Election Law

Cases and Materials

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2022 Supplement

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Table of Contents

Chapter 4. Partisan Gerrymandering and Political Competition

ADD THE FOLLOWING AFTER THE FINAL FULL PARAGRAPH ON PAGE 207:

In the 2020 redistricting cycle, state courts took a more active role than ever before in adjudicating partisan gerrymandering claims. Some of these suits were brought under specific state constitutional prohibitions of gerrymandering, while others relied on more general state constitutional provisions. Gerrymandering claims succeeded in Maryland, North Carolina, New York, and Ohio. See *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct., Mar. 25, 2022); *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022); *Harkenrider v. Hochul*, 2022 WL 1236822 (N.Y. Apr. 27, 2022); *Adams v. DeWine*, 2022 WL 129092 (Ohio Jan. 14, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 2022 WL 110261 (Ohio Jan. 12, 2022). They failed in Florida, Kansas, Michigan, and Oregon. See *In re: Senate Joint Resolution of Legislative Apportionment 100*, 334 So. 3d 1282 (Fla. 2022); *Rivera v. Schwab*, 2022 WL 2208770 (Kan. June 21, 2022); *League of Women Voters of Michigan v. Independent Citizens Redistricting Commission*, 971 N.W.2d 595 (Mich. 2022); *Clarno v. Fagan*, No. 21CV40180, 2021 WL 5632371 (Or. Cir. Ct. Nov. 24, 2021). Note the small number and unrepresentativeness of the states in which these suits were brought. At the congressional level, these features create the possibility that the bias of the House of Representatives might be *worsened* by state court rulings striking down gerrymanders. For example, when New York's Democratic gerrymander was invalidated and replaced by a more neutral map, this exacerbated the existing pro-Republican skew of the House. See Aaron Goldzimer & Nicholas Stephanopoulos, *The Novel Strategy Blue States Can use to Solve Partisan Gerrymandering by 2024*, Slate, May 6, 2022, https://perma.cc/9BTU-WRLY.

ADD THE FOLLOWING AT THE END OF NOTE 11 ON PAGE 208:

A subsequent bill that was passed by the House but failed to overcome a Senate filibuster, the Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (2021), would have taken a different approach to curbing partisan gerrymandering. It would have allowed state legislatures to continue enacting congressional plans, but it would have imposed a presumptive ceiling on how biased these plans could be. Any plan with an efficiency gap above seven percent or one seat (whichever is greater) in two or more of the last four elections for President and U.S. Senator would have been presumptively unlawful. *Id.* § 5003(c)(3). Separate from this presumption, the bill would also have prohibited any plan "drawn with the intent or . . . the effect of materially favoring or disfavoring any political party." *Id.* § 5003(c)(1).

ADD THE FOLLOWING AT THE END OF NOTE 12 ON PAGE 208:

In the 2020 redistricting cycle, both parties' mapmakers aggressively gerrymandered where they had the chance, but these efforts essentially maintained the status quo of the latter half of the 2010 redistricting cycle—namely, a moderate Republican advantage. According to various statistical measures of partisan fairness, the House of Representatives will be almost exactly as biased after congressional plans were redrawn as before. See Christopher Warshaw et al., *Districts*

for a New Decade—Partisan Outcomes and Racial Representation in the 2021-22 Redistricting Cycle, Publius: J. Federalism, June 17, 2022, at 1, 14. As might also be expected, nonpartisan mapmakers in the 2020 cycle (divided state governments, courts, and commissions) designed plans with small or no partisan skews relative to maps generated randomly by computers. See *id.* at 17.

Chapter 5. Race and Redistricting

ADD THE FOLLOWING AT THE END OF THE FIRST PARAGRAPH OF NOTE 6 ON PAGE 298:

See also *Section 2 Cases Database*, Michigan Law Voting Rights Initiative, Dec. 31, 2021, https://perma.cc/UGS8-6B4R (updating the database of Section 2 decisions through the end of 2021).

