022 election—thus allowing incumbency advantage for the gerrymandering party to carry over into the new redistricting decade. This happened in *Byrd v. Black Voters Matter Capacity Building Institute, Inc.*, 339 So. 3d 1070, 1073, 1077 (Fla. Dist. Ct. App.), *writ denied*, 340 So. 3d 475 (Fla.), and *appeal docketed* No. SC2022-0685 (Fla. Mar. 2, 2022) (Fl. Cts. ACIS).

<sup>64</sup> These states included Florida, Kentucky, New Mexico, North Carolina, and Utah. There were several additional federal challenges in place that were unresolved as of the 2022 election (Alabama, Arkansas, Louisiana, Georgia, and South Carolina). Florida's congressional map has been challenged under the state's partisan gerrymandering and racial gerrymandering provisions, but parties jointly decided to drop the partisan gerrymandering claim in *Byrd*, 339 So. 3d at 1072. See Mike Schneider & Brendan Farrington, *Deal over Florida's Redistricting Plan Could Lead to Restoration of Black-Dominant District*, AP NEWS, <https://apnews.com/article/florida-redistricting-desantis-race-civil-rights-2f97367f325a77aca00701b08e9d22a4> [<https://perma.cc/Q5NN-L97R>] (Aug. 15, 2023, 5:13 PM). In addition to the protections against partisan gerrymandering, Florida's constitution protects racial and language minorities by requiring districts that do not "diminish their ability to elect representatives of their choice." FLA. CONST. art. III, § 20(a). For example, the Florida Legislature—under instruction from the Florida governor—could be accused of having gone *hog wild* in the 2020 redistricting round in seeking to advantage Republicans. See Joshua Kaplan, *How Ron DeSantis Blew up Black-Held Congressional Districts and May Have Broken Florida Law*, PROPUBLICA (Oct. 11, 2022, 6:00 AM), <https://www.propublica.org/article/ron-desantis-florida-redistricting-map-scheme> [<https://perma.cc/74RU-CULU>]; see also Greg Allen, *Gov. DeSantis Takes Over Congressional Redistricting in Florida*, NPR (Apr. 12, 2022, 5:13 PM), <https://www.npr.org/2022/04/12/1092414662/gov-desantis-takes-over-congressional-redistricting-in-florida> [<https://perma.cc/5N2P-TP83>]; Gary Fineout, *Florida Supreme Court Locks in DeSantis-Backed Redistricting Map*, POLITICO, <https://www.politico.com/news/2022/06/02/florida-redistricting-map-court-decision-00036740> [<https://perma.cc/9NYY-L96K>] (June 2, 2022, 6:33 PM). A simultaneous federal racial gerrymandering case is also proceeding in Florida. See *Common Cause Fla. v. Byrd*, 674 F. Supp. 3d 1097 (N.D. Fla. 2023).

<sup>65</sup> For example, the maps used for North Carolina and Ohio in 2022 will need to be redrawn for future election cycles. See Michael Li, *How Voting Districts Could Change Before 2024*, BRENNAN CTR. FOR JUST. (Feb. 6, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/how-voting-districts-could-change-2024> [<https://perma.cc/G3WF-RMA4>]. Plaintiffs in *Hoffmann v. N.Y. State Independent Redistricting Commission* successfully litigated to have the redistricting commission in New York replace the court-drawn map for the 2024 election cycle. See *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, No. 904972-22, 2022 WL 13654170, at \*3-4 (Sup. Ct. Sept. 12, 2022).

There are also maps that might yet be challenged as partisan or racial gerrymanders.<sup>66</sup>

(5) The proportion of partisan gerrymander challenges to maps in states under one party control (ten of twenty-eight)<sup>67</sup> is much higher than the proportion of partisan gerrymander challenges to legislative-drawn maps in states under divided control, since there were no such challenges (zero of six).<sup>68</sup>

(6) In half of the cases where there was a partisan gerrymandering challenge resolved by November 2022, the state court found in favor of plaintiffs: three of six instances (Maryland, New York, and Ohio).<sup>69</sup>

(7) The proportion of successful partisan gerrymander challenges to legislatively-drawn maps in states under one party control (three of six) resolved by November 2022 is much higher than the proportion of successful partisan gerrymander challenges to legislatively-drawn maps in states under divided control (zero of zero), since the latter is an empty set.<sup>70</sup>

(8) While these comparisons must be interpreted with care since the nature of the case facts obviously affects the outcome, and commissions differ in their institutional rules, we see that the likelihood of a partisan challenge being brought to a congressional plan was higher in challenges brought to a legislative-drawn map

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<sup>66</sup> After the U.S. Supreme Court ruled in appellants' favor in *Allen*, Alabama was required to draw a second Black-opportunity-to-elect district (all but guaranteeing an additional Democratic representative in the state). However, circa August 2023, Alabama has refused the Court's order and instead passed the "2023 Plan" which decreases the Black voting age population in the one performing district that previously existed and raised the percentage in another to a level that likely still violates the Voting Rights Act. See Brian Lyman & Alander Rocha, *Federal Court Blocks Alabama's Congressional Map, Orders New Lines Drawn*, ALA. REFLECTOR (Sept. 5, 2023, 9:38 AM), <https://alabamareflector.com/2023/09/05/federal-court-blocks-alabamas-congressional-map-orders-new-lines-drawn/> [<https://perma.cc/RGP4-7YB2>].

<sup>67</sup> See *supra* notes 59–60 and accompanying text.

<sup>68</sup> Of the six states under split control where the legislature is the primary authority for drawing the maps (Connecticut, Pennsylvania, Maine, Minnesota, New Hampshire, and Wisconsin), all but Maine were drawn by courts. See *supra* Table 1.

<sup>69</sup> Kansas, New Jersey, and Oregon are the three cases where the state court found in favor of the defendants (or determined that there was not a justiciable claim). Ohio is difficult to classify because of the inability of the state court to draw a map of its own, leading to federal court intervention to resolve a deadlock, but state law requires the map needs to be redrawn for 2024. Before federal court intervention, the state court did reject various maps. See *supra* note 37 and accompanying text.

<sup>70</sup> There is a conditional probability effect in that we can expect challenges to be more likely to be brought and those challenges to be more likely to be successful in states where there is egregious partisan gerrymandering and, as emphasized earlier, we also expect that partisan gerrymandering is most likely to be found in states where the redistricting process is under single party control. See *supra* notes 47–53 and accompanying text.



(ten challenges out of twenty-eight states)<sup>71</sup> than to a commission-drawn map (one challenge out of ten states).<sup>72</sup> The success rate of plaintiffs in challenges to a legislatively-drawn map (four of ten)<sup>73</sup> was higher than the success rate of challenges to a map drawn by a commission (zero of one).<sup>74</sup>

(9) In the 2020 redistricting round, not only did Republicans have many more states under one party control (twenty) than did the Democrats (eight),<sup>75</sup> but there were also many more congressional districts in states under full Republican control (191 districts) than there were congressional districts in states under full Democratic control (seventy-five districts).<sup>76</sup> Though the difference was smaller than in the 2010 round, partisan control in 2020 redistricting round still very disproportionately favored one party, the Republicans, and the partisan disproportionality from the partisan gerrymandering in the 2010 round reinforced the Republican advantage in the 2020 round because of the advantages of incumbency that persisted even as district configurations changed.<sup>77</sup>

<sup>71</sup> See *supra* Tables 1, 2. The thirty-one states are those in which the legislature drew a map, so it does not include Connecticut, Pennsylvania, and Wisconsin which, because of split control, were drawn by courts.

<sup>72</sup> See *supra* Tables 1, 2. New Jersey was the one (unsuccessful) challenge brought against a state court. See *supra* Table 2. A challenge was brought in state court against the maps drawn by the Michigan independent commission as racially discriminatory, but a 4-3 majority of the state supreme court dismissed the case for lack of evidence. See *Detroit Caucus v. Mich. Indep. Citizens Redistricting Comm'n*, 969 N.W.2d 331, 335 (Mich. 2022).

<sup>73</sup> See *supra* Tables 1, 2. Successful challenges to enacted plans include Maryland, New York, North Carolina, and Ohio. See *supra* Table 2.

<sup>74</sup> See *supra* Tables 1, 2.

<sup>75</sup> See *supra* Table 1.

<sup>76</sup> See *supra* Table 1; U.S. CENSUS BUREAU, CONGRESSIONAL DISTRICTS OF THE 118TH CONGRESS OF THE UNITED STATES, JANUARY 2023-2025, [https://www2.census.gov/geo/maps/cong\\_dist/uswall/cd118/CD118\\_US\\_WallMap.pdf](https://www2.census.gov/geo/maps/cong_dist/uswall/cd118/CD118_US_WallMap.pdf) [<https://perma.cc/UV6T-YCXG>].

<sup>77</sup> In the 2010 redistricting round, Democrats had party control in six states (Arkansas, Illinois, Maryland, Massachusetts, Rhode Island, West Virginia; forty-four total districts). See SUNDEEP IYER & KEESHA GASKINS, BRENNAN CTR. FOR JUST., REDISTRICTING AND CONGRESSIONAL CONTROL: A FIRST LOOK 7 (2012), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Redistricting\\_Congressional\\_Control.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Redistricting_Congressional_Control.pdf) [<https://perma.cc/FC2R-4PE2>]. Republicans had party control in eighteen states (Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin; 206 total districts). See *id.* Although Democrats nominally controlled the process in Arkansas and West Virginia, these two states were at the end of a transition from single-party Democratic control to single-party Republican control. By the end of the decade, both states in both chambers had at least two-to-one Republican-to-Democrat ratios. See *Party Control of Arkansas State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Arkansas\\_state\\_government](https://ballotpedia.org/Party_control_of_Arkansas_state_government) [<https://perma.cc/TQV2-Q96P>]; *Party Control of West Virginia State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_West\\_Virginia\\_state\\_government](https://ballotpedia.org/Party_control_of_West_Virginia_state_government) [<https://perma.cc/L4X9-MX5X>]. Nebraska's legislature is non-partisan. See NEB. CONST. art. III, § 7. Going into 2020, Democrats controlled the redistricting process in eight states (Illinois,

(10) Partisan gerrymandering challenges to congressional maps were more likely in states under Republican control (six)<sup>78</sup> than in states under Democratic control (four).<sup>79</sup>

(11) Among the four successful partisan challenges to congressional maps, the same number of successful challenges happened in states under Democratic control (two)<sup>80</sup> as those under Republican control (two).<sup>81</sup>

(12) We might expect that partisan gerrymandering litigation will come from non-partisan groups, such as the League of Women Voters or Common Cause, or local groups that identify themselves in non-partisan terms, on the one hand, or groups of voters whose strong partisan identifications make them willing to sign on as plaintiffs to partisan gerrymandering litigation when recruited by party officials,

