THE STATE OF NEW HAMPSHIRE SUPREME COURT

No. 2023-0097

Daniel Richard

v.

Christopher Sununu, et al.

Motion for Leave of the Court to File Third Late Authority.

Now comes, the Appellant Daniel Richard, pro se, pursuant to Supreme Court Rule 16 (7), respectfully gives notice of a new compelling authority from the recent decision by the Supreme Court of the United States "SCOTUS", decided May 23, 2024 in the matter of *ALEXANDER v. SOUTH CAROLINA STATE CONFERENCE OF THE NAACP,* No. 22-807 602 U.S.___ (2024). ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, Argued October 11, 2023—Decided May 23, 2024, hereinafter '*Alexander'*, where the Appellant here offers the court this late SCOTUS decision in support of my argument for 'Standing'.

Accordingly, the Appellant respectfully submits to the court, where *"Alexander" above,* is an election law case reaffirming the Appellants previous citation of *Moore v. Harper*, 600 U.S. 1 (2023), "*Harper*" and the *New York State Rifle & Pistol Assn., Inc., et al. v. Bruen*—No. 20-843 (U.S. June 23, 2022), *"Bruen"* and the *District of Columbia v. Heller*, 554 U.S. 570 (2008), "*Heller*" in the Appellants motion for late

authorities this SCOTUS decision is not only appropriate but precedent in the Appellants currently pending decision within this honorable court.

Notwithstanding, the harms which the Appellant has experienced and currently faces is reinforced by the Defendants' failures in providing equal rights and due-process protections, *inter alia*, during his previous attempts to vote as described in Appellant's initial brief. In presenting his earlier arguments, Appellant argued that the standard of review must be examined under the *Heller/Bruen* methodology—*above*, and not by means-end scrutiny.

However, Appellant used this said *Bruen* methodology in concert with the 2023 Election case of *Moore v Harper—above,* although *Heller* nor *Bruen* were Elections-related cases. This new late Elections law authority of *Alexander* has now cited *Bruen* in its' decision, supporting the Appellants use of the *Heller/Bruen* methodology in Election law cases.

Supreme Court Justice Clarence Thomas joining the majority opinion by concurring in part, in the *Alexander v. South Carolina NAACP* decision, reinforces the precedent of *Moore v. Harper,* in the examination of the elections clause of the Constitution for the United States, Article I, §4, cl. 1, reinforcing judicial review by State and Federal Courts who both possess the authority to exercise judicial review over state legislative actions affecting the Time, Place and *Manner* of conducting Federal Elections.

Justice Thomas in his concurring opinion in *Alexander v. South Carolina NAACP* has tied *Moore v. Harper* (2023) and *Bruen* (2022) together and reinforces the Appellants arguments, by stating a fact in law, that the standard of review for examination of the rights enumerated in the U.S. Const. including the Federal Elections Clause Article I, §4, cl. 1, must be examined under Heller/Bruen methodology, and not by means-end scrutiny.

Quoting Justice Thomas:

> *Although States have the initial duty to draw district lines, the Elections Clause commits exclusive supervisory authority over the states drawing of congressional districts to Congress—not federal courts. It provides: "The*

Times, Places, and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may it any time by – Law make or alter such Regulations, except as to the places of choosing Senators." Art. I, §4, cl. 1. The first part of the Clause "imposes a duty upon" state legislatures to "prescribe the details necessary to hold congressional elections." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 862 (1995) (Thomas J., dissenting). The second part "grants power exclusively to Congress" to police the state legislatures' performance of their duty. Id., at 864. Critically, the Clause leaves the Judiciary out of the districting process entirely.

The Clause's assignment of rules is comprehensive. For example, a state legislature's responsibility over congressional elections "'transcends any limitations sought to be imposed by the people of a State'" through other state actors; the state legislature is the exclusive state authority. Moore v. Harper, 600 U.S. 1, 58 (2023) (Thomas, J., dissenting) (quoting Leser v. Garnett, 258 U. S. 130, 137, (1922)). In a similar vein, the Clause makes Congress the exclusive federal authority over States' efforts to draw congressional districts, to the exclusion of the courts.

The historical record compels this interpretation of the Elections Clause text. Gerrymandering and vote delusion are not new phenomena. The founding generation was familiar with political districting problems from the American colonial experience. See Vieth, 541 U.S., at 274 (collecting examples). But, the framers nowhere suggested the federal courts as a potential solution to those problems. Instead, they relied on congressional oversight. The framers' considered choice of a non-judicial remedy is highly relevant to context to the interpretation of the elections clause. See New York State rifle& pistol Assn., Inc. v. Bruen, 597 U.S. 1, 26—27 (2022). See *below.*

Bruen provides on pages 26 and 27 *below*:

We categorize these historical sources, because, when it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." Heller, 554 U.S., at 634—635 (emphasis added). The Second Amendment was adopted in 1791; -pg. 25.