ADD THE FOLLOWING AT THE END OF NOTE 6 ON PAGE 389:

The impact of race-blind redistricting is suddenly of much more than academic interest. A district court recently applied current Section 2 doctrine to conclude that Alabama must draw a second congressional Black opportunity district. See *Caster v. Merrill*, 2022 WL 264819 (N.D. Ala. Jan. 24, 2022). In its appeal to the Supreme Court, Alabama argued that *Gingles*'s first prong should be rendered race-blind. That is, the question should be whether a map drawn *without considering race* includes more reasonably compact majority-minority districts than a jurisdiction's enacted plan. The Court then stayed the district court's decision, with several Justices expressing interest in Alabama's position. See *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of application for stays) ("[T]he underlying merits appear to be close and, at a minimum, not clearcut in favor of the plaintiffs."); *id.* at 883 (Roberts, C.J., dissenting from grant of application for stays) (citing the lone lower court decision to have contemplated a race-blind approach for Section 2, *Gonzalez v. City of Aurora*, 535 F.3d 594 (7th Cir. 2008), as well as Chen & Stephanopoulos, *The Race-Blind Future of Voting Rights*, *supra*). The case will be argued in the 2022 Term, and the Court will hold in the meantime another case involving the very similar issue of whether Section 2 requires a second congressional Black opportunity district in Louisiana. Ardoin v. Robinson, 2022 WL 2312680 (U.S. June 28, 2022).

ADD THE FOLLOWING NOTE ON PAGE 389:

7. In *Wisconsin Legislature v. Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022), the Supreme Court reversed a Wisconsin Supreme Court ruling adopting a state house plan with seven majority-Black districts. The state court endorsed this plan after the elected branches deadlocked. The Supreme Court held that the plan's seven majority-Black districts (most of whose Black majorities barely exceeded fifty percent) were designed for predominantly racial reasons. The Court further held that the state court had not properly justified the need under Section 2 for seven Black opportunity districts. "[T]he court's analysis of *Gingles*' preconditions fell short of our standards," because "the court improperly relied on generalizations to reach the conclusion that the preconditions were satisfied." *Id.* at 1250. Additionally, "the court improperly reduced *Gingles*' totality-of-circumstances analysis to a single factor," "focus[ing] exclusively on proportionality." *Id.* The Supreme Court thus remanded for either a more thorough Section 2 analysis or (as actually transpired) the adoption of a plan with fewer Black opportunity districts.

Chapter 6. Election Administration and Remedies

ADD THE FOLLOWING AT THE END OF NOTE 9 ON PAGE 412:

One reason for the increase in election litigation may be changes to federal law that have allowed political parties to collect additional contributions that may be used only for recounts and legal fees. As a result, political party expenditures on litigation have skyrocketed:

> Between 2003 and 2015, political parties' legal expenditures—measured by examining the Democratic and Republican national committees and their congressional and senate entities—hovered around $5 million per year. That figure dipped to just below $3 million in 2008 but surpassed $7.5 million in 2012, but it remained fairly steady between 2003 and 2015.
>
> In 2016, however, legal expenses shot up to over $15 million in expenditures, more than double the 2012 total. In 2017, the total dipped to just under $10 million. In 2018, it rose again to nearly $24 million, went up again in 2019 to $28 million, and surpassed an astonishing $66 million in 2020.

Derek T. Muller, *Reducing Election Litigation*, 90 Fordham Law Review 561, 565-566 (2021); see also Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, Election Law Journal, https://www.liebertpub.com/doi/epdf/10.1089/elj.2021.0050 (2022) (disagreeing with Muller on whether reducing election litigation is necessarily a worthy goal).

ADD THE FOLLOWING AFTER THE FIRST FULL PARAGRAPH ON PAGE 414:

The independent state legislature theory continues to provoke substantial interest and pointed commentary. In *Moore v. Harper*, 142 S. Ct. 1089 (2022), the Supreme Court refused to grant a stay request based on this theory. But Justice Alito (joined by Justices Thomas and Gorsuch) dissented on the ground that the case presented "an exceptionally important and recurring question of constitutional law," namely the issue whether state courts have authority to reject a state legislature's rules for conducting congressional elections. While Justice Kavanaugh concurred in the stay denial (as discussed *infra* this Chapter of the Supplement, in connection with the *Purcell* doctrine), he agreed that the issue was important and thought that it should be resolved in an appropriate case. That appropriate case turned out to be *Moore* itself, in which the Court granted certiorari in June 2022. Moore v. Harper, 2022 WL 2347621 (U.S. June 30, 2022). The 2022 Term will therefore feature a high-stakes ruling about whether any state law limits to state legislatures' power over federal elections are permissible.

The stakes in this debate are extraordinarily high, especially given the many state legislators who have pressed the discredited claim that the 2020 presidential election was stolen. One study found that at least 357 Republican legislators in battleground states – 44% of those in the nine closest states – have tried to discredit or overturn the 2020 presidential election. Nick Corasaniti, Karen Yourish & Keith Collins, *How Trump's 2020 Election Lies Have Gripped State Legislatures*, N.Y. Times, May 22, 2022, https://perma.cc/2DZ2-9EMK. According to Judge

Michael Luttig, a prominent conservative who served on the Fourth Circuit for 15 years and advised former Vice President Mike Pence on his responsibilities in connection with the 2020 electoral count: "Trump and the Republicans can only be stopped from stealing the 2024 election at this point if the Supreme Court rejects the independent state legislature doctrine (thus allowing state court enforcement of state constitutional limitations on legislatively enacted election rules and elector appointments) . . . ." J. Michael Luttig, *The Republican Blueprint to Steal the 2024 Election*, CNN, April 27, 2022, https://perma.cc/MLQ2-LBSR.

