

## COMMENT

# RACIAL GERRYMANDERING, THE FOR THE PEOPLE ACT, AND *BRNOVICH*: SYSTEMIC RACISM AND VOTING RIGHTS IN 2021

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### INTRODUCTION

The U.S. Supreme Court held racial gerrymandering unconstitutional in 1960 in *Gomillion v. Lightfoot*,<sup>1</sup> striking down the bizarrely redrawn congressional boundaries of the City of Tuskegee, Alabama: a twenty-eight-sided figure that removed virtually all Black voters from within the city limits and placed them outside the city limits—without removing a single white voter.<sup>2</sup> Nevertheless, as states across the country redraw legislative district lines that disenfranchise minorities and perpetuate systemic racism, the legal doctrine protecting against racial discrimination in gerrymandering remains fraught. In the spring of 2021, minority voting power is both championed and attacked in Congress and in the Supreme Court of the United States. The For the People Act of 2021,<sup>3</sup> passed by the House of Representatives in early March 2021, promises to restore the strength of the Voting Rights Act of 1965<sup>4</sup> by expressly banning partisan gerrymandering.<sup>5</sup> If passed, the For the People Act would provide the first federal statutory cause of action for voters to bring claims challenging partisan gerrymandering. Meanwhile, at the Court, *Brnovich v. Democratic National Committee*<sup>6</sup> raises challenges to § 2 of the Voting Rights Act,<sup>7</sup> a tool historically used to challenge racially

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1. 364 U.S. 339 (1960).
2. *Id.* at 341.
3. H.R. 1, 117th Cong. (2021).
4. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).
5. H.R. 1, 117th Cong. § 2403(b).
6. No. 19-1257 (U.S. argued Mar. 2, 2021).
7. 52 U.S.C. § 10301. This Comment uses “Voting Rights Act” to refer to the Voting Rights Act of 1965.

discriminatory redistricting, by threatening its ability to protect minority voting power and potentially legitimizing highly restrictive election laws that disproportionately impact marginalized Black, Indigenous, and other people of color (BIPOC) communities.

In the spring of 2021, minority voting rights are at stake. This Comment begins with Part I, a brief primer on the current state of U.S. legal doctrine around race, redistricting, and representation that precipitated the For the People Act (particularly the sections that comprise the Redistricting Reform Act<sup>8</sup>) and that are implicated in *Brnovich*. Then, Part II.A explains the imaginary line between partisan and racial gerrymandering that the For the People Act seeks to eradicate. State legislatures and redistricting commissions draw district lines with significant racialized impact under the banner of “partisan gerrymandering,” which the Supreme Court upheld as constitutional on nonjusticiability grounds under the political question doctrine in 2019 in *Rucho v. Common Cause*.<sup>9</sup> Under the guise of a permissible partisan purpose, these district lines deprive minority citizens of equal voting power, perpetuating and entrenching racial power imbalances.

Part II.B introduces § 2 of the Voting Rights Act, the provision challenged in *Brnovich*. This Part then presents historical successes in challenging and deterring racial gerrymandering using § 2. It proceeds to outline § 2’s weaknesses in protecting minority voting strength and combating minority voter suppression after the Supreme Court struck down its sister provision—§ 5—in 2013 in *Shelby County v. Holder*.<sup>10</sup>

Part III outlines several of the current “open questions” on minority voting power and redistricting raised by *Brnovich* and the Redistricting Reform Act of 2021. First, this Part charts the relationship between *Brnovich*—a Voting Rights Act vote denial case—and redistricting, which gives rise to Voting Rights Act vote dilution claims. This Part shows that the Court may use *Brnovich* to limit the reach of its vote dilution precedents, thereby potentially weakening § 2 of the Voting Rights Act. Next, this Part outlines the important features of the Redistricting Reform Act, which passed the House in March 2021 as part of the For the People Act. With detailed mechanisms for restricting partisan gamesmanship in congressional districting and strong remedial provisions, the Act shows a promising way out of entrenched, nonjusticiable disenfranchisement.

#### I. UNCONSTITUTIONAL AND HAPPENING ALL THE TIME

Racial gerrymandering has been unconstitutional since the Supreme Court’s *Gomillion* decision in 1960.<sup>11</sup> Yet even today, states redistrict in ways that dilute minority voting power and entrench systemic racism, while

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8. H.R. 1, 117th Cong. §§ 2400–2435.

9. 139 S. Ct. 2484 (2019).

10. 570 U.S. 529 (2013).

11. *Id.* at 347–48.

the broader legal doctrine around gerrymandering, race, and representation is pervasively unsettled.<sup>12</sup>

Racial gerrymandering is unconstitutional.<sup>13</sup> But it still happens.<sup>14</sup> In 2019, the Court reinforced the constitutionality of “political” gerrymandering in *Rucho*,<sup>15</sup> preserving an easy defense for racial gerrymandering by allowing legislatures to redistrict in ways that dilute the voting power of racial minorities in the many districts across the nation where race and political party affiliation are closely tied, if the legislature justifies redistricting on political affiliation grounds.<sup>16</sup>

### A. Redistricting

States redraw their congressional and state legislative district maps every ten years after the U.S. Census provides new population demographic data.<sup>17</sup>