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Maryland, Massachusetts, Nevada, New Mexico, New York, Oregon, Rhode Island; seventy-five total districts). See Levitt, *supra* note 42. Republicans controlled the process in twenty states (Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana (supermajority), Mississippi, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia; 191 total districts [New Hampshire, two districts, is also controlled by Republicans, but the governor vetoed his party's own plan]). See *id.*; 2020 Louisiana Legislative Session, BALLOTPEDIA, [https://ballotpedia.org/2020\\_Louisiana\\_legislative\\_session](https://ballotpedia.org/2020_Louisiana_legislative_session) [https://perma.cc/5YCK-DPR2]; Nebraska State Senate Elections, 2020, BALLOTPEDIA, [https://ballotpedia.org/Nebraska\\_State\\_Senate\\_elections\\_2020](https://ballotpedia.org/Nebraska_State_Senate_elections_2020) [https://perma.cc/3DUV-SYBS]; Jane C. Timm, *New Hampshire Governor Vetoes Bipartisan Bill to Ward Off Gerrymandering*, NBC NEWS (Aug. 9, 2019, 7:30 PM), <https://www.nbcnews.com/politics/2020-election/new-hampshire-governor-vetoes-bipartisan-bill-ward-gerrymandering-n1041001> [https://perma.cc/NW5N-VVW2]. In Kansas, the legislature was subject to the veto of the Democratic governor but overrode her veto with a supermajority vote. See Tim Carpenter, *GOP Clings to Kansas House Supermajority Entering Kelly's Second Term as Governor*, KAN. REFLECTOR (Nov. 10, 2022), <https://kansasreflector.com/2022/11/10/gop-clings-to-kansas-house-supermajority-entering-kellys-second-term-as-governor/> [https://perma.cc/85LA-K3UZ]. Nebraska's legislature is technically non-partisan, though the outcome of the legislative process matched the partisan character of the legislature. See Margery A. Beck, *Even Nebraska's Nonpartisan Legislature Is Divided Among Acrimonious 2023 Session*, AP NEWS (June 2, 2023, 8:46 PM), <https://apnews.com/article/nebraska-legislature-filibuster-nonpartisan-814790373744b59cd1822f472f6ab3ec> [https://perma.cc/L24H-RQB2]. Thus, in 2020 Democrats controlled two more states than they had in 2010, and Republicans controlled the process in two more states in 2020 than they did in 2010. But, more importantly for the U.S. House of Representatives, in terms of districts, the advantage that Republicans had in 2010 (162-district advantage) was significantly reduced by 2020 (116-district advantage). See U.S. CENSUS BUREAU, *supra* note 76. The *district advantage* is calculated by finding the difference in the total number of districts for which each party had complete control over the process. See Chris Leaverton, *Who Controlled Redistricting in Every State*, BRENNAN CTR. FOR JUST. (Oct. 5, 2022), <https://www.brennancenter.org/our-work/research-reports/who-controlled-redistricting-every-state> [https://perma.cc/472A-Q9FK].

<sup>78</sup> Florida, Kansas, Kentucky, North Carolina, Ohio, and Utah, not including race-based claims. See *supra* Table 1.

<sup>79</sup> Maryland, New Mexico, New York, and Oregon. See *supra* Table 1.

<sup>80</sup> Maryland and New York. See *supra* Tables 1, 2.

<sup>81</sup> North Carolina and Ohio. See *supra* Table 1. Florida and Utah have not yet been decided. See *supra* Tables 1, 2.

on the other. What we see from Table 2 is interesting. In the 2010 round, since only a handful of cases were brought in state court, it is easy to determine that good-government groups, such as the League of Women Voters, were the plaintiffs in early partisan gerrymandering cases in state court, and good-government groups were also instrumental in bringing partisan gerrymandering challenges in federal courts.<sup>82</sup> During the 2020 redistricting cycle, although non-partisan groups continued to be active, many plaintiffs were explicitly (or implicitly) affiliated with the political party that served to gain from state courts overturning the enacted plan.<sup>83</sup>

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

## II. THREE KEY QUESTIONS

### *A. How Did State Courts Faced with a Redistricting Challenge Based on a Claim of a Denial of Equal Treatment and “Excessive” Partisanship Decide Whether State Law Allowed Them to Address the Actual Aspects of the Claim, Rather than Following the U.S. Supreme Court and Treating the Claim as Non-justiciable?*

While decisions to bring a challenge to a map and judicial rulings depend upon the case facts, we can nonetheless ask whether the features of the state constitution that are of direct or potential effect on partisan gerrymandering appear to influence such choices. The categories highlighted in Table 1 identify constitutions that have an explicit prohibition on partisan gerrymandering in the form of a prohibition on favoring or disfavoring particular parties or candidates.<sup>84</sup> Some state constitutions have other (older) language

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<sup>82</sup> See, e.g., *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 369, 416 (Fla. 2015). In *Harper v. Lewis*, Rebecca Harper, a member of the organization Common Cause, volunteered to be one of the named plaintiffs on the case. See Laura Leslie, *Meet the Cary Woman Behind the Supreme Court Case* *Moore v. Harper*, WRAL NEWS, <https://www.wral.com/story/meet-the-cary-woman-behind-the-supreme-court-case-moore-v-harper/20621561/> [https://perma.cc/YMF8-PA8F] (Dec. 9, 2022, 7:32 PM).

<sup>83</sup> See, e.g., *Graham v. Adams*, 684 S.W.3d 663, 673 (Ky. 2023) (“Appellants are the Kentucky Democratic Party . . . , Democratic State House Representative Derrick Graham, and four Kentucky voters.”).

<sup>84</sup> A state constitutional prohibition on the use of partisan data in the redistricting process, found in the state constitutions of Arizona, California, Colorado, Florida, Hawaii, Idaho, Iowa, Michigan, Montana, Nebraska, New York, Ohio, Oregon, Utah, and Washington, see *supra* Table 1, may also trigger a partisan gerrymandering claim if it is thought that the redistricting authorities have flouted that provision, see, e.g., *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 684 (S.D. Ohio 2022) (Marbley, C.J., concurring in part and dissenting in part) (discussing previous

(*e.g.*, a requirement for free and open elections) that can be used to justify bringing a partisan gerrymandering challenge—as was shown in the Pennsylvania and North Carolina cases from the 2010 round.<sup>85</sup>

### 1. Likelihood of a Challenge

Partisan gerrymandering challenges to legislative maps usually occur in states controlled by one party.<sup>86</sup> Presumably, this is not a coincidence since partisanship is more likely in these states.<sup>87</sup> But is the likelihood of challenge affected by the nature of state constitutional provisions? In particular:

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

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

We now turn to the evidence. As shown in Table 1, in states with an explicit constitutional prohibition on partisan gerrymandering, where congressional districting was under single party legislative control, and the redistricting authority offered a map, a challenge to the map was brought in only five of the seven such states (71.4%).<sup>88</sup> In states with an indirect constitutional provision (*e.g.*, Pennsylvania and North Carolina in the previous round) and the same prerequisites above, a challenge was brought in only six of the sixteen states (37.5%) (note that some states have both provisions).<sup>89</sup> In

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findings by the Ohio Supreme Court that maps were “conscious choices to flout the redistricting criteria”).

<sup>85</sup> See *supra* Table 2; see also Cervas et al., *supra* note 2, at 425 & nn.12–13 (“[E]ven when there was no explicit anti-gerrymandering provision in the state constitution, beginning with a Pennsylvania Supreme Court decision in 2018, some state courts have begun to interpret older provisions of their state constitutions as implicitly prohibiting egregious gerrymandering—language that says elections shall be ‘free and equal,’ ‘free and open,’ simply ‘free,’ or language regarding the ‘right to vote.’”)

<sup>86</sup> See *supra* notes 67–68 and accompanying text.

<sup>87</sup> See Timothy Williams, *With Most States Under One Party’s Control, America Grows More Divided*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html> [<https://perma.cc/9R9X-AFD5>].

<sup>88</sup> Florida, New York, Ohio, Oregon, and Utah out of Florida, Iowa, Nebraska, New York, Ohio, Oregon, and Utah. See *supra* Table 1.

<sup>89</sup> Kentucky, Maryland, North Carolina, New Mexico, Oregon, and Utah out of Arkansas, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, New Hampshire, North Carolina, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, Texas, and Utah. See *supra* Table 1.

states where neither direct nor indirect provisions were found and the same prerequisites as above were met, a challenge was brought in only one of the eight states (12.5%).<sup>90</sup> Thus, the decision to bring a challenge is related to the strength of the provisions available, and the absence of any sort of prohibition on partisan gerrymandering resulted in fewer challenges being brought.

## 2. Likelihood of a Successful Challenge

But what can we say about the likely influence of state constitutional provisions on the *success* of partisan gerrymandering challenges? In particular, are states with constitutional provisions that prohibit favoring or disfavoring particular candidates more likely, *ceteris paribus*, to have a successful gerrymandering challenge?<sup>91</sup>

There were seven partisan gerrymandering challenges to a congressional map in the 2020 round that were resolved before the 2022 election.<sup>92</sup> In four of the seven instances, the court agreed that the challenged map was unconstitutional.<sup>93</sup>

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

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

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

Hypotheses 2b and 2b' are contradictory hypotheses. Legislatures charged with drawing districts under explicit direction of state law may choose to follow the law, or at least avoid violating it in a blatant fashion, knowing that a consequence of not following the law is possible forfeiture of any control over the process in the remedial

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<sup>90</sup> Kansas out of Alabama, Georgia, Kansas, Louisiana, Mississippi, Nevada, Rhode Island, and West Virginia. *See supra* Table 1. We do not include New Jersey here because the map was drawn by a commission including a non-party tie-breaking vote. *See In re Cong. Dists. by N.J. Redistricting Comm'n*, 268 A.3d 299, 309 (N.J. 2022).

<sup>91</sup> Of course, the likelihood of successful challenge depends not just on the state-specific legal environment, but also state-specific case facts.

<sup>92</sup> *See supra* Table 2.

<sup>93</sup> Maryland, New York, North Carolina, and Ohio out of Kansas, Maryland, New Jersey, New York, North Carolina, Ohio, and Oregon. *See supra* Table 2.

stage.<sup>94</sup> There are arguments pointing in both directions. On the one hand, absent a direct bar on gerrymandering we might expect it to be difficult for plaintiffs to prevail in gerrymandering litigation. On the other hand, in states where there is a direct bar on partisan gerrymandering, we might expect mapmakers to be more cautious about drawing partisan gerrymanders, thus making it less likely that their plans are overturned.<sup>95</sup>

There were only a small number of partisan gerrymandering challenges brought before the 2022 midterm election (eleven states).<sup>96</sup> There were even fewer challenges that were both decided and successful (out of the eight states in which the cases were decided, only four cases were successful).<sup>97</sup> The data suggests that there are no clear differences regarding successful litigation in terms of differences in the state constitutional language upon which the challenge might hang.<sup>98</sup> Of the four successful partisan gerrymandering claims that were brought, two states had only indirect state constitutional provisions (Maryland and North

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<sup>94</sup> See *Callais v. Landry*, No. 24-CV-00122, 2024 WL 1903930, at \*8 (W.D. La. Apr. 30, 2024) (“Representative Landry testified that the Special Session was convened because the Republicans were afraid that if they did not draw a map which satisfied the court, then the court would draw a map that would not be as politically advantageous for them.”); see also *Shelby Cnty. v. Holder*, 570 U.S. 529, 577–79 (2013) (Ginsburg, J., dissenting). Relatedly, we would note that the vigorous implementation of Section 5 of the Voting Rights Act reduced the frequency of many types of discriminatory action by state authority and made counting successful Section 2 challenges a misleading way of judging the success of that provision. As the dissenters said in *Shelby County*, “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.” *Shelby Cnty.*, 570 U.S. at 590.