For recent scholarly criticism of the independent state legislature theory, see Vikram D. Amar & Akhil R. Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Supreme Court Review 1 (2022), Michael Weingartner, *Liquidating the Independent State Legislature Theory*, Harvard Journal of Law & Public Policy (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138, and Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 University of Chicago Law Review (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322. See also Miriam Seifter, *Countermajoritarian Legislatures*, 121 Columbia Law Review 1733, 1794-99 (2021) (challenging the majoritarian arguments underpinning the independent state legislature theory and arguing that state constitutional law injects "actual democracy" into federal elections); For a qualified defense of the independent state legislature theory that seeks to disentangle different aspects of it, see Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham Law Review 501 (2021).

ADD THE FOLLOWING AT THE END OF NOTE 11 ON PAGE 416:

It remains unclear whether Donald Trump or any of his allies will be criminally charged either in Georgia or by the federal government for attempting to interfere with the confirmation of his opponent as the winner of the 2020 presidential election. See Tamar Hallerman, *Fulton Prosecutors to Begin Jury Selection for Trump Probe*, Atlanta Journal-Constitution, May 2, 2022, https://perma.cc/H74F-8T2D; Glenn Thrush & Luke Broadwater, *Justice Department is Said to Request Transcripts from Jan. 6 Committee*, N.Y. Times, May 17, 2022, https://perma.cc/78KY-T35E.

In addition, a special Select Committee at the House of Representatives continues to investigate the events of January 6, and potential wrongdoing by Trump and others. In the context of a civil discovery dispute with one of Trump's lawyers, John Eastman, on whether the crime-fraud exception to attorney-client privilege applies, a federal district court found it more likely than not that Trump and Eastman corruptly attempted to disrupt the official proceeding when Congress was set to count Electoral College votes. It also found it more likely than not that they conspired to commit two other crimes. *Eastman v. Thompson*, 2022 WL 894256, *20 - *25 (C.D. Cal. Mar. 28, 2022). Any criminal prosecution, of course, would require proof beyond a reasonable doubt. Below are some of the court's findings on potential criminal activity:

Eastman v. Thompson

2022 WL 894256 (C.D. Cal. Mar. 28, 2022)

. . .

The Select Committee alleges that President Trump violated 18 U.S.C. § 1512(c)(2), which criminalizes obstruction or attempted obstruction of an official proceeding. It requires three elements: (1) the person obstructed, influenced or impeded, or attempted to obstruct, influence or impede (2) an official proceeding of the United States, and (3) did so corruptly. . . .

Section 1512(c)(2) requires that the obstructive conduct have a "nexus ... to a specific official proceeding" that was "either pending or was reasonably foreseeable to [the person] when he engaged in the conduct." President Trump attempted to obstruct an official proceeding by launching a pressure campaign to convince Vice President Pence to disrupt the Joint Session on January 6.

President Trump facilitated two meetings in the days before January 6 that were explicitly tied to persuading Vice President Pence to disrupt the Joint Session of Congress. On January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office with Vice President Pence, the Vice President's counsel Greg Jacob, and the Vice President's Chief of Staff Marc Short. At that meeting, Dr. Eastman presented his plan to Vice President Pence, focusing on either rejecting electors or delaying the count. When Vice President Pence was unpersuaded, President Trump sent Dr. Eastman to review the plan in depth with the Vice President's counsel on January 5. Vice President Pence's counsel interpreted Dr. Eastman's presentation as being on behalf of the President.

On the morning of January 6, President Trump made several last-minute "revised appeal[s] to the Vice President" to pressure him into carrying out the plan. At 1:00 am, President Trump tweeted: "If Vice President @Mike_Pence comes through for us, we will win the Presidency ... Mike can send it back!" At 8:17 am, President Trump tweeted: "All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!" Shortly after, President Trump rang Vice President Pence and once again urged him "to make the call" and enact the plan. Just before the Joint Session of Congress began, President Trump gave a speech to a large crowd on the Ellipse in which he warned, "[a]nd Mike Pence, I hope you're going to stand up for the good of our Constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you. I will tell you right now." President Trump ended his speech by galvanizing the crowd to join him in enacting the plan: "[L]et's walk down Pennsylvania Avenue" to give Vice President Pence and Congress "the kind of pride and boldness that they need to take back our country."