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12. See Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 1009 (2020) (“In a time of increasing cultural diversity in the United States—a time when whites will soon cease to constitute a numerical majority of the population—the Court appears to have gerrymandered the law of justiciability in a way that facilitates the efforts of whites to preserve the current advantage they have over racial minorities in the domain of electoral politics.”); Emily K. Dalessio, Note, *Say the Magic Words: Establishing a Historically Informed Standard to Prevent Partisanship from Shielding Racial Gerrymanders from Federal Judicial Review*, 77 WASH. & LEE L. REV. 1907, 1954–55 (2020) (“Had the *Rucho* Court started with a presumption of racial gerrymandering, this evidence would likely have been sufficient for the Court to uphold that presumption, even in the face of the State’s evidence that the map was governed by race-neutral partisan districting principles. Thus, under this test the 2016 map would have been subject to the strict racial gerrymandering analysis . . . rather than being dismissed as a political question.”); Kyle Keraga, Note, *Drawing the Line: A First Amendment Framework for Partisan Gerrymandering in the Wake of Rucho v. Common Cause*, 79 MD. L. REV. 798, 799–800 (2020) (“*Rucho* . . . declared that partisan gerrymandering is a nonjusticiable political question . . . despite a longstanding acknowledgement that extreme gerrymandering is ‘incompatible with [our] democratic principles’—over the years, assorted Justices from both parties have criticized gerrymandering as everything from ‘cherry-pick[ing] voters,’ to ‘rigging elections,’ to a subversion of ‘the core principle of republican government . . . that the voters should choose their representatives, not the other way around.’”).

13. See *Gomillion*, 364 U.S. at 347–48 (holding that a racial gerrymander affecting Black voters violated the Due Process and Equal Process Clauses of the Fourteenth Amendment, as well as the right to vote in the Fifteenth Amendment).

14. See Michael Li, *The Redistricting Landscape, 2021–22*, BRENNAN CTR. FOR JUST. (Feb. 11, 2021), <https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22> [<https://perma.cc/89XB-XNGV>] (detailing current and ongoing risks for gerrymandering and unfair map drawing); Press Release, Brennan Ctr. for Just., 2021–22 Redistricting Cycle Poses High Risk of Racial Discrimination in the South, New Projections Show (Feb. 8, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/2021-22-redistricting-cycle-poses-high-risk-racial-discrimination-south> [<https://perma.cc/3XRX-W9TC>] [hereinafter Brennan Ctr. Press Release] (identifying redistricting risk factors and locations currently prone to racial gerrymandering).

15. 139 S. Ct. 2484, 2488–89 (2019).

16. See Sara Tofighbakhsh, Note, *Racial Gerrymandering After Rucho v. Common Cause: Untangling Race and Party*, 120 COLUM. L. REV. 1885, 1900–01 (2020) (demonstrating the inextricable intertwining between race and party).

17. *Who Draws the Maps?: Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUST. (Jan. 30, 2019), <https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting> [<https://perma.cc/27RV-JXQX>] (surveying all fifty states’ approaches to redistricting).

Historically, each state determines who designs the district maps, resulting in a wide variety of districting authorities that includes: state legislatures, which may propose districts through regular legislation; advisory commissions that consist of legislators or nonlegislators who recommend redistricting plans to the legislature; independent commissions; political appointee commissions; political commissions consisting entirely of incumbent lawmakers; backup commissions that draw maps in cases of legislative deadlock or a governor's veto; and single district states that have only one congressional district.<sup>18</sup> When districts are drawn such that their voting populations tilt in favor of one party and gain or retain one party's political power, these districts are "gerrymandered."<sup>19</sup>

### B. Gerrymandering

The portmanteau term "gerrymandering" arose in 1812 after Massachusetts governor Elbridge Gerry drew salamander-shaped state legislative districts that favored Democratic-Republicans over Federalists.<sup>20</sup> Over the ensuing two hundred years, gerrymandering's strategically wiggly district-drawing has become a critical feature of the political apparatus, allowing those who control the redistricting processes to secure political power that goes far beyond pure proportional representation to exceed their numerical voting strength.<sup>21</sup>

How are gerrymandered districts drawn? The "[t]wo common forms of contemporary gerrymandering are: (1) partisan gerrymandering that seeks to secure electoral advantages for one's preferred political party, and (2) racial gerrymandering that seeks to secure electoral advantages for one's preferred race."<sup>22</sup> Both partisan and racial gerrymandering strategies give voters in some districts a stronger voice than voters in others, raising serious constitutional controversy on questions of vote dilution that strain the principle of democratic self-governance and the principle of "one person, one vote."<sup>23</sup> Critically, both partisan and racial gerrymandering have a disproportionate impact on the voting strength of racial minorities: purportedly partisan gerrymanders substantially affect voters who are minorities.<sup>24</sup> Moreover, gerrymandering is just one component of a program

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18. *See id.*

19. *See* Michael Wines, *What Is Gerrymandering? And How Does It Work?*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/what-is-gerrymandering.html> [<https://perma.cc/PV64-M4DP>] (explaining the mechanics of gerrymandering in the weeks after the *Rucho* decision).

20. *See* Spann, *supra* note 12, at 984.

21. *See id.*

22. *See id.* at 984–85.

23. *See id.*; *see also* Reynolds v. Sims, 377 U.S. 533, 565–67 (1964) (outlining the "one person, one vote" principle under the Equal Protection doctrine).

24. *See, e.g.*, China Dickerson, *To Attack Systemic Racism at the Root, Look to the State House*, THE HILL (Aug. 21, 2020, 8:30 AM), <https://thehill.com/blogs/congress-blog/politics/513054-to-attack-systemic-racism-at-the-root-look-to-the-state-house> [<https://perma.cc/VEH2-2495>] ("[S]ome of the most powerful drivers of structural racism in America . . . includ[e] voter suppression and partisan gerrymandering."). *See generally* Kim

of voter suppression driven primarily by state legislatures that disproportionately impacts voters of color and also includes restrictions and barriers like voter identification laws, voter purges, aggressive pushes to close polls in communities of color, and felon disenfranchisement.<sup>25</sup>

### C. Redistricting in 2021

Redistricting's pressing questions arose yet again this year, not just because of the controversies surrounding the 2020 federal election and the 2020 Census leading to redistricting,<sup>26</sup> but also because of two critical movements in the legislature and judiciary. The For the People Act, passed by the House of Representatives in early March 2021, includes the Redistricting Reform Act which promises to restore the strength of the Voting Rights Act by expressly banning partisan gerrymandering. If passed, the For the People Act would establish the first federal statutory cause of action for voters to bring claims challenging their district lines. Meanwhile, *Brnovich v. Democratic National Committee*<sup>27</sup> calls into question § 2 of the Voting Rights Act—the tool historically used to challenge racially discriminatory redistricting—by potentially jeopardizing the section's validity while undermining its protections of minority voting power and may legitimize highly restrictive election laws that disproportionately impact marginalized BIPOC communities.