<sup>95</sup> A case out of North Carolina, *Moore v. Harper*, decided by the Supreme Court after the November 2022 election, challenged whether a state court could be allowed to interpret indirect language from their state’s constitution to constrain a legislature from enacting a partisan gerrymander. See *Moore v. Harper*, 600 U.S. 1, 7–8 (2023). The challenge in *Moore* suggested that the U.S. Constitution’s Election Clause gave exclusive power to state legislatures for determining rules for federal elections, including redistricting. *Id.* at 19. The Court determined that “[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review” for violations of state constitutional constraints on lawmaking. *Id.* at 22. However, Justice Kavanaugh issued a concurring opinion that says, “a state court’s interpretation of state law in a case implicating the Elections Clause is subject to federal court review” and that state courts cannot “impermissibly distort[] state law ‘beyond what a fair reading required.’” *Id.* at 38 (Kavanaugh, J., concurring) (quoting *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)). The U.S. Supreme Court had previously denied *certiorari* in *Costello v. Carter*, a case which questioned the role of courts imposing remedial maps in response to either an impasse in the state legislature (and governor) or in response to a constitutional violation. See *Carter v. Chapman*, 270 A.3d 444, 450–51 (Pa.), *cert. denied*, *Costello*, 143 S. Ct. 102 (mem.) (2022).

<sup>96</sup> Florida, Kansas, Kentucky, Maryland, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, and Utah. See *supra* Table 2.

<sup>97</sup> See *supra* Table 2; see also *supra* note 93 and accompanying text.

<sup>98</sup> See *supra* Tables 1, 2.

Carolina), and two had direct constitutional provisions (New York and Ohio).<sup>99</sup> In the four unsuccessful partisan gerrymandering claims, two states had neither direct nor indirect constitutional provisions (New Jersey and Kansas), one state had both direct and indirect constitutional provisions (Oregon), and the final state only had indirect constitutional provisions (Kentucky).<sup>100</sup>

*B. How Do Courts Determine What Is an Unconstitutional Partisan Gerrymander?*

Redistricting litigation is decided on the basis of one or more of the following categories: (1) on the failure of maps to satisfy traditional good government criteria; (2) on statistical tests of partisan bias/partisan vote dilution; (3) on process grounds, such as failure to comply with requirements for public comment, or votes on passage that are entirely along partisan lines; (4) on examination of specific changes made in the proposed map *vis-à-vis* the map from the last decade such that inferences could be drawn about a deliberate intent to achieve partisan advantage; and/or (5) as violative of the Voting Rights Act or of the Equal Protection Clause of the U.S. Constitution.<sup>101</sup> The first four categories are all challenges brought in state court, and the fifth is usually brought in federal court.<sup>102</sup> Not all these items are explicitly about partisan advantage, but other issues may be used as indirect means of overturning plans that are based on the belief that one party has benefitted from the lines as they were drawn. For instance, a disfavored party might challenge a plan for splitting too many political subdivisions when the state constitution requires the maintenance of these boundaries.<sup>103</sup> Excessive political subdivision splits might allow for additional advantage for the majority party, and, therefore, a court remedy could act to decrease excessive partisanship.<sup>104</sup>

<sup>99</sup> See *supra* Table 1.

<sup>100</sup> See *supra* Table 1; *infra* Table 3.

<sup>101</sup> See Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. 299, 304, 316–17, 324, 326, 331, 351 (2023).

<sup>102</sup> See Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. Rev. 563, 591–92 (2013). Though, some states have adopted provisions similar to the federal Voting Rights Act. For additional information about state voting rights, see Greenwood & Stephanopoulos, *supra* note 101, at 304–51.

<sup>103</sup> See, e.g., *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 Md. Cir. Ct. LEXIS 9, at \*17–18 (Mar. 25, 2022) (challenging an apportionment plan for failing to give due regard to “boundaries of political subdivisions” as required by Article III, Section 4 of the Maryland Constitution).

<sup>104</sup> See *id.* at \*123–24 (explaining that an outlier map—one that, “if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn”—is likely to be the product of partisan gerrymandering).

Table 3, limited to claims made in state courts, uses the classification scheme above to identify the nature of the claim. The table also includes quotes, or our own paraphrasing of the language used to define a partisan gerrymander, when this is available.<sup>105</sup> The table additionally provides the partisan affiliations of the deciding justices, with those justices voting in favor of the opinion on the first line, followed by those justices who dissent on the second line.<sup>106</sup>

**Table 3. How State Courts Defined and Operationalized Partisan Gerrymandering**

*Category 1 – violation of good government criteria*

*Category 2 – statistical criteria*

*Category 3 – process grounds*

*Category 4 – deliberate intent to achieve partisan advantage*

Case	Who drew the plan	C 1	C 2	C 3	C 4	Outcome	Definition – partisan gerrymander
2010 REDISTRICTING ROUND							
FLORIDA							
<i>League of Women Voters of Fla. v. Detzner</i> , 172 So. 3d 363 (Fla. 2015).	(R) Legislature	Y	-	-	Y	5-2 unconstitutional 1 (D) 4 (R) - 2 (R)	Was the plan or district drawn with an improper partisan intent in mind? <sup>107</sup>

<sup>105</sup> We leave to a subsequent essay a more detailed analysis of the use by individual justices or sets of justices of specific criteria/metrics and how they set a threshold to decide when a metric could be taken to provide evidence that the level of partisan gerrymandering was beyond “politics as usual” and rose to the level of a constitutional violation. In that essay we will also discuss how justices dealt with tradeoffs/conflicts among criteria.

<sup>106</sup> We have done our best to track down the partisan affiliations of justices. *See infra* note 149. There are several challenges to this task and our data here should be viewed as illustrative rather than definitive. For instance, on the Court of Appeals, New York State’s highest court, justices are appointed by the governor and confirmed by the state senate (a list of possible appointees is provided to the governor by the Commission on Judicial Nominations). N.Y. CONST. art. VI, § 2. The justices themselves do not have a partisan affiliation the way someone who runs for office would (such as in Pennsylvania, where justices are elected via statewide election). *See infra* note 149. When the governor and the majority party of the state senate have differing affiliations, it is not always clear how to classify them.

<sup>107</sup> *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 375–76 (Fla. 2015) (quoting *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 617–18 (Fla. 2012)). This doesn’t necessarily mean it was drawn with a “malevolent or evil purpose.” *League of Women Voters of Fla.*, 172 So. 3d at 379 (quoting *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d at 617). If unconstitutional intent is found, the burden shifts to the legislature to justify the plan. *League of Women Voters of Fla.*, 172 So. 3d at 400.



PENNSYLVANIA							
<i>League of Women Voters of Pa. v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).	(R) Legislature	-	Y	-	Y	5-2 unconstitutional 5 (D) - 2 (R)	Partisan gerrymandering occurs when traditional neutral criteria are subordinated in favor of partisan advantage. <sup>108</sup>
NORTH CAROLINA							
<i>Harper v. Lewis</i> , No. 19-CVS-012667, (N.C. Super. Ct. Oct. 28, 2019).	(R) Legislature	Y	Y	-	Y	Granted preliminary injunction <sup>109</sup> 2 (D) 1 (R)	“[R]edistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others . . . .” <sup>110</sup>
2020 REDISTRICTING ROUND							
KANSAS							
<i>Rivera v. Schwab</i> , 512 P.3d 168 (Kan. 2022).	(R) Legislature	Y	-	-	-	4-3 non-justiciable 2 (R) 2 (D) - 3 (D)	When partisan factors are used “too much.” <sup>111</sup>

<sup>108</sup> See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018).

<sup>109</sup> That is, plaintiffs were likely to succeed on the merits of a constitutional partisan gerrymandering claim, and the maps were prevented from being used in the 2020 elections. *Harper v. Lewis*, No. 19-CVS-012667, 2019 N.C. Super. LEXIS 122, at \*18, \*24–25 (Super. Ct. Oct. 28, 2019).

<sup>110</sup> *Id.* at \*7 (citing *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 N.C. Super. LEXIS 56, at \*333–46 (Super. Ct. Sept. 3, 2019)).

<sup>111</sup> *Rivera v. Schwab*, 512 P.3d 168, 183 (Kan. 2022). While the definition of *partisan gerrymandering* is similar to the definition used in other states, it is worth noting that Kansas tries to quantify how much is too much. “[A]t the heart of a claim of partisan gerrymandering is not merely that partisan factors were used, but rather that they were used ‘too much.’” *Id.* (adopting the reasoning in *Rucho* of “whether there can ever be ‘too much’ of a legitimate legislative purpose in the process of state law-making . . . presents no ‘clear, manageable and politically neutral’ judicial standard” (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019)).

NEW JERSEY							
<i>In re Cong. Dists. by N.J. Redistricting Comm'n</i> , 268 A.3d 299 (N.J. 2022).	Redist. Comm'n including partisan members	Y	Y	-	-	5-0 failure to state a claim <sup>112</sup> 3 (D) <sup>113</sup> 2 (R)	N/A <sup>114</sup>
NEW YORK							
<i>Harkenrider v. Hochul</i> , 197 N.E.3d 437 (N.Y. 2022).	(D) Legislature <sup>115</sup> with Independent Redist. Comm'n	-	Y	Y	Y	4-3 unconstitutional 3 (D) 1 (R) - 3 (D)	"[C]ongressional districts were drawn with a particular impermissible intent or motive . . . to 'discourage competition' or to 'favor[] or disfavor[] incumbents or other particular candidates or political parties.'" <sup>116</sup>

<sup>112</sup> The plaintiffs did not challenge the map because it invidiously discriminated or was unlawful, as required by the New Jersey State Constitution. See *In re Cong. Dists. by N.J. Redistricting Comm'n*, 268 A.3d 299, 307 (N.J. 2022). Instead, they challenged the reasons given by the individual who cast the tiebreaking vote for choosing one map over the other, which was based in large part on an evaluation of partisan fairness. *Id.* Ultimately, for reasons not important in this context, the court held that even if all factual allegations were true, they were insufficient to establish a cause of action. *Id.* at 310.

<sup>113</sup> Judge Jose L. Fuentes was temporarily assigned to the supreme court by Justice Rabner to hear this decision. David Wildstein, *Fuentes Will Serve as 7th N.J. Supreme Court Justice Until LaVecchia Replacement Is Confirmed*, N.J. GLOBE (Jan. 3, 2022, 9:43 AM), <https://newjerseyglobe.com/judiciary/fuentes-will-serve-as-7th-n-j-supreme-court-justice-until-lavecchia-replacement-is-confirmed/> [https://perma.cc/8KUM-P7HN]. Justice Fuentes was originally appointed to the New Jersey Superior Court by a Democratic governor and is represented with a Democratic Party affiliation. See *id.*; David Wildstein, (*Updated*) *Appellate, Assignment Judges Are Mostly Democrats, Despite Tradition of Partisan Balance of N.J. Courts*, N.J. GLOBE (July 11, 2022, 12:01 AM), <https://newjerseyglobe.com/judiciary/appellate-assignment-judges-are-mostly-democrats-despite-tradition-of-partisan-balance-of-n-j-courts/> [https://perma.cc/C8E3-NM83].

<sup>114</sup> The usual type of partisan gerrymandering claim was not actually before the state court. See *supra* note 112 and accompanying text. The Commission indicated that it made use of the requirement that "no district may be formed solely to favor or disfavor any political party or the election of any person." See *In re Cong. Dists. by N.J. Redistricting Comm'n*, 268 A.3d at 305.