Together, these actions more likely than not constitute attempts to obstruct an official proceeding. . . .

The Court next analyzes whether the Joint Session of Congress to count electoral votes on January 6, 2021, constituted an "official proceeding" under the obstruction statute. The United States Code defines "official proceeding" to include "a proceeding before the Congress." The Twelfth Amendment outlines the steps to elect the President, culminating in the President of the Senate opening state votes "in the presence of the Senate and House of Representatives." Dr. Eastman does not dispute that the Joint Session is an "official proceeding." While there is no binding authority interpreting "proceeding before the Congress," ten colleagues from the District of Columbia have concluded that the 2021 electoral count was an "official proceeding" within the meaning of section 1512(c)(2), and the Court joins those well-reasoned opinions. . . .

A person violates § 1512(c) when they obstruct an official proceeding with a corrupt mindset. The Ninth Circuit has not defined "corruptly" for purposes of this statute. However, the court has made clear that the threshold for acting "corruptly" is lower than "consciousness of wrongdoing," meaning a person does not need to know their actions are wrong to break the law. Because President Trump likely knew that the plan to disrupt the electoral count was wrongful, his mindset exceeds the threshold for acting "corruptly" under § 1512(c).

President Trump and Dr. Eastman justified the plan with allegations of election fraud—but President Trump likely knew the justification was baseless, and therefore that the entire plan was unlawful. Although Dr. Eastman argues that President Trump was advised several state elections were fraudulent, the Select Committee points to numerous executive branch officials who publicly stated and privately stressed to President Trump that there was no evidence of fraud. By early January, more than sixty courts dismissed cases alleging fraud due to lack of standing or lack of evidence, noting that they made "strained legal arguments without merit and speculative accusations" and that "there is no evidence to support accusations of voter fraud." President Trump's repeated pleas for Georgia Secretary of State Raffensperger clearly demonstrate that his justification was not to investigate fraud, but to win the election: "So what are we going to do here, folks? I only need 11,000 votes. Fellas, I need 11,000 votes. Give me a break." Taken together, this evidence demonstrates that President Trump likely knew the electoral count plan had no factual justification.

The plan not only lacked factual basis but also legal justification. Dr. Eastman's memo noted that the plan was "BOLD, Certainly." The memo declared Dr. Eastman's intent to step outside the bounds of normal legal practice: "we're no longer playing by Queensbury Rules." In addition, Vice President Pence "very consistent[ly]" made clear to President Trump that the plan was unlawful, refusing "many times" to unilaterally reject electors or return them to the states. In the meeting in the Oval Office two days before January 6, Vice President Pence stressed his "immediate instinct [ ] that there is no way that one person could be entrusted by the Framers to exercise that authority."

Dr. Eastman argues that the plan was legally justified as it "was grounded on a good faith interpretation of the Constitution." But "ignorance of the law is no excuse," and believing the Electoral Count Act was unconstitutional did not give President Trump

license to violate it. Disagreeing with the law entitled President Trump to seek a remedy in court, not to disrupt a constitutionally-mandated process. And President Trump knew how to pursue election claims in court—after filing and losing more than sixty suits, this plan was a last-ditch attempt to secure the Presidency by any means.

.

The illegality of the plan was obvious. Our nation was founded on the peaceful transition of power, epitomized by George Washington laying down his sword to make way for democratic elections. Ignoring this history, President Trump vigorously campaigned for the Vice President to single-handedly determine the results of the 2020 election. As Vice President Pence stated, "no Vice President in American history has ever asserted such authority." Every American—and certainly the President of the United States—knows that in a democracy, leaders are elected, not installed. With a plan this "BOLD," President Trump knowingly tried to subvert this fundamental principle.

Based on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021. . . .

[T]he evidence demonstrates that President Trump likely attempted to obstruct the Joint Session of Congress on January 6, 2021. While the Court earlier analyzed those actions as attempts to obstruct an "official proceeding," Congress convening to count electoral votes is also a "lawful function of government" within the meaning of 18 U.S.C. § 371, which Dr. Eastman does not dispute.