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Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST (June 9, 2016, 12:01 PM), <https://www.washingtonpost.com/news/wonk/wp/2016/06/09/how-a-widespread-practice-to-politically-empower-african-americans-might-actually-harm-them/> [<https://perma.cc/67ND-KTP6>]; Olga Pierce & Kate Rabinowitz, *'Partisan' Gerrymandering Is Still About Race*, PROPUBLICA (Oct. 9, 2017, 6:48 PM), <https://www.propublica.org/article/partisan-gerrymandering-is-still-about-race> [<https://perma.cc/6ZGV-DX2B>].

25. See, e.g., Ankita Rao et al., *Is America a Democracy? If So, Why Does It Deny Millions the Vote?*, GUARDIAN (Nov. 7, 2019, 6:01 AM), <https://www.theguardian.com/us-news/2019/nov/07/is-america-a-democracy-if-so-why-does-it-deny-millions-the-vote> [<https://perma.cc/EJZ2-P964>] (“Legislators across the country have tightened the requirements for acceptable forms of identification—this in a country where 7% of Americans do not have photo IDs, and the number is higher among black and Hispanic populations. In 2016, Wisconsin reinstated strict voter ID laws, ostensibly to fight voter fraud, which experts have repeatedly found to be almost non-existent.”).

26. See, e.g., Reid J. Epstein & Nick Corasaniti, *The Gerrymander Battles Loom, as G.O.P. Looks to Press Its Advantage*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/us/politics/gerrymander-census-democrats-republicans.html> [<https://perma.cc/2A8K-6NK7>] (“While partisan warfare on Capitol Hill draws most of the national attention, the battles over redistricting are among the fiercest and most consequential in American government. Reapportionment and redistricting occurs every 10 years after the census . . . . The balance of power established by gerrymandering can give either party an edge that lasts through several election cycles; court challenges—even if successful—can take years to unwind those advantages.”); David A. Lieb, *Redistricting Power at Stake in 2020 Legislative Elections*, AP NEWS (Jan. 11, 2020), <https://apnews.com/article/db1ad1c1d335599b579f90262ee0e537> [<https://perma.cc/2YT3-FJUG>] (“‘We’ve got the next 10 years of politics at stake in these elections,’ said Patrick Rodenbush, communications director for the National Democratic Redistricting Committee.”).

27. No. 19-1257 (U.S. argued Mar. 2, 2021).

As discussed later in Part III, these principles underlie the key “open questions” on minority voting power and redistricting raised by the Redistricting Reform Act and *Brnovich*. These questions concern the relationship between redistricting and vote dilution under the Voting Rights Act, the road ahead for redistricting reform that insists on independent redistricting commissions and rejects both racial and partisan gerrymandering, and the artificial distinction between them.

## II. RACE, REDISTRICTING, AND REPRESENTATION

This Part presents a brief primer on the current state of U.S. legal doctrine surrounding race, redistricting, and representation that precipitated the For the People Act and that are implicated in *Brnovich*. Redistricting commissions continue to draw lines with significant racial impact under the banner of “partisan gerrymandering,” which the Court held to be constitutional on nonjusticiable political question grounds in *Rucho*.<sup>28</sup> These purportedly partisan lines deprive minority citizens of equal voting power and of voting’s expressive and associative functions, perpetuating and entrenching racial power imbalances. Finally, this Part describes the questions of race, redistricting, and representation raised in the Redistricting Reform Act of 2021 and *Brnovich*.

### A. Why Do We Need Redistricting Reform?

The Redistricting Reform Act of 2021, one component of the For the People Act sweeping electoral reform package,<sup>29</sup> proposes a fundamental overhaul of the states’ approaches to redistricting by implementing clear national standards. Its proposals include both mandating the use of independent redistricting commissions and prohibiting the use of any map that discriminates against minorities or that unduly favors or disfavors a political party.<sup>30</sup> These reforms directly confront the Court’s 2019 ruling in *Rucho*, which held that, unlike racial gerrymandering claims, partisan gerrymandering claims are outside a federal court’s jurisdiction because they present nonjusticiable political questions.<sup>31</sup> *Rucho* establishes that redistricting bodies can create voting districts with the predominant intent of achieving a particular political composition.<sup>32</sup> While overtly racial gerrymanders drawn predominantly on lines of race had already been held

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28. 139 S. Ct. 2484, 2498–99 (2019).

29. See G. Michael Parsons, *The Peril and Promise of Redistricting Reform in H.R.1*, HARV. L. REV. BLOG (Feb. 2, 2021), <https://blog.harvardlawreview.org/the-peril-and-promise-of-redistricting-reform-in-h-r-1/> [<https://perma.cc/JX7W-9ZE2>].

30. See Ronald Brownstein, *The GOP Cheat Code to Winning Back the House: The Stakes for Democrats’ Election-Reform Plan Couldn’t be Higher*, ATLANTIC (Feb. 11, 2021), <https://www.theatlantic.com/politics/archive/2021/02/democrats-need-hr-1-and-new-vra-protect-party/617987/> [<https://perma.cc/SP7D-89JW>] (evaluating H.R. 1’s redistricting provisions and highlighting the partisan gerrymander prohibition’s connections to election reform trends in state law).

31. *Rucho*, 139 S. Ct. at 2506.