<sup>115</sup> "[O]nly upon rejection of a second set of IRC maps is the legislature is free to offer amendments to the maps created by the IRC . . ." *Harkenrider v. Hochul*, 197 N.E.3d 437, 441 (N.Y. 2022) (citing N.Y. CONST. art. III, § 4).

<sup>116</sup> *Harkenrider*, 197 N.E.3d at 452 (quoting N.Y. CONST. art. III, § 4, cl. 5).

NORTH CAROLINA							
<i>Harper v. Hall (Harper I)</i> , 868 S.E.2d 499 (N.C. 2022)	(R) Legislature Joint Redist. Committee	Y	Y	-	-	4-3 unconstitutional  4 (D) - 3 (R)	“[W]hen a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size—the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power.” <sup>117</sup>
OHIO							
<i>Adams v. DeWine</i> , 195 N.E.3d 74 (Ohio 2022)	(R) Legislature	Y	Y	-	-	4-3 unconstitutional  3 (D) 1 (R) - 3 (R)	“A plan with a partisan advantage that ‘is unwarranted by valid considerations, namely, the redistricting criteria set forth in Article XIX.’” <sup>118</sup>

<sup>117</sup> *Harper v. Hall*, 868 S.E.2d 499, 546–47 (N.C. 2022), *overruled by* 886 S.E.2d 393 (N.C. 2023).

<sup>118</sup> *Adams v. DeWine*, 195 N.E.3d 74, 85 (Ohio 2022). Criteria include ensuring contiguous territory with a single nonintersecting boundary line, various guidelines of splitting municipalities, providing no districts share portions of more than one county unless the population exceeds 400,000, and maintaining compact districts. *See id.* at 510. If the proposed plan favors a political party to a degree that is in excess of the neutral constitutional criteria, then the plan is considered a political gerrymander and unconstitutional. *See id.*

PENNSYLVANIA							
<i>Carter v. Chapman</i> , 270 A.3d 444 (Pa. 2022)	PA Judiciary	Y	Y	-	-	4-3 unconstitutional <sup>119</sup> 4 (D) - 1 (D) 2 (R)	Where maps meet traditional criteria but still “dilute . . . a particular group’s vote,” partisan fairness metrics can be used for objective evaluation of proposed plans to determine whether they are fair. <sup>120</sup>
MARYLAND							
<i>Szeliga v. Lamone</i> , No. C-02-CV-21-001816 (Md. Cir. Ct. March 25, 2022) <sup>121</sup>	(D) Legislature	Y	Y	-	Y	1 unconstitutional 1 (D)	A plan drawn with “partisanship as a predominant intent, to the exclusion of traditional redistricting criteria” found in “Article III, Section 4, of the Maryland Constitution.” <sup>122</sup>
2020 REDISTRICTING ROUND (Post-November 2022)							
ARKANSAS							
<i>Suttlar v. Thurston</i> , No. 60CV-22-1849 (Ark. Cir. Ct. May 11, 2023)	(R) Legislature	-	-	-	-	Dismissed <sup>123</sup>	n/a

<sup>119</sup> The court determined that the special master’s process for choosing a plan was unconstitutional, leaving it up to the court to select a plan that comported with traditional criteria and did not exhibit partisan unfairness. See *Carter v. Chapman*, 270 A.3d 444, 458, 471 (Pa. 2022).

<sup>120</sup> *Id.* at 470 (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018)).

<sup>121</sup> This case was consolidated with *Parrot v. Lamone*, No. C-02-CV-21-001773. See *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 Md. Cir. Ct. LEXIS 9, at \*1, \*5–6 (Mar. 25, 2022). Another related case petitioned the Maryland Court of Appeals to take original jurisdiction over the action and consolidate it with *Szeliga* and *Parrot*, however the court denied the petition. *Alban v. Lamone*, No. COA-MISC-30-2021 (Md. Mar. 1, 2022) (order denying petition).

<sup>122</sup> *Szeliga*, 2022 Md. Cir. Ct. LEXIS 9, at \*11, \*124.

<sup>123</sup> The court held that it lacked subject-matter jurisdiction over plaintiff’s claim, as it should have been brought in Arkansas Supreme Court—the court did not reach the merits of the case. *Suttlar v. Thurston*, No. 60CV-22-1849, at \*4 (Ark. Cir. Ct. May 11, 2023) (ARCourts).

FLORIDA							
<i>Black Voters Matter Capacity Bldg. Inst., Inc. v. Fla. Sec’y of State</i> , No. SC2023-1671 (Fla. Jan. 24, 2024)	(R) Legislature	-	-	-	-	1 unconstitutional <sup>124</sup> 1 (X) <sup>125</sup> Currently pending before Florida’s Supreme Court <sup>126</sup>	n/a
KENTUCKY							
<i>Graham v. Adams</i> , No. 22-CI-00047 (Ky. Cir. Ct. Nov. 10,	(R) Legislature	Y	Y	-	Y	1 constitutional <sup>127</sup> 1 (X) <sup>128</sup> 5-2	n/a <sup>130</sup>

<sup>124</sup> After *League of Women Voters of Florida v. Detzner*, the Florida Supreme Court determined that “partisan intent tainted the entire redistricting process” and ordered and approved a new map that “would preserve a historically performing Black district.” *Black Voters Matter Capacity Bldg. Inst., Inc. v. Byrd*, No. 2022-CA-000666, at \*5 (Fla. Cir. Ct. Sept. 2, 2023) (Fla. Cts. ACIS) (first citing *League of Women Voters of Fla. v. Detzner (LWV I)*, 172 So. 3d 363 (Fla. 2015); then citing *League of Women Voters of Fla. v. Detzner (LWV II)*, 179 So. 3d 258, 272 (Fla. 2015)). During the 2020 redistricting round, the governor vetoed both newly proposed plans for that particular district, one of which maintained the previous configuration, and created a new plan, which was subsequently passed by the legislature. *Black Voters Matter Capacity Bldg., Inc. v. Fla. Sec’y of State*, No. 2022-CA-000666, at \*7–8. The plaintiffs then sued, claiming that the new map violated the Florida Constitution since it “was drawn with improper discriminatory and partisan intent” and diminished “Black voters’ ability to elect their candidate of choice.” *Id.* at \*9. The parties agreed to limit the case to only the diminishment claim and allowed the court to decide the claim as a matter of law by stipulating to various facts. *Id.* at \*9–10. The court ultimately held the new map unconstitutional because it “weaken[ed] . . . [and] actually eliminate[d] . . . Black voters’ ability to elect the candidate of their choice.” *Id.* at \*18.

<sup>125</sup> Florida’s local courts use the non-partisan election method to elect judges, so partisan affiliation for Judge J. Lee Marsh could not be determined. *See infra* note 149.

<sup>126</sup> *Black Voters Matter Capacity Bldg. Inst., Inc. v. Fla. Sec’y of State*, No. SC2023-1671 (Fla. Jan. 24, 2024) (Fl. Cts. ACIS)

<sup>127</sup> Despite the court finding that the proposed maps were partisan gerrymanders, the court ultimately held they were constitutional. *Graham v. Adams*, No. 22-CI-00047, at \*40, \*70 (Ky. Cir. Ct. Nov. 10, 2022) (Am. Redistricting Proj.). “[T]he Kentucky Supreme Court has recognized that apportionment is a political process. And the Kentucky Constitution does not explicitly forbid the consideration of partisan interests in apportioning representation.” *Id.* at \*62 (citing *Jensen v. State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997)). The Kentucky Supreme Court affirmed this decision in December 2023. *Graham v. Adams*, 684 S.W.3d 663, 693–94 (Ky. 2023).

<sup>128</sup> Partisan affiliation for Hon. Thomas D. Wingate, the deciding Judge, was unable to be determined. He was elected in a non-partisan election and is not included in either of the two studies mentioned. *See infra* note 149; *Graham*, No. 22-CI-00047, at \*71.

<sup>130</sup> The court does not expressly define *partisan gerrymandering* but determines that the proposed maps are partisan gerrymanders based on expert testimony using various computer algorithms and evaluating traditional criteria such as “cracking” and “packing” to determine whether the proposed map “unusually favors one party over another.” *See Graham*, No. 22-CI-00047, at \*5, \*7–8, \*11–12, \*40–41, \*43.

2022), <i>aff'd</i> , 684 S.W.3d 663 (Ky.2023)						constitutional 5 (X) <sup>129</sup> - 2 (X)	
NEW MEXICO							
<i>Republican Party of N.M. v. Oliver</i> , No. D-506-CV-20220041, (N.M. Dist. Ct. Oct. 6, 2023)	(D) Legislature	-	Y	-	Y	constitutional	<i>Rucho's</i> dissent's definition, "(1) intent; (2) effects; and (3) causation." <sup>131</sup>
NORTH CAROLINA							
<i>Harper v. Hall (Harper II)</i> , 881 S.E.2d 156 (N.C. 2022) <sup>132</sup>	(R) Legislature	Y	Y	-	-	4-3 unconstitutional (in part) <sup>133</sup>  4 (D) - 3 (R)	"[W]hen a districting plan systematically makes it harder for individuals of one political party to elect a governing majority than individuals of another party of equal size based upon . . . partisanship, it deprives a voter of his or her fundamental right to equal voting power." <sup>134</sup>

<sup>129</sup> Partisan affiliation for the Kentucky Supreme Court justices was unable to be determined. Kentucky's justices are elected through non-partisan election. See *infra* note 149; *Graham*, 684 S.W.3d at 693–94.

<sup>131</sup> *Grisham v. Van Soelen*, 539 P.3d 272, 289 (N.M. 2023) (quoting *Rucho v. Common Cause*, 588 U.S. 684, 735 (2019) (Kagan, J., dissenting)).

<sup>132</sup> The court in *Harper I* remanded the case back to the trial court so they could oversee the creation of remedial maps, in accordance with their holding in *Harper I*. *Harper v. Hall (Harper II)*, 881 S.E.2d 156, 162 (N.C. 2022) (citing *Harper v. Hall (Harper I)*, 868 S.E.2d 449, 559–60 (N.C. 2022)). The trial court rejected the remedial congressional plan but approved the house and senate plans. *Harper II*, 881 S.E.2d at 162. The Supreme Court heard this case and ruled that “state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures.” *Moore v. Harper*, 143 S. Ct. 2065, 2090 (2023).

<sup>133</sup> The court affirmed the lower court's rejection of the remedial congressional plan and acceptance of the remedial house plan. *Harper II*, 881 S.E.2d at 162. The court rejected the lower court's approval of the remedial senate plan, finding that it was unconstitutional. *Id.* at 162, 181.

<sup>134</sup> *Id.* at 161 (citing *Harper I*, 868 S.E.2d at 547–48).