An "agreement" between co-conspirators need not be express and can be inferred from the conspirators' conduct. There is strong circumstantial evidence to show that there was likely an agreement between President Trump and Dr. Eastman to enact the plan articulated in Dr. Eastman's memo. In the days leading up to January 6, Dr. Eastman and President Trump had two meetings with high-ranking officials to advance the plan. On January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office to persuade Vice President Pence to carry out the plan. The next day, President Trump sent Dr. Eastman to continue discussions with the Vice President's staff, in which Vice President Pence's counsel perceived Dr. Eastman as the President's representative. Leading small meetings in the heart of the White House implies an agreement between the President and Dr. Eastman and a shared goal of advancing the electoral count plan. The strength of this agreement was evident from President Trump's praise for Dr. Eastman and his plan in his January 6 speech on the Ellipse: "John is one of the most brilliant lawyers in the country, and he looked at this and he said, 'What an absolute disgrace that this can be happening to our Constitution.'"

Based on these repeated meetings and statements, the evidence shows that an agreement to enact the electoral count plan likely existed between President Trump and Dr. Eastman. . . .

Obstruction of a lawful government function violates § 371 when it is carried out "by deceit, craft or trickery, or at least by means that are dishonest." While acting on a "good faith misunderstanding" of the law is not dishonest, "merely disagreeing with the

law does not constitute a good faith misunderstanding ... because all persons have a duty to obey the law whether or not they agree with it."

The Court discussed above how the evidence shows that President Trump likely knew that the electoral count plan was illegal. President Trump continuing to push that plan despite being aware of its illegality constituted obstruction by "dishonest" means under § 371.

The evidence also demonstrates that Dr. Eastman likely knew that the plan was unlawful. Dr. Eastman heard from numerous mentors and like-minded colleagues that his plan had no basis in history or precedent. Fourth Circuit Judge Luttig, for whom Dr. Eastman clerked, publicly stated that the plan's analysis was "incorrect at every turn." Vice President Pence's legal counsel spent hours refuting each part of the plan to Dr. Eastman, including noting there had never been a departure from the Electoral Count Act and that not "a single one of [the] Framers would agree with [his] position."

Dr. Eastman himself repeatedly recognized that his plan had no legal support. In his discussion with the Vice President's counsel, Dr. Eastman "acknowledged" the "100 percent consistent historical practice since the time of the Founding" that the Vice President did not have the authority to act as the memo proposed. More importantly, Dr. Eastman admitted more than once that "his proposal violate[d] several provisions of statutory law," including explicitly characterizing the plan as "one more relatively minor violation" of the Electoral Count Act. In addition, on January 5, Dr. Eastman conceded that the Supreme Court would unanimously reject his plan for the Vice President to reject electoral votes. Later that day, Dr. Eastman admitted that his "more palatable" idea to have the Vice President delay, rather than reject counting electors, rested on "the same basic legal theory" that he knew would not survive judicial scrutiny.

Dr. Eastman's views on the Electoral Count Act are not, as he argues, a "good faith interpretation" of the law; they are a partisan distortion of the democratic process. His plan was driven not by preserving the Constitution, but by winning the 2020 election:

> [Dr. Eastman] acknowledged that he didn't think Kamala Harris should have that authority in 2024; he didn't think Al Gore should have had it in 2000; and he acknowledged that no small government conservative should think that that was the case.

Dr. Eastman also understood the gravity of his plan for democracy—he acknowledged "[y]ou would just have the same party win continuously if [the] Vice President had the authority to just declare the winner of every State."

The evidence shows that Dr. Eastman was aware that his plan violated the Electoral Count Act. Dr. Eastman likely acted deceitfully and dishonestly each time he pushed an outcome-driven plan that he knew was unsupported by the law. . . .

> President Trump and Dr. Eastman participated in numerous overt acts in furtherance of their shared plan. As detailed at length above, President Trump's acts to strong-arm Vice President Pence into following the plan included meeting with and calling the Vice President and berating him in a speech to thousands outside the Capitol. Dr. Eastman joined for one of those meetings, spent hours attempting to convince the Vice President's counsel to support the plan, and gave his own speech at the Ellipse "demanding" the Vice President "stand up" and enact his plan.
>
> Based on the evidence, the Court finds that it is more likely than not that President Trump and Dr. Eastman dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021.