32. *Id.* at 2506–07.

both justiciable and unconstitutional,<sup>33</sup> *Rucho* has created an impenetrable thicket that complicates analyzing redistricting cases for districts in which racial identity and political affiliation are closely intertwined.<sup>34</sup>

### B. *Rucho's Defense of Partisan Gerrymandering*

Chief Justice John G. Roberts, writing for the five Republican-appointed Justices of the Supreme Court forming the majority in *Rucho*, rejected the Court's ability to review a partisan gerrymandering claim because such claims present "political questions beyond the reach of the federal courts,"<sup>35</sup> which "have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide [them] in the exercise of such authority."<sup>36</sup> In other words, *Rucho* construes partisan gerrymandering as nonjusticiable because of the lack of workable standards to guide the courts.<sup>37</sup>

### C. *Rucho's Imaginary Line Between Racial and Partisan Gerrymandering*

The position that the Court adopted in *Rucho* in 2019 had previously been widely criticized for drawing an impracticable and arguably artificial bright line between partisan gerrymandering and racial gerrymandering.<sup>38</sup> Where racial identity and party affiliation are closely intertwined, *Rucho* forces federal courts to make logically impossible determinations about whether race or party drives the gerrymander.<sup>39</sup> As Professor Girardeau A. Spann has written, the *Rucho* decision on justiciability doctrines in gerrymandering "protects the political power of white voters" by "allowing white Republicans to dilute the political power of minority Democrats."<sup>40</sup> Spann notes that the Court clearly acknowledged the strong correlation between

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33. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 644–45 (1993); *Gomillion v. Lightfoot*, 364 U.S. 339, 347–48 (1960).

34. See *Rucho*, 139 S. Ct. at 2495–96.

35. *Id.* at 2506–07.

36. *Id.* at 2508.

37. See *id.*

38. See, e.g., Richard L. Hasen, *Racial Gerrymandering's Questionable Revival*, 67 ALA. L. REV. 365, 381 (2015) ("The intersection of race and party makes the search for a predominant motive impossible.").

39. See Richard L. Hasen, *Opinion, The Gerrymandering Decision Drags the Supreme Court Further into the Mud*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/opinion/gerrymandering-rucho-supreme-court.html> [<https://perma.cc/3XEW-2CT6>]; Meaghan Winter, *Opinion, Want to Dismantle Structural Racism in the US? Help Fight Gerrymandering*, GUARDIAN (Aug. 21, 2020, 6:27 AM), <https://www.theguardian.com/commentisfree/2020/aug/21/gerrymandering-republicans-us-election-structural-racism> [<https://perma.cc/2LBJ-QX4Z>] ("The US supreme court [sic] has prohibited explicit racial gerrymanders but has declined to ban gerrymanders that effectively achieve the same outcome.").

40. See Spann, *supra* note 12, at 982–84 (arguing that "whites will derive a net benefit from treating racial gerrymanders as justiciable. And by gerrymandering the line that separates justiciable from nonjusticiable claims, the Supreme Court will have succeeded in helping whites to preserve the political advantage that they have over racial minorities.").

race and political affiliation in *Department of Commerce v. New York*.<sup>41</sup> There, the Court rejected the Trump administration's proposal to add a citizenship question to the 2020 Census, holding that the administration's self-proclaimed interest in compliance with the Voting Rights Act was "contrived" and "pretextual" and that the administration poorly concealed its true, underlying motivation to use the citizenship question to facilitate electoral redistricting.<sup>42</sup> The analysis in *Department of Commerce* indicates that the Court recognizes the close entanglement between race and partisan political affiliation in the electoral districting context.<sup>43</sup>

Yet in *Rucho* the Court found no such entanglement, drawing an illusory bright line between political and racial gerrymandering on the very same day that it handed down *Department of Commerce*.<sup>44</sup> Yet, like in the 2020 Census case, the Court in *Rucho* reviewed evidence suggesting an insidious racial motivation: the district court decision had revealed that the primary mapmaker, tasked by the state legislature to remedy an earlier redistricting that had been determined to be an unconstitutional racial gerrymander, was explicitly instructed by Republican state legislators to use granular political data to "'change as few' of the district lines . . . as possible in remedying the racial gerrymander."<sup>45</sup> Moreover, the mapmaker created detailed maps that "tracked race, voting patterns and addresses of tens of thousands of North Carolina college students" and drew a congressional district line that divided North Carolina Agricultural and Technical State University—the largest historically Black college in the nation—"so precisely that it all but guarantees it will be represented in Congress by two Republicans for years to come."<sup>46</sup>

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41. 139 S. Ct. 2551 (2019).

42. *See id.* at 2575–76.

43. *See id.*; *see also* Spann, *supra* note 12, at 995–96 (noting that "[t]he correlation between race and political affiliation is particularly strong in the electoral context, as evidenced . . . in *Department of Commerce*," and further noting that "[p]ress coverage indicated that, although the stated reason for adding the question was to facilitate enforcement of the Voting Rights Act, the real reason was to facilitate the drawing of election districts that would enhance the voting strength of white Republicans by reducing the voting strength of Latinx residents who were likely to support Democratic candidates" (citing Tara Bahrampour, *GOP Strategist and Census Official Discussed Citizenship Question, New Documents Filed by Lawyers Suggest*, WASH. POST (June 16, 2019), [https://www.washingtonpost.com/dc-md-va/2019/06/15/new-documents-suggest-direct-connection-between-republican-redistricting-strategist-census-bureau-official-over-citizenship-question/?utm\\_term=.fb19ad03c406](https://www.washingtonpost.com/dc-md-va/2019/06/15/new-documents-suggest-direct-connection-between-republican-redistricting-strategist-census-bureau-official-over-citizenship-question/?utm_term=.fb19ad03c406) [<https://perma.cc/M8SS-CFL2>] (writing that expert map strategist and advisor Thomas "Hofeller had also done a study in 2015 that concluded a citizenship question on the census would result in a structural electoral advantage for Republicans and non-Hispanic whites.")).