-the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions change in the intervening years. It is one thing for courts to "reac[h] back to the 14th century" for English practices that "prevailed up to the 'period immediately before and after the framing of the Constitution.'" Sprint Communications Co. v. APCC Services, Inc. 554 U.S. 269, 311 (2008) (Roberts, C. J., dissenting). It is quite another to rely on in an "ancient" practice that had become "obsolete in England at the time of the adaptation of the Constitution" and never "was acted upon or accepted in the colonies." Dimick v. Schiedt, 293 U.S. 474, 477 (1935) … —pg. 26

...Sometimes, in interpreting our own Constitution, "it [is] better not to go too far back into antiquity for the best securities of our liberties," Funk v. United States, 290 U.S. 371, 382 (1983), unless evidence shows that medieval law survived to become our Founders' law. A long, unbroken line of common-law precedent stretching from Braxton to Blackstone is far more likely to be part of our law than a short-lived, 14th century English practice. –pg. 26

Thomas has said specifically that these two pages apply as the corrected standard of review of constitutional interpretation of the Elections Clause Article I, §4, cl. 1.

Similarly, we must also guard against giving post enactment history more weight than it can rightly bear. It is true – pg. 26.

-that in Heller we reiterated that evidence of "how the second amendment was interpreted from immediately after it's ratification through the end of the 19th century" represented a "critical tool of constitutional interpretation." 554 U.S., at

605. We therefore examined "a variety of legal and other sources to determine the public understanding of [the Second Amendment] after its… ratification." Ibid. And, in other context, we have explained that "'a regular course of practice' can 'liquidate & settle the meaning of' disputed or intermediate 'terms & phrases'" in the Constitution. Chiafalo v. Washington, 591 U.S. __, __ (2020) (slip op., at 13) (quoting Letter from J. Madison to S. Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908)); see also, e.g., Houston Community college System v. Wilson, 595 U.S.___, ___, (2022) (slip op. at 5) (same); The Federalist No. 37, p. 229 (C. Rossiter ed. 1961) (J. Madison); see generally C. Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 10—21 (2001); W. Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019). In other words, we recognize that "<u>where A governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.</u>" [Emphasis added.] NLRB v. Noel Canning, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment); see also Myers v. United States, 272 U.S. 52, 174 (1926); Printz v. United States, 521 U.S. 898, 905 (1997). —pg. 27

<u>But to the extent later history contradicts what the text says, the text controls</u>. *[Emphasis added.] "'[L]iquidating' indeterminacies in written laws is far removed from expanding or altering them." Gamble v. United States, 587 U.S. __, __ (2019) (Thomas, J. concurring) (slip op., at 13); see also Letter from James Madison 477 (G. Hunt ed. 1910). Thus, "post-ratification adaptation or acceptance of laws that are inconsistent with the original meaning of the constitutional text* – pg. 27

–obviously cannot overcome or alter that text." – pg. 28. Heller, 670 F. 3d, at 1274, n. 6 (Kavanagh, J., dissenting); see also Espinoza v. Montana Dept. of Revenue, 591 U.S. __, __, (2020) (slip op., at 15).

Bruen stated that the Court has *"made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government."* 142 S. Ct. at 2137.—pg. 39.

Heller provides on pages 634 and 635 *below*:

The *Heller* decision abolished means end scrutiny as a test for any of the enumerated rights in the U.S. Bill of Rights and its Constitution, Justice Scalia writing for the majority:

> *Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important govern mental interests." Post, at 689–690. After an exhaustive discussion of the arguments for and against gun control, Justice Breyer arrives at his interest-balanced answer: Because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.* – pg. 635
>
> *We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future*

judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted— pg. 634

them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See National Socialist Party of America v. Skokie, 432 U. S. 43 (1977) (per curiam). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrongheaded views. The Second Amendment is no different. Like the First, it is the very product of an interest balancing by the people—which Justice Breyer would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home. – pg. 635.

Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. See post, at 720–721. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than Reynolds v. United States, 98 U. S. 145 (1879), our first in depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *District of Columbia v. Heller,* 554 U.S. 570 (2008)— pg. 635.

Fifteen other cases in the last eleven months since June 2023 citing Moore v. Harper are predicated upon this same principle in law and include the following:

> "Since early in our Nation's history, courts have recognized their duty to evaluate the constitutionality of legislative acts."
>
> "When government is alleged to have threatened any of [the provisions in the New Mexico Bill of [R]ights, it is the responsibility of the courts to interpret and apply the protections of the Constitution."

Grisham v. Soelen, 539 P.3d 272 (N.M. 2023) 09-22-2023. See also *Griego* , 2014-NMSC-003, ¶ 1, 316 P.3d 865; *Hoffmann v. N.Y. State Ind. Redistricting Comm'n*, 2023 N.Y. Slip Op. 6344 (N.Y. 2023); *Keefer v. Biden*, CIVIL 1:24-CV-00147 (M.D. Pa. Mar. 26, 2024) Election Clause cases.

Meanwhile, the *Bruen* decision has been cited 78 times since June 27, 2022.

WHEREFORE, THE APPELLANT respectfully submits this Notice of New Authorities for additional consideration for standing in this case forthwith.

Respectfully submitted,

/s/ Daniel Richard

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I, Daniel Richard, certify that the foregoing facts are true and correct to the best of my knowledge and belief.

May 28, 2024 /s/ *Daniel Richard*

Daniel Richard

Certificate of Service

I hereby certify that a copy of the foregoing was served through the Court's e-filing system to all parties of record.

May 28, 2024 /s/ Daniel Richard

Daniel Richard