ADD THE FOLLOWING AFTER THE FIRST FULL PARAGRAPH FOLLOWING THE BULLET POINTS ON PAGE 482:

A new empirical study uses a dataset of approximately 400 voting records across multiple election cycles to estimate voter turnout gaps by race, age, and political affiliation. It finds that people of color, young people, and Democrats are much more likely to live in "turnout deserts" where voting rates are markedly lower. Here are some of the study's key findings:

> [I]n 2016 Whites voted at a rate 4 percentage points higher (9% higher relative than the base rate) than Black citizens, 20 percentage points (69%) higher than Asians, and 19 percentage points (63%) higher than Hispanics; Republicans voted at a rate 5 percentage points higher (11%) than democrats; and older citizens (>60 years old) voted at a rate 47 percentage points higher (124%) than younger citizens (<30 years old). In 2014, these gaps were further magnified—Whites voted at a rate 10 percentage points higher (36% greater) than Black citizens, 22 percentage points higher (138%) than Asians, and 24 percentage points higher (171%) than Hispanics; republicans voted at a rate 7 percentage points higher (24%) than democrats; and older citizens vote at a rate 45 percentage points higher (375%) than younger citizens. These gaps are striking. . . .
>
> These results show that voter turnout is highly segregated by race, politics, and age in the United States; minorities, young people, and democrats are much more likely to live in turnout deserts. . . . [I]f we define a turnout desert as a precinct where turnout was one standard deviation lower than the national average, Black, Hispanic, and Asian individuals are 3, 4, and 2.5 times more likely to live in a turnout desert than whites, respectively. (In the SI we look at alternative definitions of turnout deserts and find similar results.) Likewise, democrats are 2.5 times more likely to live in a turnout desert than republicans. Turnout deserts are also divided by age, albeit less than race and party, perhaps, in part, because age-based segregation is comparatively smaller in the United States. Still, young people are still much more likely (1.6x) to live in a turnout desert than older citizens. . . .
>
> In addition to clear demographic patterns (i.e. minorities are more likely to live in areas with very low turnout rates overall) we also see geographic patterns across the country. For example, California, Arizona, and Texas stand out as states with many

> counties where a large fraction of precincts have remarkably low turnout rates. Counties with high proportions of turnout desert precincts also appear more frequently in the Appalachian region and in the Great Lakes states of Michigan and Wisconsin. However, counties with many precinct turnout deserts appear in both urban and rural parts of country.

Michael Barber & John B. Holbein, *400 Million Voting Records Show Profound Racial and Geographic Disparities in Voter Turnout in the United States*, 17 PLoS ONE 6 at 1 (June 8, 2022) https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0268134.

ADD THE FOLLOWING AT THE END OF PAGE 502:

In 2022, Justice Kavanaugh sought to defend application of the *Purcell* principle in a case stopping the drawing of congressional districts following redistricting where the primary was four months away and the general election nine months away. *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring). After first remarking that the "traditional test for a stay does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state's election law in the period close to an election," *id.* at 880, he explained:

> Some of this Court's opinions, including *Purcell* itself, could be read to imply that the principle is absolute and that a district court may never enjoin a State's election laws in the period close to an election. As I see it, however, the *Purcell* principle is probably best understood as a sensible refinement of ordinary stay principles for the election context—a principle that is not absolute but instead simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures. Although the Court has not yet had occasion to fully spell out all of its contours, I would think that the *Purcell* principle thus might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

Id. at 881.

Justice Kagan for the three liberal Justices dissented, pointing out that the Court in the past had rejected *Purcell* arguments in cases on similar timeframes. She further noted that plaintiffs were diligent in suing within hours or days of the enactment of the redistricting plan. "Alabama is not entitled to keep violating Black Alabamians' voting rights just because the court's order came down in the first month of an election year." *Id*. at 888-889 (Kagan, J., dissenting).

In *Moore v. Harper*, 142 S. Ct. 1089 (2022), the Supreme Court refused to block a North Carolina Supreme Court order requiring new congressional districts against a claim that the state court exceeded its powers under the Constitution. Justice Kavanaugh, citing *Merrill* and its similar time frame, concurred on *Purcell* grounds even as he expressed sympathy with the merits. *Id.* (Kavanaugh, J., concurring). Three conservative Justices, led by Justice Alito, dissented, without

mentioning *Purcell*. *Id.* at 1089-1090 (Alito, J., dissenting). The Supreme Court subsequently granted certiorari in that case, as noted on page 5 of this Supplement.

One difference between *Milligan* and *Moore*: In *Milligan*, applying *Purcell* benefitted Republicans and in *Moore* it benefited Democrats.

Chapter 8. Major Political Parties

ADD THE FOLLOWING AT THE END OF NOTE 8 ON PAGE 614:

A bipartisan group of Senators have been meeting to consider legislation to reform the Electoral Count Act, and perhaps to take other actions to combat election subversion, such as providing new protections for election officials. Jordain Carney, *Manchin, Collins Leading Talks on Overhauling Election Law, Protecting Election Officials*, The Hill, Jan. 20, 2022, https://perma.cc/3NPX-PSXY. So far, the group has not announced any proposed legislation, and it is unlikely that such legislation would pass after the 2022 elections if Republicans take control of either the House or Senate.