44. *See generally* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Dep't of Com.*, 139 S. Ct. 2551 (2019).

45. *See* *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 805 (M.D.N.C. 2018).

46. *See* Dalessio, *supra* note 12, at 1954 (citation omitted); *see also id.* at 1954–55 ("Had the *Rucho* Court started with a presumption of racial gerrymandering, this evidence would likely have been sufficient for the Court to uphold that presumption, even in the face of the State's evidence that the map was governed by race-neutral partisan districting principles. Thus, under this test the 2016 map would have been subject to the strict racial gerrymandering analysis . . . rather than being dismissed as a political question." (citations omitted)).

The *Rucho* problem of distinguishing race from political party arises in an era of hyper-partisanship amplified in the districting process by highly sophisticated software and demographic data tools that enable districts to be drawn with exacting precision for anyone seeking a political advantage—whether racial, partisan, or both.<sup>47</sup> Precision redistricting, a multimillion-dollar enterprise driven by advanced mapmaking software and terabytes of voting data, escalates the level of demographic knowledge and control that redistricting authorities may exert during the redistricting process.<sup>48</sup>

With sitting lawmakers and other partisan affiliates drawing maps in many states and powerful incentives to tilt the playing field toward maintaining and expanding incumbents' political reach,<sup>49</sup> the majority's position in *Rucho* further limits the judiciary's ability to intervene in the next wave of gerrymanders that have the potential to further diminish voting power for racial minorities. This strengthens the defense of partisanship even in those cases where district lines trace racial demographics and diminish minority voting power.<sup>50</sup> The Brennan Center for Justice identified the 2021–2022 redistricting round as likely to be particularly detrimental to communities of color, particularly in the South where historic features like single-party control of the redistricting process and weaker legal protections for communities of color meet new challenges of fast population growth and demographic change.<sup>51</sup>

In the face of these challenges, several states have implemented redistricting reform measures that may inform the aims and successes of the proposed federal plan; examples include the independent commissions introduced in Michigan and Colorado that will draw both congressional and legislative maps independent of the state legislatures, advisory commissions in New York and Utah, and a bipartisan commission introduced in Virginia.<sup>52</sup> These successes of state legislative action signal the possibility of broader reform that can target the hyper-partisanship shaping the redistricting process which perpetuates systemic racism through vote dilution and entrenchment. As outlined in Part III, the relationship between vote dilution claims and redistricting under the Voting Rights Act is currently being challenged at the

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47. See generally Rebecca Green, *Redistricting Transparency*, 59 WM. & MARY L. REV. 1787 (2018) (surveying technological approaches and innovations impacting redistricting); Spann, *supra* note 12.

48. See Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race: Advances in Data, Computing, and Fundraising Have Given Politicians New Power to Gerrymander Democracy Away*, ATLANTIC (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/> [<https://perma.cc/Z6LQ-RAVH>] (“Redistricting is the great game of modern politics, and the arms race for the next decade’s maps promises to be the most extensive—and most expensive—of all time.”).

49. See *Who Draws the Maps?: Legislative and Congressional Redistricting*, *supra* note 17 (surveying all fifty states’ redistricting authorities).

50. See Brennan Ctr. Press Release, *supra* note 14 (demonstrating how the upcoming redistricting round is “likely to be the most challenging in recent history and particularly detrimental to communities of color.”).

51. See *id.*

52. See *id.*

Supreme Court and is expected to probe the connection between redistricting and other electoral administration measures and procedures that disproportionately impact the voting rights of communities of color while also threatening the tenuous status of the Voting Rights Act. Meanwhile, as discussed in Part IV, the For the People Act amplifies the successes of several state-level electoral reforms and moves toward a future electoral process that circumvents *Rucho*'s unworkable divide between race and politics: the For the People Act would create the first federal statutory cause of action for political gerrymandering and mandate independent redistricting commissions for each state's redistricting body.

### III. *BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE*

This term, the Supreme Court, in *Brnovich v. Democratic National Committee*, is considering whether two Arizona voting statutes violate the Voting Rights Act. One of the challenged Arizona laws invalidates any ballot cast at a polling location outside the voter's assigned election precinct.<sup>53</sup> The other law prohibits volunteers from collecting ballots from voters' homes to deliver them to election authorities for counting.<sup>54</sup> Minority voters' ballots are invalidated under the out-of-precinct rule at double the rate of white voters' ballots, and the policy "has disenfranchised over 38,000 Arizonans since 2008."<sup>55</sup> Similarly, the ballot collection ban disproportionately impacts Black, Latinx, and Indigenous voters, who often lack reliable transportation and mail services and who are, for those reasons and others, more likely than white voters to submit their ballots with the assistance of volunteer ballot collectors.<sup>56</sup>

The Ninth Circuit, sitting en banc in 2020, found that both of Arizona's voting restrictions violated § 2 of the Voting Rights Act.<sup>57</sup> Section 2(a) of the Voting Rights Act prohibits state and local governments from enacting election-related rules or policies that result in "a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."<sup>58</sup> Section 2(b) gives shape to this proscription by defining impermissible rules as those which give voters of one racial group "less opportunity than other

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53. See ARIZ. REV. STAT. § 16-122 (LexisNexis 2021) ("No person shall be permitted to vote unless such person's name appears as a qualified elector in both the general county register and in the precinct register . . ."); *id.* § 16-584(C) (permitting voting by provisional ballot where a voter's name does not appear in a precinct's voter register only if the voter's "residence address [is] within the precinct in which the voter is attempting to vote").

54. See ARIZ. REV. STAT. § 16-1005(H) ("A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony."). Voters' ballots may, however, be collected by such voters' mail carriers, election officials, family members, household members, or caregivers. See *id.* §§ 16-1005(H), 16-1005(I).