<i>Harper v. Hall (Harper III)</i> , 886 S.E.2d 393 (N.C. 2023)	Court	-	-	-	-	5-2 non-justiciable <sup>135</sup> 5 (R) - 2 (D)	“There is no judicially manageable standard by which to adjudicate partisan gerrymandering claims.” <sup>136</sup>
UTAH							
<i>League of Women Voters of Utah v. Utah State Legislature</i> , No. 220901712, (Utah Dist. Ct. Nov. 22, 2022)	(R) Legislature	-	-	-	-	Ongoing <sup>137</sup>	-

There are several interesting features of Table 3. Among plans created after the 2020 census, there are five states where a court rejected a congressional plan.<sup>138</sup> These include four states where the state legislature was responsible for the plan’s design, and a fifth, Pennsylvania, where the state high court rejected the lower court’s plan in lieu of a map passed by the legislature.<sup>139</sup>

First, we see that of the court opinions finding unconstitutionality in the 2020 round, five made substantial use of two or more different

<sup>135</sup> *Harper v. Hall (Harper III)*, 886 S.E.2d 393, 449 (N.C. 2023). The court overruled its decision in *Harper I* and withdrew its opinion in *Harper II*, reinstating the original trial court’s decision on January 11, 2022, that the plaintiff’s claims presented non-justiciable political questions and were dismissed. *Id.*

<sup>136</sup> *Id.* at 448–49.

<sup>137</sup> The Third District Court of Utah denied defendant’s motion to dismiss the partisan gerrymandering claims. *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712, 2022 WL 21745734 (Utah Dist. Ct. Nov. 22, 2022). Defendants then appealed to the Utah Supreme Court, where the case is currently pending. *League of Women Voters of Utah v. Utah State Legislature*, No. 20220991 (Utah 2024) (UTCourts); Carol Funk, *Gerrymandering, Abortion, and Much More: Cases and Issues in the Pipeline at the Utah Supreme Court*, 37 UTAH BAR J. 40, 41–42 (2024).

<sup>138</sup> Maryland (never reached the state’s high court, but the plan was ruled unconstitutional by the trial court), New York, North Carolina, Ohio, and Pennsylvania. *See supra* Table 3. In no state did a trial court get reversed by the higher court. *See supra* Table 3.

<sup>139</sup> In Pennsylvania, the legislature’s preferred map was selected by the lower court judge. *See Carter v. Chapman*, 270 A.3d 444, 453–54 (Pa. 2022). The state supreme court, however, did not take the recommendation from the lower court judge and instead appointed an outside expert to help them draw their own map. *Id.* at 463.

categories of factors.<sup>140</sup> Second, four of the cases used Factor One (violation of good government criteria) and Factor Two (use of statistical criteria for evaluating the extent of gerrymandering), one court (New York) used three different factors, Factors Two, Three (process), and Four (deliberate intent to achieve partisan advantage),<sup>141</sup> and Maryland used three factors, Factor One, Two, and Four.<sup>142</sup>

Looking at both the 2010 and 2020 rounds, all of the eight cases where there was a finding of unconstitutionality used either a finding of a violation based on statistical analyses (Factor Two) or deliberate intent to achieve partisan advantage to make their determination (Factor Four).<sup>143</sup> Third, we see that, despite the U.S. Supreme Court's ruling in *Rucho*, which essentially delegated partisan gerrymandering claims to state courts, two cases were dismissed due to non-justiciability (Kansas and North Carolina).<sup>144</sup> Kansas has no provision in its state constitution prohibiting partisan gerrymandering (either direct or indirect), and North Carolina has an indirect prohibition on partisan gerrymandering claims.<sup>145</sup> Further, New Jersey, which concluded there was a failure to state a claim on which relief could be granted, also has no provision

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<sup>140</sup> See *supra* Table 3. As noted earlier, another state supreme court (Alaska) is prepared to reject legislative plans as unconstitutional gerrymanders, but having only one congressional district, that state is not included in our data set. See *supra* note 31; U.S. CENSUS BUREAU, *supra* note 76.

<sup>141</sup> See *supra* Table 3. The congressional plan in New York was overturned on both substantive and procedural grounds, with the procedural violation relating to the failing of the redistricting commission to submit a second set of maps. *Harkenrider v. Hochul*, 197 N.E.3d 437, 447, 451–54 (N.Y. 2022) (“Based on the foregoing, the enactment of the congressional and senate maps by the legislature was procedurally unconstitutional, and the congressional map is also substantively unconstitutional as drawn with impermissible partisan purpose, leaving the state without constitutional district lines for use in the 2022 primary and general elections.”). The court relied on evidence from computer simulations to find that the legislature enacted a map that discouraged competition and favored Democrats. *Id.* at 443, 453. In its opinion, it referred to this as “partisan gerrymandering.” See *id.* at 452–54. The state high court also determined that the legislature had no ability to create their own map, since the redistricting commission failed to first meet its constitutional requirements. See *id.* at 456–57.

<sup>142</sup> See *supra* Table 3.

<sup>143</sup> See *supra* Table 3. These two criteria are overlapping in some ways, since evidence of “deliberate intent to achieve partisan advantage” might come from “statistical criteria,” such as an ensemble analysis comparing the enacted plan to thousands of computer-drawn alternatives and comparing the map as a statistical outlier.

<sup>144</sup> See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (finding that partisan gerrymandering claims are “beyond the reach of the federal courts”); see also *supra* Table 3.

<sup>145</sup> See *Rivera v. Schwab*, 512 P.3d 168, 186 (Kan. 2022); *Harper v. Hall* (*Harper I*), 868 S.E.2d 499, 510 (N.C. 2022), *overruled by* 886 S.E.2d 393 (N.C. 2023). After there was a change in the partisan composition of the North Carolina Supreme Court in 2023, the new Republican majority reversed the previous Democratic majority and held that partisan gerrymandering was, in fact, non-justiciable under North Carolina state law. See Montellaro et al., *supra* note 35.



prohibiting partisan gerrymandering in their state constitution.<sup>146</sup> Fourth, we see a surprisingly high proportion of states in our sample where the majority party in the legislature is different from the majority party in the state's supreme court (Pennsylvania (twice), Kansas, and North Carolina (twice)). Additionally, in half of the cases, we see states with a majority party in the legislature that is different from the majority party that rendered the final decision in the case in the state court.<sup>147</sup> Finally, and perhaps most importantly, while there remains no clear consensus in the legal literature on how to define/operationalize a partisan gerrymander, two state courts in the 2010 round and four state courts in the 2020 round were able to develop *judicially manageable standards* sufficient to identify and determine a partisan gerrymander. These standards all seem to converge around a common idea that partisan gerrymandering occurs when there is an improper advantage based on political party affiliation. The academic literature on partisan gerrymandering generally emphasizes the use of various statistical metrics,<sup>148</sup> and a majority of the above cases followed suit, but traditional good government criteria continue to be an important factor in most cases.

*C. Is There (Indirect) Evidence that the Decisions of Individual State Supreme Court Justices on Partisan Gerrymandering Challenges to a Congressional Map Reflect Their Partisan Leanings?*

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

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<sup>146</sup> See *supra* Table 3; *In re* Cong. Dists. by N.J. Redistricting Comm'n, 268 A.3d 299, 310 (N.J. 2022).

<sup>147</sup> See *supra* Tables 1, 3.

<sup>148</sup> See, e.g., John F. Nagle, *Measures of Partisan Bias for Legislating Fair Elections*, 14 ELECTION L.J. 346, 346–55 (2015).

redistricting cases before state courts.<sup>149</sup> We first focus on comparing votes by justices in relationship to the party that drew the map.<sup>150</sup>

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

<sup>149</sup> For example, the North Carolina Supreme Court reversed its own understanding of its constitution as the membership of the court changed. See Montellaro et al., *supra* note 35. While the court's membership changed, the facts and the law were unchanged. Compare Harper v. Hall (*Harper I*), 868 S.E.2d 499, 510 (N.C. 2022) (holding that partisan gerrymandering was illegal), with Harper v. Hall (*Harper II*), 886 S.E.2d 393, 400 (N.C. 2023) (reversing the decision in *Harper I* and holding that claims of partisan gerrymandering were non-justiciable). For more information, see *supra* notes 132–36 and accompanying text.

<sup>150</sup> There are multiple ways that states have chosen to select supreme court justices: gubernatorial election, where the governor directly appoints justices (New Jersey); partisan elections, where justices indicate their party affiliation on a ballot and are elected by the people (Pennsylvania, North Carolina, and Ohio); non-partisan elections where judges are listed on a ballot with no party affiliation and elected by the people (Maryland Circuit Court, Kentucky Circuit Court, and Florida Circuit Court); and assisted appointment, where a commission either appointed by the governor or the state bar association compiles a list of judges for nomination that the governor then votes on (Florida, New York, and Kansas). See *Judicial Election Methods by State*, BALLOTPEDIA, [https://ballotpedia.org/Judicial\\_election\\_methods\\_by\\_state](https://ballotpedia.org/Judicial_election_methods_by_state) [<https://perma.cc/QBU2-HEKQ>]; *Maryland Judicial Elections*, BALLOTPEDIA, [https://ballotpedia.org/Maryland\\_judicial\\_elections](https://ballotpedia.org/Maryland_judicial_elections) [<https://perma.cc/8N9X-JNJT>]; *Kentucky Judicial Elections*, BALLOTPEDIA, [https://ballotpedia.org/Kentucky\\_judicial\\_elections](https://ballotpedia.org/Kentucky_judicial_elections) [<https://perma.cc/HW43-YQGY>]; *Florida Judicial Elections*, BALLOTPEDIA, [https://ballotpedia.org/Florida\\_judicial\\_elections](https://ballotpedia.org/Florida_judicial_elections) [<https://perma.cc/LTC2-M8VZ>]. Justice party affiliation for gubernatorial election states (New Jersey) were determined based on the party affiliation of the governor who appointed them. For partisan election states (Pennsylvania, North Carolina, and Ohio), justice party affiliation was determined by the party each justice chose to affiliate with for that election. For assisted appointment states (Florida, New York, and Kansas), the justice affiliation was determined by the party affiliation of the governor who appointed the justice, except for Justice Lewis (Florida), Justice Quince (Florida), and Judge Garcia (New York). These three Justices were appointed by Democratic governors but received conservative scores on a 2012 survey by Stanford University, titled “State Supreme Court Ideology and ‘New Style’ Judicial Campaigns” (both Florida justices) and a 2020 study by Ballotpedia titled “Ballotpedia Courts: State Partisanship” (New York judge). See *Bonica and Woodruff Campaign Finance Scores of State Supreme Court Justices, 2012*, BALLOTPEDIA, [https://ballotpedia.org/Bonica\\_and\\_Woodruff\\_campaign\\_finance\\_scores\\_of\\_state\\_supreme\\_court\\_justices\\_2012](https://ballotpedia.org/Bonica_and_Woodruff_campaign_finance_scores_of_state_supreme_court_justices_2012) [<https://perma.cc/Z453-KAK3>]; BALLOTPEDIA, BALLOTPEDIA COURTS: STATE PARTISANSHIP 33 (2020); *Fred Lewis*, BALLOTPEDIA, [https://ballotpedia.org/Fred\\_Lewis](https://ballotpedia.org/Fred_Lewis) [<https://perma.cc/D2RE-TULL>]; *Peggy Quince*, BALLOTPEDIA, [https://ballotpedia.org/Peggy\\_Quince](https://ballotpedia.org/Peggy_Quince) [<https://perma.cc/X8UY-PDPU>]; *Michael Garcia (New York)*, BALLOTPEDIA, [https://ballotpedia.org/Michael\\_Garcia\\_\(New\\_York\)](https://ballotpedia.org/Michael_Garcia_(New_York)) [<https://perma.cc/PR4X-W5VH>]. Aside from Justice Standridge (Kansas), Justice Fuentes and Justice Pierre-Louis (New Jersey), and Judge Singas, Judge Cannataro, and Judge Troutman (New York), who were not included in the surveys, the remaining justices' party affiliation based on appointing governor matched the scores they received on the surveys. For non-partisan states (Maryland, Kentucky, and Florida Circuit Court), justice party affiliation was determined based on the previous two studies listed, if available. Judge Wingate (Kentucky Circuit Court) and Judge J. Lee Marsh (Florida Circuit Court) were not listed on one of these studies, and their partisan affiliation could not be determined.