For a detailed analysis of some of the most worrisome vulnerabilities in the presidential election process that unscrupulous candidates or their supporters might try to exploit in the future, see Matthew Seligman, *Disputed Presidential Elections and the Collapse of Constitutional Norms* (draft manuscript Jan. 30, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3283457.

Chapter 11. Bribery

ADD THE FOLLOWING AFTER THE PROBLEM ON PAGE 814-15:

For an examination of the meaning of corrupt intent in a different context see *Eastman v. Thompson*, 2022 WL 894256 (C.D. Cal. Mar. 28, 2022), excerpted in Chapter 6 of this Supplement. *Eastman* involved a federal statute, 18 U.S.C. § 1512(c)(2), that criminalizes the corrupt obstruction of an official proceeding. Presented with evidence that former President Donald Trump and his lawyer John Eastman acted deceitfully and with knowledge that their actions were wrongful, in planning to disrupt the electoral count on January 6, 2021, the district court found it more likely than not that they acted "corruptly" under § 1512.

Chapter 14. Contribution Limits

ADD THE FOLLOWING AT THE END OF NOTE 2 ON PAGE 1020:

After the Ninth Circuit struck down Alaska's individual campaign finance limits, Alaska legislators considered but were unable to reach a deal imposing new limits. Alaska has now gone from a state with one of the lowest individual contribution limits to one in which a donor may give directly to a candidate for office any size donation. Some supporters of lower limits are considering a ballot measure. Nathaniel Herz, *A Last-Minute Deal to Restore Alaska's Campaign Finance Limits Fell Through. Here's How*, Anchorage Daily News, May 19, 2022, https://perma.cc/FKR2-NRNR.

ADD THE FOLLOWING AT THE END OF NOTE 5 ON PAGE 1040:

Campaign committees run by candidates and supportive Super PACs have found new creative ways to coordinate their messages and themes without running afoul of technical Federal Election Commission coordination rules. "To work around the prohibition on directly coordinating with super PACs, candidates are posting their instructions to them inside the red boxes on public pages that super PACs continuously monitor. [¶] The boxes highlight the aspects of candidates' biographies that they want amplified and the skeletons in their opponents' closets that they want exposed. Then, they add instructions that can be extremely detailed: Steering advertising spending to particular cities or counties, asking for different types of advertising and even slicing who should be targeted by age, gender and ethnicity." Shane Goldmacher, *The Little Red Boxes Making a Mockery of Campaign Finance Laws*, N.Y. Times, May 16, 2022, https://perma.cc/V8BT-FHEW.

ADD THE FOLLOWING AT THE END OF NOTE 7 ON PAGE 1070:

With no noted dissents, the Supreme Court once again turned down a case raising the constitutionality of the federal ban on direct corporate contributions to candidates. *Lundergan v. United States*, 2022 WL 1295718 (U.S. May 2, 2022).

ADD THE FOLLOWING AT THE END OF NOTE 8 ON PAGE 1073:

In *Federal Election Commission v. Cruz for Senate*, 142 S. Ct. 1638 (2022), the Supreme Court struck down another part of the McCain-Feingold law as violating the First Amendment. The opinion confirmed the consistent conservative-liberal split on the constitutionality of campaign finance limits, but it appeared to break little new doctrinal ground.

The contested provision essentially made it illegal for a campaign to pay back a candidate for loans the candidate made to the campaign in excess of $250,000 with funds raised after the election. "The Government argues that the contributions at issue raise a heightened risk of corruption because of the use to which they are put: repaying a candidate's personal loans. It also maintains that post-election contributions are particularly troubling because the contributor will know—not merely hope—that the recipient, having prevailed, will be in a position to do him some good." *Id.* at 1652.

The Court majority was unpersuaded, seeing the law as a "drag" on the willingness of candidates to lend money to their campaigns, thereby burdening their First Amendment-protected activity:

> We greet the assertion of an anticorruption interest here with a measure of skepticism, for the loan-repayment limitation is yet another in a long line of "prophylaxis-upon-prophylaxis approach[es]" to regulating campaign finance. *McCutcheon* (quoting *WRTL*) (opinion of ROBERTS, C. J.)). . . .
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> There is no cause for a different conclusion here. Because the Government is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than "simply posit the existence of the disease sought to be cured." *Colorado Republican*. It must instead point to "record evidence or legislative findings" demonstrating the need to address a special problem. *Ibid.* We have "never accepted mere conjecture as adequate to carry a First Amendment burden." *McCutcheon,* (quoting *Shrink Missouri*).
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> Yet the Government is unable to identify a single case of quid pro quo corruption in this context—even though most States do not impose a limit on the use of post-election contributions to repay candidate loans. Cf. Brief for Campaign Legal Center et al. as *Amici Curiae* 17–18 (citing the 10 States that do impose such a prohibition). Our previous cases have found the absence of such evidence significant. See *Citizens United* (the Government did not claim that the political process was corrupted in the 26 States that allowed unrestricted independent expenditures by corporations); *McCutcheon* (the Government presented no evidence of corruption in the 30 States that did not impose aggregate limits on individual contributions).
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> The Government instead puts forward a handful of media reports and anecdotes that it says illustrate the special risks associated with repaying candidate loans after an election. But as the District Court found, those reports "merely hypothesize that individuals who contribute after the election to help retire a candidate's debt might have greater influence with or access to the candidate." That is not the type of *quid pro quo* corruption the Government may target consistent with the First Amendment. See *McCutcheon*.

Id. at 1652-53.

Justice Kagan, for the three liberal dissenters, saw the matter differently:

> A candidate for public office extends a $500,000 loan to his campaign organization, hoping to recoup the amount from benefactors' post-election contributions. Once elected, he devotes himself assiduously to recovering the money; his personal bank account, after all, now has a gaping half-million-dollar hole. The politician solicits donations from wealthy individuals and corporate lobbyists, making clear that the money they give will go straight from the campaign to him, as repayment for his loan. He is deeply grateful to those who help, as they know he will be—more grateful than for ordinary campaign contributions

(which do not increase his personal wealth). And as they paid him, so he will pay them. In the coming months and years, they receive government benefits—maybe favorable legislation, maybe prized appointments, maybe lucrative contracts. The politician is happy; the donors are happy. The only loser is the public. It inevitably suffers from government corruption.

The campaign finance measure at issue here has for two decades checked the crooked exchanges just described. The provision, Section 304 of the Bipartisan Campaign Reform Act of 2002, prohibited a candidate from using post-election donations to repay loans exceeding $250,000 that he made to his campaign. The theory of the legislation is easy to grasp. Political contributions that will line a candidate's own pockets, given after his election to office, pose a special danger of corruption. The candidate has a more-than-usual interest in obtaining the money (to replenish his personal finances), and is now in a position to give something in return. The donors well understand his situation, and are eager to take advantage of it. In short, everyone's incentives are stacked to enhance the risk of dirty dealing. At the very least—even if an illicit exchange does not occur—the public will predictably perceive corruption in post-election payments directly enriching an officeholder. Congress enacted Section 304 to protect against those harms.

In striking down the law today, the Court greenlights all the sordid bargains Congress thought right to stop. The theory of the decision (unlike of the statute) is hard to fathom. The majority says that Section 304 violates the candidate's First Amendment rights by interfering with his ability to "self-fund" his campaign. But the candidate can in fact *self*-fund all he likes. The law impedes only his ability to use *other people*'s money to finance his campaign—much as standard (and permissible) contribution limits do. And even that third-party restriction is a modest one, applying only to post- (not pre-) election donations to repay sizable (not small) loans. So the majority overstates the First Amendment burdens Section 304 imposes. At the same time, the majority understates the anti-corruption values Section 304 serves. In the majority's view, there is "scant" danger here of *quid pro quo* corruption; loan repayments produce only the "sort of 'corruption' " in which contributors wield "greater influence" over candidates than they otherwise would. Assume away all objections to that distinction, which even the majority concedes is "vague,"; for better or worse, it underlies this Court's recent campaign finance decisions. Still, the conduct targeted by Section 304 threatens, if anything does, both corruption and the appearance of corruption of the *quid pro quo* kind. That is because the regulated transactions—as Members of Congress well knew from experience—personally enrich those already elected to office. In allowing those payments to go forward unrestrained, today's decision can only bring this country's political system into further disrepute.

Id. at 1657-58 (Kagan, J., dissenting).

Chapter 16. Disclosure

ADD THE FOLLOWING AT THE END OF NOTE 6 ON PAGE 1192:

Relying in part upon *Bonta*, a federal district court struck down some broad campaign finance disclosure rules in Wyoming as violating the First Amendment. *Wyoming Gun Owners v. Buchanon*, 2022 WL 1310456 (D. Wyo. Mar. 21, 2022). The rules appeared to require disclosure of funding for some non-election-related political activities. The court recognized the government interests served by disclosure, and it suggested ways that Wyoming could narrow its disclosure rules so that they would be more likely to satisfy exacting scrutiny and not violate plaintiff's rights. The case is currently on appeal to the Tenth Circuit.