55. Brief for Respondents at 2, *Brnovich v. Democratic Nat'l Comm.* (U.S. argued Mar. 2, 2021) (No. 19-1257), 2021 WL 242302 [hereinafter DNC Brief].

56. See *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1005–07 (9th Cir. 2020) (en banc), *cert. granted sub nom.* *Ariz. Republican Party v. Democratic Nat'l Comm.*, 141 S. Ct. 221 (2020) (mem.) and *cert. granted sub nom.* *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 222 (2020) (mem.).

57. See *Hobbs*, 948 F.3d at 1032, 1037.

58. 52 U.S.C. § 10301(a).

members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>59</sup> Alleged violations of this provision of § 2 are assessed based on “the totality of circumstances.”<sup>60</sup> In the Ninth Circuit’s analysis, governments violate § 2 when: (1) their election rules impose a “disparate burden on members of the protected class” and (2) there is a “legally significant relationship between the disparate burden on minority voters and the social and historical conditions affecting them.”<sup>61</sup> Because the disparate impacts of Arizona’s voting restrictions are attributable to “the social and historical conditions affecting”<sup>62</sup> Arizona’s minority citizens—including, for example, the state’s history of discriminatory voting practices<sup>63</sup> and the effects of past and present discrimination on current health, educational disparities, and economic disparities<sup>64</sup>—Arizona’s restrictions failed the Ninth Circuit’s § 2 test.<sup>65</sup>

Arizona successfully petitioned the Supreme Court for a writ of certiorari to review the Ninth Circuit’s decision.<sup>66</sup> Arizona insists that facially neutral election laws only violate § 2 if they: (1) result in a “substantial disparate impact” on minority citizens’ opportunity to vote<sup>67</sup> and (2) directly cause disproportionate outcomes such that “the substantial disparate impact arises from ‘the state’s actions rather than those of other persons.’”<sup>68</sup> If the Ninth Circuit’s construction of the Voting Rights Act were sanctioned, Arizona contends that the Voting Rights Act may exceed Congress’s power under the Reconstruction Amendments<sup>69</sup> (as limited by *City of Boerne v. Flores*<sup>70</sup>) and run afoul of the Equal Protection Clause.<sup>71</sup>

While the election restrictions challenged in *Brnovich* are unrelated to districting, the reach of the Court’s districting jurisprudence is at stake in *Brnovich*. This is because the Ninth Circuit’s analysis relied on a leading Voting Rights Act districting case: *Thornburg v. Gingles*.<sup>72</sup> Challenges to

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59. *Id.* § 10301(b).

60. *Id.*

61. *Hobbs*, 948 F.3d at 1012.

62. *Id.*

63. *See id.* at 1017–26, 1034.

64. *See id.* at 1027–28, 1034.

65. *See id.* at 1032, 1037.

66. *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 222 (2020) (mem.).

67. Brief for State Petitioners at 19, *Brnovich v. Democratic Nat’l Comm.* (U.S. argued Mar. 2, 2021) (No. 19-1257), 2020 WL 7121776 [hereinafter *Arizona Brief*].

68. *Id.* at 24 (quoting *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020)).

69. *See id.* at 25–26 (arguing that § 2 of the Voting Rights Act is unconstitutional if it “invalidates facially neutral laws like Arizona’s without evidence of a substantial disparate impact” because such a proscription would impermissibly expand the right to vote as guaranteed by the Fifteenth Amendment).

70. 521 U.S. 507, 519 (1997) (holding that Congress cannot “make a substantive change” in the constitutional rights it seeks to protect when it enacts remedial legislation pursuant to the Reconstruction Amendments).

71. *Arizona Brief*, *supra* note 67, at 26–27 (arguing that the Ninth Circuit’s exacting test would compel state legislators to enact “overwhelmingly race conscious” voting laws in violation of the Equal Protection Clause).

72. 478 U.S. 30 (1986); *see Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1011–14, 1016 (9th Cir. 2020) (en banc) (using *Gingles* to frame the court’s analysis), *cert. granted sub*

discriminatory redistricting under § 2 of the Voting Rights Act—such as the one sustained in *Gingles*—allege that minority citizens’ votes are *diluted*;<sup>73</sup> by contrast, Arizonans’ votes are not merely diluted but *denied* if cast in violation of the contested policies.<sup>74</sup> The courts have historically had more occasion to address claims of vote dilution than claims of outright vote denial, in part because voting schemes that threatened to disproportionately deny minorities their votes were often rejected by the federal government before they could take effect pursuant to the Voting Rights Act’s since-invalidated preclearance mechanism.<sup>75</sup> For this reason, and because § 2 of the Voting Rights Act nowhere indicates that different standards ought to be used to assess vote dilution and vote denial claims,<sup>76</sup> the Ninth Circuit looked to *Gingles* to guide its evaluation of Arizona’s voting laws.<sup>77</sup> The two-part test adopted by the Ninth Circuit<sup>78</sup> derives from *Gingles*, and *Gingles* provides the salient questions a court must ask to make effective use of that test—including a list of nine context-specific factors enumerated in the Senate Report accompanying the 1982 amendments to the Voting Rights Act.<sup>79</sup> Among other things, those factors include “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health,” “whether political campaigns have been characterized by overt or subtle racial appeals,” and “whether the policy underlying the . . . voting [regulations] is tenuous.”<sup>80</sup>

The parties in *Brnovich* vigorously contest whether the *Gingles* test is appropriate in vote denial cases.<sup>81</sup> Arizona even insinuates that the Court

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*nom. Ariz. Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 221 (2020) (mem.), and *cert. granted sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 222 (2020) (mem.).