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

Hypothesis 3a is straightforward, in that one expectation is that justices are not entirely independent of politics, and therefore rule on cases in ways that match their partisan tendencies.<sup>151</sup>

Table 4 allows us to examine these hypotheses. This table examines the number of Republican- or Democratic-affiliated justices that voted in favor of the decision, displayed as a percentage of the total number of justices from the majority or minority party. For example, in Florida, the congressional map was drawn by a Republican legislature after 2010. There were six Republican justices who voted in *League of Women Voters of Florida*.<sup>152</sup> Four of those six justices voted that the plan was unconstitutional and two rejected the claim of partisan gerrymandering, leading to 66.6% majority party agreement with the decision.<sup>153</sup>

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<sup>151</sup> It would be useful to differentiate between justices that ascend via neutral institutions (such as merit), and those whose rises to the high court are more partisan in nature. However, statistical significance on these tests would be difficult due to the few cases that fit into these categories, and other complications such as when justices are appointed by the governor of one party and confirmed by a majority consisting of the other party. This is beyond the scope of this Essay.

<sup>152</sup> See *supra* Table 3; note 147 and accompanying text; *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 417 (Fla. 2015).

<sup>153</sup> *League of Women Voters of Fla.*, 172 So. 3d at 417; see *supra* note 150. Justice Pariente (D) issued the 5-2 opinion, in which Chief Justice Labarga (R), and Justice Quince (R) and Justice Perry (R), concurred; Justice Lewis (R) concurred in the result. *League of Women Voters of Fla.*, 172 So. 3d at 417; see *supra* note 150. Justice Canady (R) dissented with an opinion, in which Justice Polston (R) concurred. *League of Women Voters of Fla.*, 172 So. 3d at 417; see *supra* note 150.

**Table 4. Majority and Minority Party Justice Agreement with the Decision<sup>154</sup>**

State	Majority Party	Majority Party (% agreement with decision)	Minority Party (% agreement with decision)
<b>Ruled Unconstitutional</b>			
FLORIDA (2015)	R	66.6% (4/6)	100% (1/1)
PENNSYLVANIA (2018)	R	0% (0/2)	100% (5/5)
NEW YORK (2022)	D	50% (3/6)	100% (1/1)
NORTH CAROLINA (2022) ( <i>Harper I</i> )	R	0% (0/3)	100% (4/4)
OHIO (2022)	R	25% (1/4)	100% (3/3)
PENNSYLVANIA (2022)	R <sup>155</sup>	0% (0/2)	80% (4/5)
MARYLAND (2022)	D	100% (1/1)	n/a (0/0)
NORTH CAROLINA (2022) ( <i>Harper II</i> )	R	0% (0/3)	100% (4/4)
OVERALL (averaged by justices, not by states)		33.3% (9/27)	95.6% (22/23)
<b>Ruled on other grounds (e.g., justiciability, failure to state a claim)</b>			
KANSAS (2022)	R	100% (2/2)	40% (2/5)
NEW JERSEY (2022)	Commission (plan considered D) <sup>156</sup>	100% (3/3)	100% (2/2)
NORTH CAROLINA (2023)	R	100% (5/5)	0% (0/2)
OVERALL (averaged by justices, not by states)		100% (10/10)	44.4% (4/9)

Note: R = Republican, D = Democratic, U = Unconstitutional, C = Constitutional

Hypothesis 3a is clearly confirmed. While there are some justices (like those in Florida in 2015) who vote to find a congressional plan drawn by a legislature controlled by their own party unconstitutional, overall, it is less than half—only 33.3%—of majority party justices voted against their own party.<sup>157</sup> Overwhelmingly, minority party justices voted to find a plan drawn

<sup>154</sup> Ongoing, pending, and dismissed cases, as well as those cases that did not rule on constitutionality, e.g., *Harper v. Lewis*, No. 19-CVS-012667, 2019 N.C. Super. LEXIS 122 (Super. Ct. Oct. 28, 2019), from Table 3 were omitted here, as was *Graham v. Adams*, No. 22-CI-00047 (Ky. Cir. Ct. Nov. 10, 2022) (Am. Redistricting Proj.), *aff'd*, 684 S.W.3d 663 (Ky. 2023), due to the inability to determine judge or justice party affiliation. *See supra* note 150.

<sup>155</sup> The Republican legislature proposed a plan (without the support of the Democratic governor). *Carter v. Chapman*, 270 A.3d 444, 454 (Pa. 2022). The Commonwealth Court, which heard proceedings to adopt a plan, selected this plan unaltered. *See id.* The state supreme court, however, rejected that plan as an unconstitutional gerrymander. *Id.* at 457–59.

<sup>156</sup> *In re Cong. Dists. by N.J. Redistricting Comm'n*, 268 A.3d 299, 302–03 (2022). The plan was proposed by a non-partisan redistricting commission, with the tie-breaking vote cast by an independent, non-partisan member of the commission. *Id.* Here, we consider the plan Democratic since the claim was that it unduly favored Democrats. *Id.* at 303, 308.

<sup>157</sup> *See supra* Table 4.

by the opposing party to be an unconstitutional partisan gerrymander—95.6% of minority party justices agreed with a finding of unconstitutionality.<sup>158</sup> In all but one case, minority party justices had 100% agreement with a finding of unconstitutionality,<sup>159</sup> with the remaining case at 80% agreement.<sup>160</sup> But, because all but one of the legislatively-drawn maps we are examining are drawn by legislatures under Republican control, we cannot fully rule out the potential confound (Hypothesis 3b) that Republicans are simply less likely to find plans to be partisan gerrymanders, while Democrats are much more likely to do so.<sup>161</sup> In the one state where the plan was overturned (and reached the highest court) and the map was drawn by a Democratic legislature (New York), the Republican leaning justice voted to find the map unconstitutional.<sup>162</sup> In Ohio, the Republican Chief Justice Maureen O'Connor voted to overturn the Republican-drawn plan (multiple times),<sup>163</sup> and as noted earlier, four justices in Florida voted against their own party's congressional plan (in 2015).<sup>164</sup>

Relating Table 1 to Table 4, we see that the presence of an explicit provision prohibiting partisan gerrymandering affects the willingness of justices to find a plan to be an unconstitutional gerrymander, even when it negatively affects their own political party.<sup>165</sup> In the three states with express prohibitions (Florida, New York, and Ohio), majority party justices agreed with a finding of

<sup>158</sup> Of course, the cases in Table 4 do not reflect a random sample of all redistricting maps, and we should not expect them to. Cases are brought where they are likely to succeed. Moreover, Table 4 only examines the links to partisanship of justices in situations where maps are drawn under one party control and where partisan gerrymandering is suspected enough to trigger a credible lawsuit.

<sup>159</sup> See *supra* Table 4. (Florida, Pennsylvania (2018), New York, North Carolina (*Harper I* and *Harper II*), and Ohio).

<sup>160</sup> See *supra* Table 4. In Pennsylvania (2022), one Democratic justice voted to uphold the plan created by the Republican legislature. See *supra* Table 3.

<sup>161</sup> See *supra* Table 4. We will revisit this question in future work when we look in more detail at these court opinions to see the reasons given for their view by those justices who did not find a plan to be unconstitutional when a majority of their fellow justices did find the plan to be unconstitutional.

<sup>162</sup> See *supra* Table 4. In Maryland, although the decision did not reach the highest state court, the trial court judge was appointed by a Democratic governor. Nick Corasaniti, *Judge Throws Out Maryland Congressional Map, in Blow to Democrats*, N.Y. TIMES (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/us/politics/maryland-redistricting-map-judge-ruling.html> [<https://perma.cc/9USN-V5VU>]. So, in both cases in which a Democrat-drawn legislature map was overturned, justices of the same party voted to overturn the plan.

<sup>163</sup> Morgan Trau, *Former Ohio Chief Justice Continues Fight Against Gerrymandered Maps*, OHIO CAP. J. (Aug. 21, 2023, 4:50 AM), <https://ohiocapitaljournal.com/2023/08/21/former-ohio-chief-justice-continues-fight-against-gerrymandered-maps/> [<https://perma.cc/89LS-6PZT>].

<sup>164</sup> See *supra* Table 4.

<sup>165</sup> See *supra* Tables 1, 4.

unconstitutionality at a level between 25% and 66.6%, as compared to a level of 0% in the two states (Pennsylvania and North Carolina) where more indirect language had to be interpreted as banning partisan gerrymandering.<sup>166</sup>

Moreover, it is Republican-affiliated justices who resist interpreting their state constitution to have broad voting rights provisions that ban partisan gerrymandering. This can even be seen in the two cases that did not reach the merits of the partisan gerrymandering claim due to non-justiciability (Kansas and North Carolina). Majority party agreement was 100% for those two cases, both of which were Republican-controlled legislatures.<sup>167</sup> Minority party agreement was 44.4%.<sup>168</sup> Nonetheless, the data show that even in situations where there is an explicit constitutional prohibition of partisan gerrymandering, there is some unwillingness, on the part of justices, to find a map drawn by their own party unconstitutional. This is true both for cases where the map was drawn by Republicans (Florida and Ohio) and Democrats (New York).

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

When looking at the dissenting opinions of the justices who vote to uphold a plan, they commonly criticize the court majority's disregard of separation of powers and critique the standard of review that was used by the majority.<sup>169</sup> These criticisms generally held true for all

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<sup>166</sup> See *supra* Tables 1, 4.

<sup>167</sup> See *supra* Table 4.

<sup>168</sup> See *supra* Table 4.