73. See *Gingles*, 478 U.S. at 46–51 (explaining the relationship of districting to impermissible vote dilution).

74. See *Hobbs*, 948 F.3d at 1012 (“The case now before us involves two vote-denial claims.”).

75. See *id.* (explaining that “[t]he jurisprudence of vote-denial claims is relatively underdeveloped in comparison to vote-dilution claims” because the effectiveness of the Voting Rights Act’s preclearance system had reduced the need for civil litigants to enforce vote denial claims until the Court declared the preclearance system unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013)); see also Brief of the NAACP Legal Def. & Educ. Fund, Inc. as Amicus Curiae in Support of Respondents at 16, *Brnovich v. Democratic Nat’l Comm.* (U.S. argued Mar. 2, 2021) (No. 19-1257), 2021 WL 276500 (“Without the preclearance requirement, Section 2 is the primary tool for combating racial discrimination in access to the political process.”).

76. See generally 52 U.S.C. § 10301.

77. See *Hobbs*, 948 F.3d at 1012–13 (citing *Gingles* to define the appropriate “results test” to apply to vote denial claims).

78. See *supra* note 61 and accompanying text.

79. See *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986) (citing S. REP. NO. 97-417, at 28–29 (1982)); *Hobbs*, 948 F.3d at 1012–13 (first citing *Gingles*, 478 U.S. at 36–37; then citing S. REP. NO. 97-417, at 28–29).

80. *Hobbs*, 948 F.3d at 1013.

81. Compare DNC Brief, *supra* note 55, at 32–33 (arguing that § 2 of the Voting Rights Act requires the same analysis in vote dilution and vote denial claims), with Arizona Brief, *supra* note 67, at 32–33 (arguing that the Court’s framework for analyzing vote dilution claims is inapposite in vote denial cases).

should abandon *Gingles* entirely.<sup>82</sup> But *Brnovich* demonstrates the dangers of sequestering *Gingles*'s context-focused analysis in the Court's § 2 jurisprudence in favor of the strict and formalistic test Arizona presses.<sup>83</sup> For example, using the *Gingles* analysis, the Ninth Circuit noted that the campaign in support of Arizona's ballot collection prohibition was supported by a racially inflammatory campaign video that baselessly suggested that a Latino ballot collector engaged in voter fraud.<sup>84</sup> While this is a damning fact under *Gingles*, which invites courts to ask "whether political campaigns have been characterized by overt or subtle racial appeals,"<sup>85</sup> there is no room for it in Arizona's narrow inquiry. Moreover, *Gingles*'s admonition to consider "whether the policy underlying the . . . voting [regulations] is tenuous"<sup>86</sup> encourages judicial skepticism of pretextual justifications for voting restrictions that impose racially disparate burdens. The Ninth Circuit demonstrated the power of this component of the *Gingles* test: picking through Arizona's dubious election-integrity rationales for its ballot collection policy, the court noted that "if some Arizonans today distrust third-party ballot collection, it is because of the fraudulent campaign mounted by proponents" of the law.<sup>87</sup> But some of the Justices of the Supreme Court appear far more credulous of Arizona's proffered justifications: at oral argument, Chief Justice Roberts and Justice Gorsuch referred to ballot collection as ballot "harvesting"<sup>88</sup>—a "loaded term" adopted by opponents of the practice<sup>89</sup>—and pointed to a report that purportedly supported restrictions on third-party ballot collection.<sup>90</sup> If *Gingles*'s rigorous "tenuousness" inquiry were relaxed or jettisoned in the manner suggested by the Justices' comments and urged by Arizona, the federal courts could lose a powerful check on discriminatory state voting laws.

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82. Arizona alleges *Gingles* has a "myopic focus on legislative history," Arizona Brief, *supra* note 67, at 33, indicative of a "bygone era of statutory construction." *Id.* (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019)).

83. See *supra* notes 67–68 and accompanying text (describing Arizona's reading of § 2).

84. See *Hobbs*, 948 F.3d at 1009–10, 1028–29.

85. *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986) (quoting S. REP. NO. 97-417, at 28–29 (1982)).

86. *Id.*

87. *Hobbs*, 948 F.3d at 1037.

88. See Transcript of Oral Argument at 65–67, 96, *Brnovich v. Democratic Nat'l Comm.* (U.S. argued Mar. 2, 2021) (No. 19-1257) [hereinafter *Brnovich* Transcript] (Chief Justice Roberts's references to ballot "harvesting"); *id.* at 57, 83–84 (Justice Gorsuch's references to the same).

89. Amber Phillips, *What Is Ballot 'Harvesting,' and Why Is Trump So Against It?*, WASH. POST (May 26, 2020, 3:55 PM), <https://www.washingtonpost.com/politics/2020/05/26/what-is-ballot-harvesting-why-is-trump-so-against-it/> [<https://perma.cc/PA63-GLMN>] ("Election experts say 'harvesting' is a loaded term . . .").

90. See *Brnovich* Transcript, *supra* note 88, at 65, 67–68 (Chief Justice Roberts's references to the report); *id.* at 83 (Justice Gorsuch's references to the same); see also *id.* at 88, 112 (Justice Kavanaugh's references to the same).

Finally, in a colloquy with Justice Kagan, counsel for the Arizona Republican Party<sup>91</sup> suggested that under his context-insensitive interpretation of the Voting Rights Act, a state or local government could lawfully cancel early voting on Sundays—even if evidence showed that Black citizens vote on Sundays at ten times the rate of white citizens.<sup>92</sup> While Justice Kagan posed this scenario as a hypothetical, its implications are real and concrete: just this year, Georgia Republicans considered restricting early voting on Sundays as a means to suppress Black voter turnout.<sup>93</sup>

When faced with a racially discriminatory districting scheme, the *Gingles* Court interpreted § 2 of the Voting Rights Act to require a searching, fact-intensive inquiry to assess disparate-impact claims. If Arizona persuades today’s Court to limit *Gingles*’s analysis to vote dilution cases, § 2 of the Voting Rights Act, which has grown in importance since *Shelby County*, could be weakened considerably.