<sup>169</sup> See *e.g.*, *Rivera v. Schwab*, 512 P.3d 168, 194–96 (Kan. 2022) (Rosen, J., concurring in part and dissenting in part). Justice Canady's dissent in *League of Women Voters of Florida v. Detzner* emphasizes that the majority assumes that the legislature operates under a "presumption of unconstitutionality" by "reweigh[ing] the evidence" and repudiating the "beyond all reasonable doubt" standard. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 417, 420 (Fla. 2015) (Canday, J., dissenting). As a result, the court violates the separation of powers and impermissibly encroaches on the legislature's power to draw congressional districts. See *id.* at 424; see also *Rivera*, 512 P.3d at 196 (asserting that the majority incorrectly tied state constitutional provision to the 14th amendment and as a result went "beyond . . . [their] authority" by essentially implementing a "judicial constitutional amendment" (citing *State v. Smith* 814 P.2d 652, 661 (Wash. 1991) (Utter, J., concurring)); *Harkenrider v. Hochul*, 197 N.E.3d 437, 459 (N.Y. 2022) (Wilson, J., dissenting) (stating that

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

### III. POST-SCRIPT, AFTER THE 2022 MIDTERM ELECTION

When we turn to what has happened after the November 2022 elections, the most important development relevant to this section of our Essay comes out of North Carolina. The November election included a state supreme court contest that resulted in a change in the partisan majority on the North Carolina Supreme Court from Democratic to Republican.<sup>170</sup> A large amount of money was spent on this judicial election, with the view in mind that both redistricting decisions and abortion-related decisions were going to come before the North Carolina Supreme Court.<sup>171</sup> The court promptly reversed its earlier decision finding the Republican-drawn congressional map in the state to be unconstitutional and found that partisan gerrymandering claims are *not* justiciable under the North Carolina Constitution.<sup>172</sup> Thus, the North Carolina Legislature will be unchecked in its ability to draw a partisan gerrymander.<sup>173</sup>

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the evidence does not rise to “the level of certainty required to invalidate the 2022 redistricting as unconstitutional”—i.e., “beyond reasonable doubt”); *Harper v. Hall* (*Harper I*), 868 S.E.2d 499, 563 (N.C. 2022) (Newby, C.J., dissenting) (arguing that the majority overstepped into the role of “policymakers” and essentially amended the constitution in the name of “judicial activism”), *overruled by* 886 S.E.2d 393 (N.C. 2023); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 826 (Pa. 2018) (Baer, J., concurring in part and dissenting in part) (asserting that the imposition of “court-designated districting criteria on the Legislature” violates separation of powers); *Adams v. DeWine*, 195 N.E.3d 74, 121 (Ohio 2022) (Kennedy, J., Fischer, J., & DeWine, J., dissenting) (critiquing the majority for overstepping into policy arena by saying it disagrees with the choice of counties that were split, rather than the map’s “unduly divide[d] counties”).

<sup>170</sup> See Montellaro et al., *supra* note 35.

<sup>171</sup> ASSOCIATED PRESS, *Candidates, PACs Spend \$15M in North Carolina Supreme Court Races*, WUNC 91.5 (Nov. 7, 2022, 8:12 AM), <https://www.wunc.org/politics/2022-11-07/candidates-pac-spend-15m-north-carolina-supreme-court-races> [https://perma.cc/WP6M-F2E7]. Campaign finance reports indicated that the candidates and political action committees spent at least \$15 million for this election, with “[t]wo super PACs alone hav[ing] spen[t] over \$8 million.” *Id.*

<sup>172</sup> *Harper v. Hall* (*Harper III*), 886 S.E.2d 393, 449 (N.C. 2023) (overruling their prior decision in *Harper I* and withdrawing their decision in *Harper II*).

<sup>173</sup> See Gary D. Robertson, *North Carolina Gerrymander Ruling Gives Electoral Gift to GOP in Congress*, ASSOCIATED PRESS (May 24, 2023, 12:10 AM), <https://apnews.com/article/north-carolina-redistricting-congress-republicans-a5dae9808fbfa9ff66b427b99928130d> [https://perma.cc/H2QD-ZAJ8].

Another important development comes from New York. After the New York Court of Appeals ruled the New York congressional map unconstitutional and implemented a map of its own for 2022, we see a similar pattern but with the partisanship reversed—a map enacted by the Democratic-controlled legislature being held unconstitutional.<sup>174</sup> Although the majority of judges on the New York Court of Appeals had been appointed by a Democratic Governor, some were seen as conservative.<sup>175</sup> When there was a post-election vacancy on the New York Court of Appeals, the Democrat-controlled New York Legislature was unwilling to accept a replacement that, in their view, was not sufficiently committed to overturning the 2022 court-drawn map.<sup>176</sup> Also, a Democrat-affiliated judge who voted against finding the legislatively-drawn map unconstitutional was appointed the new Chief Judge of the court.<sup>177</sup> Given this shift in the makeup of the court since its original decision in 2022, there was an expectation that the Democrats would get a second opportunity to redraw the map in their favor. This expectation was semi-realized in December 2023 when the New York Court of Appeals threw out the maps and ordered the IRC to create a new set of maps before the 2024 election.<sup>178</sup> After the New York Court of Appeals ruled in favor of the

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<sup>174</sup> See *Harkenrider*, 197 N.E.3d at 442, 454–56; Nicholas Fandos, *Top Court Clears Path for Democrats to Redraw House Map in New York*, N.Y. TIMES (Dec. 12, 2023), <https://www.nytimes.com/2023/12/12/nyregion/new-york-redistricting-democrats.html> [<https://perma.cc/2DSQ-9VZ6>]; *supra* text accompanying notes 172–73.

<sup>175</sup> See Sam Mellins, *A New Conservative Majority on New York's Top Court Is Upending State Law*, N.Y. FOCUS (July 7, 2022), <https://nysfocus.com/2022/07/07/court-of-appeals-conservative-bloc> [<https://perma.cc/Z8AX-7HBB>].

<sup>176</sup> See Luis Ferré-Sadurní, *State Senate Rejects Nominee for Chief Judge in Defeat for Hochul*, N.Y. TIMES (Feb. 15, 2023), <https://www.nytimes.com/2023/02/15/nyregion/hector-lasalle-chief-judge-vote.html> [<https://perma.cc/D7VG-W7WT>]; Jesse McKinley & Luis Ferré-Sadurní, *Inside the Political Fight that May Have Doomed a Chief Judge Nominee*, N.Y. TIMES (Jan. 18, 2023), <https://www.nytimes.com/2023/01/18/nyregion/lasalle-politics-democrats-hochul.html> [<https://perma.cc/E5DF-5T66>].

<sup>177</sup> See *Harkenrider*, 197 N.E.3d at 458 (Wilson, J., dissenting); Luis Ferré-Sadurní, *Rowan Wilson Is Confirmed as New York's Chief Judge*, N.Y. TIMES (Apr. 18, 2023), <https://www.nytimes.com/2023/04/18/nyregion/rowan-wilson-ny-chief-judge.html> [<https://perma.cc/L6AT-6XKR>].

<sup>178</sup> See generally *Hoffman v. N.Y. State Indep. Redistricting Comm'n*, No. 904972-22, 2022 WL 13654170 (Sup. Ct. Sept. 12, 2022); *Hoffman v. N.Y. State Indep. Redistricting Comm'n*, 192 N.Y.S.3d 763 (App. Div. 2023); *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, 234 N.E.3d 1002 (N.Y. 2023). Petitioners filed a motion compelling the NY State IRC to prepare a second redistricting plan for use after the 2022 election. See *Hoffman*, 2022 WL 13654170, at \*1–2. The Albany County Supreme Court granted respondent's motion to dismiss the petition, finding that the court-ordered map satisfied the constitutional mandate to create a map every ten years, and having the IRC submit a new one would “run[] afoul of that intent.” *Id.* at \*6. On appeal to the Appellate Division, Third Department, the court reversed the lower court's decision and ordered the IRC to create a second plan. See *Hoffman*, 192 N.Y.S.3d at 769–70. The court reasoned that it was unlikely the Court of Appeals's silence in *Harkenrider* implied “further ramifications than strictly required,” meaning the map should have only been used for



plaintiffs, the commission adopted, in a bipartisan 9-1 vote, a map that mostly kept the court lines intact.<sup>179</sup> The legislature rejected these lines, but, in a surprise move, approved their own plan that highly resembled the court's map.<sup>180</sup>

Kentucky and New Mexico also resolved their disputes after the 2022 midterm election but after the production of this Essay. The Florida and Utah cases are still pending.

In Kentucky, the Supreme Court affirmed a trial court decision that established that the congressional maps were partisan gerrymanders.<sup>181</sup> However, also affirming the lower court, the Supreme Court determined that partisan gerrymandering was not prohibited by the Kentucky Constitution: "Regardless of how unusual or eye-raising it may be, we must not erase it unless it plainly leaves the four corners of our constitutional frame."<sup>182</sup> They further opined that "[t]he alleged partisanship in the crafting of the Apportionment Plans does not rise to the level of a clear, flagrant, or unwarranted deviation from constitutional limitations or a threat to our democratic form of government."<sup>183</sup>

In New Mexico, the Supreme Court determined that 1) the state constitution prohibits partisan gerrymandering<sup>184</sup> and, 2) the plan adopted by the Democrats did not "rise[] to the level of an egregious gerrymander."<sup>185</sup>

An appeal in Utah challenging the congressional map was heard in July 2023.<sup>186</sup> As of June 2024, there has been no decision in this case.<sup>187</sup>

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the 2022 election. *See id.* at 768. Further, the IRC has a constitutional duty to provide a second map after the first one is rejected. *See id.* at 769. The Court of Appeals affirmed this reasoning, holding that "the IRC should comply with its constitutional mandate by submitting to the legislature, on the earliest possible date . . . a second congressional redistricting plan and implementing legislation." *Hoffman*, 234 N.E.3d at 1021–22.

<sup>179</sup> *Id.* at 1002; Nicholas Fandos, *Democrats Reject Bipartisan Map and Will Redraw N.Y. House Districts*, N.Y. TIMES (Feb. 26, 2024), <https://www.nytimes.com/2024/02/26/nyregion/redistricting-maps-ny-congress.html> [<https://perma.cc/3D7X-HNWX>].

<sup>180</sup> Nicholas Fandos, *Democrats Pass a N.Y. House Map that Modestly Benefits Them*, N.Y. TIMES (Feb. 28, 2024), <https://www.nytimes.com/2024/02/28/nyregion/redistricting-ny-house-democrats.html> [<https://perma.cc/VYC6-4BX7>].

<sup>181</sup> *See Graham v. Adams*, 684 S.W.3d 663, 682 (Ky. 2023).

<sup>182</sup> *Id.* at 672.

<sup>183</sup> *Id.* at 693.

<sup>184</sup> *See generally* *Grisham v. Van Soelen*, 539 P.3d 272 (N.M. 2023).

<sup>185</sup> *Republican Party of N.M. v. Oliver*, No. D-506-CV-20220041, at \*12–13 (N.M. Dist. Ct. Oct. 6, 2023) (Am. Redistricting Proj.); *see Grisham*, 539 P.3d at 293.

<sup>186</sup> *See* Sam Mertz, *Utah High Court Scrutinizes Process that Sliced State's Most Democrat-Heavy County into 4 Districts*, AP NEWS (July 11, 2023, 12:45 PM), <https://apnews.com/article/utah-redistricting-3cb3fb05e7253f3ec3d26749138bea9e> [<https://perma.cc/R5CD-D9NX>].

<sup>187</sup> *See id.*

Plaintiffs and defendants in a Florida case agreed to dismiss the partisan gerrymandering claim and allowed the court to decide the racial diminishment claim as a matter of law by stipulating to various facts.<sup>188</sup> The court ultimately held the new map unconstitutional because it “weaken[ed] . . . [and] actually eliminate[d] . . . Black voters’ ability to elect the candidate of their choice.”<sup>189</sup> The state appealed and the appeals court reversed the trial court.<sup>190</sup> The Florida Supreme Court has agreed to review the case, but as of June 2024, no hearing has been set.<sup>191</sup>

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<sup>188</sup> *Black Voters Matter Capacity Bldg. Inst., Inc. v. Fla. Sec’y of State*, No. SC2023-1671, at \*9–10 (Fla. Jan. 24, 2024) (Fla. Cts. ACIS).

<sup>189</sup> *Id.* at \*18.

<sup>190</sup> *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 375 So. 3d 335, 356 (Fla. Dist. Ct. App. 2023).

<sup>191</sup> See *Florida Congressional Redistricting Challenge (Black Voters Matter)*, DEMOCRACY DOCKET, <https://www.democracydocket.com/cases/florida-congressional-redistricting-challenge-black-voters-matter/> [<https://perma.cc/W5LH-RXR3>]; see also Scheduling Order, *Black Voters Matter Capacity Bldg.*, No. SC2023-1671 (Fla. Aug. 6, 2024) (Fla. Cts. ACIS).

## APPENDIX

**Table 1. Plaintiffs in State & Federal Court Cases**

State	Case	Individually Named Plaintiffs from Cases
FLORIDA		
2015 (State Court)	League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015).	League Plaintiffs: Robert Allen Schaeffer, Brenda Ann Holt, Roland Sanchez-Medina, Jr., John Steel Olmstead. Romo Plaintiffs: Rene Romo, Benjamin Weaver, William Everett Warinner, Jessica Barrett, June Keener, Richard Quinn Boylan, Bonita Agan.
Pending (State Court)	Black Voters Matter Capacity Bldg. Inst., Inc. v. Fla. Sec'y of State, No. SC2023-1671 (Fla. Jan. 24, 2024) (Fl. Cts. ACIS)	Pastor Reginald Gundy, Sylvia Young, Phyllis Wiley, Andrea Hershoin, Anaydia Connolly, Brandon P. Nelson, Katie Yarrows, Cynthia Lippert, Kisha Linebaugh, Beatriz Alonso, Gonzalo Alfredo Pedroso, Ileana Caban
Pending (Federal Court)	Common Cause Fla. v. Byrd, No. 22-cv-109, 2023 WL 6136200 (N.D. Fla. Aug. 18, 2023)	Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, Nancy Ratzan, Cassandra Brown, Peter Butzin, Charlie Clark, Veatrice Holifield Farrell, Rosemary McCoy Institutions: Common Cause Florida, FairDistricts Now, Florida State Conference of the National Association for the Advancement of Colored People Branches

KANSAS		
2022 (State Court)	Rivera v. Schwab, 512 P.3d 168 (Kan. 2022)	Rivera Plaintiffs: Faith Rivera, Diosselyn Tot-Velasquez, Kimberly Weaver, Paris Raite, Donnavan Dillon, Loud Light Alonzo Plaintiffs: Tom Alonzo, Sharon Al-Uqdah, Amy Carter, Connie Brown Collins, Sheyvette Dinkens, Melinda Lavon, Ana Marcela Maldonado Morales, Liz Meitl, Richard Nobles, Rose Schwab, Anna White Frick Plaintiffs: Susan Frick, Lauren Sullivan, Darrell Lea, Susan Spring Schiffelbein
KENTUCKY		
2022 (State Court)	Graham v. Adams, 684 S.W.3d 663 (Ky. 2023)	Derrick Graham, Jill Robinson, Mary Lynn Collins, Katima Smith-Willis, Joseph Smith
NORTH CAROLINA		
2019 (State Court)	Harper v. Lewis, No. 19-CVS-012667, 2019 N.C. Super. LEXIS 122 (Super. Ct. Oct. 28, 2019)	Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Anthony Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen, Jr., Shawn Rush, Jackson Thomas Dunn, Jr., Mark S. Peters, Joseph Thomas Gates, Kathleen Barnes, Virginia Walters Brien, David Dwight Brown
2022 (State Court)	Harper v. Hall ( <i>Harper D</i> ), 868 S.E.2d 499 (N.C. 2022)	Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Anthony Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen, Jr., Shawn Rush, Jackson Thomas Dunn, Jr., Mark S. Peters, Kathleen Barnes,

		Virginia Walters Brien, David Dwight Brown NCLCV Plaintiffs: Henry M. Michaux, Jr., Dandrielle Lewis, Timothy Chartier, Talia Fernós, Katherine Newhall, R. Jason Parsley, Edna Scott, Roberta Scott, Yvette Roberts, Jereann King Johnson, Reverend Reginald Wells, Yarbrough Williams, Jr., Reverend Deloris L. Jerman, Viola Ryals Figueroa, Cosmos George
2019 (Federal Court)	<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019)	Larry D. Hall, Douglas Berger, Cheryl Lee Taft, Richard Taft, Alice Bordsen, William H. Freeman, Melzer A. Morgan, Jr., Cynthia S. Boylan, Coy E. Brewer, Jr., John Morrison McNeill, Robert Warren Wolf, Jones P. Byrd, John W. Greshma, Russell G. Walker Jr.
MARYLAND		
2019 (Federal Court)	<i>Lamone v. Benisek</i> , 348 F. Supp. 3d 493 (D. Md. 2018) (consolidated with <i>Rucho v. Common Cause</i> )	O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Jr., Kat O'Connor, Alonnie L. Ropp, Sharon Strine
2022 (State Court)	<i>Szeliga v. Lamone</i> , Nos. C-02-CV-21-001816, 2022 Md. Cir. Ct. LEXIS 9 (Mar. 25, 2022)	Szeliga Plaintiffs: Kathryn Szeliga, Christopher T. Adams, James Warner, Martin Lewis, Janet Moye Cornick, Rickey Agyekum, Maria Isabel Icaza, Luanne Ruddell, Michelle Kordell. Parrott Plaintiffs: Neil Parrott, Ray Serrano, Carol Swigar, Douglas

		Raum, Ronald Shapiro, Deanna Mobley, Glen Glass, Allen Furth, Jeff Warner, Jim Nealis, Dr. Antonio Campbell, Sallie Taylor
<b>MICHIGAN</b>		
2022 (State Court)	Detroit Caucus v. Indep. Citizens Redistricting Comm'n, 967 N.W.2d 832 (Mich. 2022)	Dr. Carol Weaver, Wendell Byrd, Darryl Woods Institutions: Detroit Caucus and Romulus City Council
<b>NEW JERSEY</b>		
2022 (State Court)	<i>In re</i> Cong. Dists. by N.J. Redistricting Comm'n, 268 A.3d 299 (N.J. 2022)	Douglas Steinhardt, Michele Albano, Jeanne Ashmore, Mark Duffy, Mark Logrippo, and Lynda Pagliughi (each in their official capacity as members of the New Jersey Redistricting Commission; Douglas Steinhardt also in his official capacity as delegation Chair of the Commission)
<b>NEW MEXICO</b>		
2023 (State Court)	Republican Party of N.M. v. Oliver, No. D- 506-CV-20220041, (N.M. Dist. Ct. Oct. 6, 2023) (Am. Redistricting Proj.)	David Gallegos, Timothy Jennings, Dinah Vargas, Manuel Gonzales, Jr., Bobby Kimbrow, Deann Kimbro, Pearl Garcia
<b>NEW YORK</b>		
2022 (State Court)	Harkenrider v. Hochul, 197 N.E.3d 437 (N.Y. 2022)	Tim Harkenrider, Guy C. Brought, Lawrence Canning, Patricia Clarino, George Doohar, Jr., Stephen Evans, Linda Fanton, Jerry Fishman, Jay Frantz, Lawrence Garvey, Alan Nephew, Susan Rowley, Josephine Thomas, and Marianne Volante

OHIO		
2022 (State Court)	Adams v. DeWine, 195 N.E.3d 74 (Ohio 2022)	Regina C. Adams, Bria Bennett, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Carrie Kubicki, Dana Miller, Meryl Neiman, Holly Oyster, Constance Rubin, Solveig Spjeldnes, Everett Totty
2023 (State Court)	League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 225 N.E.3d 989 (Ohio 2023)	Bette Evanshine, Janice Patterson, Barbara Brothers, John Fitzpatrick, Janet Underwood, Stephanie White, Renee Ruchotzke, and Tiffany Rumbalski Institutions: League of Women Voters of Ohio and A. Philip Randolph Institute of Ohio
2022 (Federal Court)	Simon v. DeWine, No. 21-CV-2267, 2022 WL 118180 (N.D. Ohio Jan. 12, 2022)	Honorable Reverend Kenneth L. Simon, and Helen Youngblood (in their individual capacities as registered Black voters in Mahoning County, Ohio, and as successor representatives of the class of Black voters certified in <i>Armour v. State</i> , 775 F. Supp. 1044 (N.D. Ohio 1991))
OREGON		
2021 (State Court)	Clarno v. Fagan, No. 21CV40180, 2021 WL 5632371 (Or. Cir. Ct. Nov. 24, 2021)	Beverly Clarno, Gary Wilhelms, James L. Wilcox, Larry Campbell

PENNSYLVANIA		
2018 (State Court)	League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737 (Pa. 2018)	Carmen Febo San Miguel, James Solomon, John Greiner, John Capowski, Gretchen Brandt, Thomas Rentschler, Mary Elizabeth Lawn, Lisa Isaacs, Don Lancaster, Jordi Comas, Robert Smith, William Marx, Richard Mantell, Priscilla McNulty, Thomas Ulrich, Robert McKinstry, Mark Lichty, Lorraine Petrosky
2018 (Federal Court)	Corman v. Sec'y of Pennsylvania, 751 Fed. Appx. 157 (3d Cir. 2018) (per curiam)	Jacob Corman (in his official capacity as Majority Leader of the Pennsylvania Senate), Michael Folmer (in his official capacity as Chairman of the Pennsylvania Senate State Government Committee), Lou Barletta, Ryan Costello, Mike Kelly, Tom Marino, Scott Perry, Keith Rothfus, Lloyd Smucker, Glenn Thompson, Jeffrey Cutler
2022 (State Court)	Carter v. Chapman, 270 A.3d 444 (Pa. 2022) (per curiam)	Carter Petitioners: Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom Dewall, Stephanie McNulty, Janet Temin. Gressman Petitioners: Philip T. Gressman,



		Ron Y. Donagi, David P. Marsh, Kristopher R. Tapp, Pamela Gorkin, James L. Rosenberger, Amy Myers, Eugene Boman, Gary Gordon; Liz McMahan, Timothy G. Feeman, Garth Isaak
UTAH		
Pending (State Court)	League of Women Voters of Utah v. Utah State Legislature, No. 220901712, 2022 WL 21745734 (Utah Dist. Ct. Nov. 22, 2022)	Stefanie Condie, Malcolm Reid, Victoria Reid, Wendy Martin, Eleanor Sundwall, Jack Markman, Dale Cox
WISCONSIN		
2012 (Federal Court)	Baldus v. Members of the Wis. Gov't Accountability Bd., 849 F. Supp. 2d 840 (E.D. Wis. 2012)	Baldus Plaintiffs: Alvin Baldus, Carlene Bechen, Elvira Bumpus, Ronald Biendseil, Leslie Davis III, Brett Eckstein, Gloria Rogers, Richard Kresbach, Rochelle Moore, Amy Risseeuw, Judy Robson, Jeanne Sanchez-Bell, Cecelia Schliepp, Travis Thyssen, Cindy Barbera, Ron Boone, Vera Boone, Evanjelina Cleerman, Sheila Cochran, Maxine Hough, Clarence Johnson, Richard Lange, Gladys Manzanet Intervenor Plaintiffs: Tammy Baldwin, Gwendolynne Moore, and Ronald Kind Voces de la Frontera, Inc. Plaintiffs: Ramiro Vara, Olga Vara, Jose Perez, Erica Ramirez
2021 (Federal Court)	Hunter v. Bostelmann, No. 21-cv-00512, 2021 WL 4592659 (W.D. Wis. Oct. 6, 2021)	Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, Kathleen Qualheim