#### IV. THE FOR THE PEOPLE ACT OF 2021

While there is cause for concern about the future of voting rights in the federal courts, there is some cause for hope that Congress will step in to strengthen the franchise. The *Rucho* Court, in emphasizing that Congress could remedy the wrongs the Court declined to address, observed that “[t]he first bill introduced in the 116th Congress would require States to create 15-member independent commissions”<sup>94</sup>; a version of that legislation has now passed the House of Representatives.<sup>95</sup> The bill—a piece of the For the People Act titled the Redistricting Reform Act of 2021—would require independent state commissions to make congressional redistricting

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91. The Arizona Republican Party filed a separate petition for writ of certiorari, which the Court granted and consolidated with *Brnovich*. See *Ariz. Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 221 (2020) (mem.).

92. See *Brnovich* Transcript, *supra* note 88, at 24–25.

93. See Nick Corasaniti & Jim Rutenberg, *In Georgia, Republicans Take Aim at Role of Black Churches in Elections*, N.Y. TIMES (Mar. 6, 2021), <https://www.nytimes.com/2021/03/06/us/politics/churches-black-voters-georgia.html> [<https://perma.cc/NF7T-LJ4W>] (describing the historical relationship between church-affiliated early voting on Sundays and Black political mobilization and explaining how a bill that passed the Georgia House of Representatives in March 2021 would limit such voting). *But see* Nick Corasaniti, *Georgia G.O.P. Passes Major Law to Limit Voting Amid Nationwide Push*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/us/politics/georgia-voting-law-republicans.html> [<https://perma.cc/HX6D-XA3K>] (reporting that the version of the Georgia bill that ultimately became law, while deeply restrictive, does not include restrictions on Sunday voting). For the text of the restrictive law Georgia recently enacted, see Election Integrity Act, 2021 Ga. Code Ann. Adv. Legis. Serv. 9 (LexisNexis). For a thorough contextual analysis of the Georgia law’s most consequential provisions, see Nick Corasaniti & Reid J. Epstein, *What Georgia’s Voting Law Really Does*, N.Y. TIMES (Apr. 2, 2021, 2:51 PM), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html> [<https://perma.cc/X49T-DKNA>].

94. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

95. See Nicholas Fandos, *Targeting State Restrictions, House Passes Landmark Voting Rights Expansion*, N.Y. TIMES (Mar. 3, 2021), <https://www.nytimes.com/2021/03/03/us/politics/house-voting-rights-bill.html> [<https://perma.cc/MR85-DH89>]. See generally H.R. 1, 117th Cong. §§ 2400–2435 (2021).

decisions.<sup>96</sup> These commissions would be convened in part by “Nonpartisan Agenc[ies]” established within each state’s legislature.<sup>97</sup> Such agencies would choose the first six members of each commission;<sup>98</sup> those six members would in turn appoint nine more<sup>99</sup> for a total of fifteen members per commission.<sup>100</sup> Any registered voter who has not changed parties within three years,<sup>101</sup> has no immediate familial political ties,<sup>102</sup> and has not violated federal election law<sup>103</sup> may apply to be on a state commission.<sup>104</sup>

The Redistricting Reform Act is a meticulously detailed piece of legislation. It prescribes standards for each commission’s day-to-day operations,<sup>105</sup> sets deadlines for the selection of commission members,<sup>106</sup> and lays out the procedures by which the commission is to engage the public in the districting process.<sup>107</sup> But its broad provisions are likely its most significant. The bill requires, for example, that districts “respect communities of interest, neighborhoods, and political subdivisions”<sup>108</sup> and deems district lines unlawful if, under the “totality of circumstances,” it is evident that they “unduly favor[] or disfavor[] a political party.”<sup>109</sup> Reiterating the protections of the Voting Rights Act, the Redistricting Reform Act would require each congressional district to “provide racial, ethnic, and language minorities with an equal opportunity to participate in the political process and to elect candidates of choice.”<sup>110</sup> And these statutory guarantees are backed by a strong remedial framework: private rights of action would be available to anyone “aggrieved” by failures to adhere to the bill’s requirement,<sup>111</sup> and such actions would be heard by three-judge panels<sup>112</sup> whose decisions would be directly appealable to the Supreme Court on an expedited basis.<sup>113</sup>

As racially discriminatory voting policies have taken cover behind the thin veil of professed partisan motivation, the Court has declined to take remedial action. Meanwhile, precedents like *Gingles* that could equip courts to grapple with the racial impacts of facially neutral but effectively unequal election rules are embattled. With the Voting Rights Act and the Equal Protection Clause less likely to adequately safeguard minority voters, further

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96. H.R. 1, 117th Cong. § 2401(a)(1) (2021).

97. *Id.* § 2414(a).

98. *Id.* § 2411(a)(1)(A).

99. *Id.* § 2411(a)(1)(B).

100. *Id.* § 2411(a)(1).

101. *Id.* § 2412(a)(1)(B).

102. *Id.* § 2412(a)(2)(A)–(D), (F).

103. *Id.* § 2412(a)(2)(E).

104. *Id.* § 2412(a)(1).

105. *See id.* § 2411(b).

106. *See id.* § 2411(a)(1)(A)–(B).

107. *See id.* § 2413(b)–(d).

108. *Id.* § 2413(a)(1)(D).

109. *Id.* § 2413(a)(2)(B).

110. *Id.* § 2413(a)(1)(C).

111. *Id.* § 2432(a)(2).

112. *Id.* § 2432(b)(2).

113. *Id.* § 2432(b)(5).

legislation is necessary to fill the void. By joining the Voting Rights Act's protections for minority voting power with new restrictions on parties' opportunities to tilt the playing field in their favor, the Redistricting Reform Act provides a promising response to the enduring racism that infects American election law.