



To: Interested Parties
From: Protect Democracy
Date: December 13, 2017
Re: **Constitutional Prohibition Against Delay of Elections for Partisan Purposes**

Introduction and Summary

As Americans, we live in a democracy, and that means we get to participate in elections to choose our political leaders. The Guarantee Clause in Article IV of the Constitution enshrines the promise of a republican form of government, and “the distinguishing feature” of a republican form of government “is the right of the people to choose their own officers for governmental administration.”¹ That promise in turn is reflected in other constitutional provisions guaranteeing the right to vote and the freedom of political association.

Fundamental to these guarantees is the notion that elections will be held in a timely and regular manner—and that to do otherwise would undermine the very premise of republican democracy. The Founders cited King George III’s failure to hold timely elections as one of the justifications for our Declaration of Independence.² And the 1864 presidential election proceeded as scheduled, even while half the country stood in armed rebellion and hostile armies camped a few days’ march from Washington. As President Lincoln observed, “We can not have free government without elections; and if the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and ruined us.”³

Despite these foundations, our nation’s commitment to this well-established tenet of republican democracy has recently been tested. Yesterday, December 12, 2017, Alabamians cast their votes in a special election to fill the U.S. Senate seat left vacant when former Senator Jeff Sessions became Attorney General of the United States. Several months earlier, Alabama Governor Kay Ivey had scheduled the special election for that date in order to “adhere with state law” and to “steady [Alabama’s] ship of state” by allowing the “people [to] vote for a replacement U.S. Senator as soon as possible”—a “victory for the rule of law.”⁴ But in the weeks leading up to the special election, as accusations of misconduct appeared to weaken the

¹ *In re Duncan*, 139 U.S. 449, 461 (1891).

² *See* Dec. of Ind. (1776) (“He has dissolved Representative Houses repeatedly He has refused for a long time, after such dissolutions, to cause others to be elected”).

³ Abraham Lincoln, *Lincoln on the 1864 Election* (November 10, 1864), available at <https://www.nps.gov/liho/learn/historyculture/1864election.htm>.

⁴ Press Release, Office of Governor Kay Ivey, Governor Ivey Moves US Senate Special Election to Adhere with State Law (Apr. 18, 2017) (capitalization altered), available at <http://governor.alabama.gov/news/press-releases/governor-ivey-moves-us-senate-special-election-to-adhere-with-state-law>.

incumbent party's candidate in the polls, leaders of that party reportedly explored options for delaying the election—presumably to reduce their party's chances of losing the seat.⁵

To her credit, Governor Ivey never gave any public indication that she was considering a delay. But the fact that other leaders did consider it should be deeply troubling to all Americans. Postponing or canceling an election to shore up one party's chances of victory would be antithetical and dangerous to American democracy. It would also be plainly unconstitutional.

The Constitution of the United States affords states substantial latitude to regulate elections, and the states regularly exercise that authority to ensure that elections proceed in an orderly manner.⁶ But as the U.S. Supreme Court has explained, this authority “may not be exercised in a way that violates other specific provisions of the Constitution,” and it does not “justify, without more, the abridgment of fundamental rights, such as the right to vote ... or ... the freedom of political association.”⁷

Any decision to postpone or cancel an election—whether federal or state, primary or general, regularly scheduled or specially set—must therefore withstand constitutional scrutiny. In some cases, a decision to cancel or postpone an election might survive that scrutiny, such as when a natural disaster, terrorist attack, or similar circumstance makes conducting an election on the scheduled date unsafe or impossible. But as discussed below, a decision driven by pursuit of partisan advantage or to improve one candidate's prospects of success has no such legitimate justification and would violate constitutional protections enshrined in the First and Fourteenth Amendments. If such a move is threatened again in connection with a future election, courts can and should step in to prevent the infringement of Americans' constitutional rights and to enforce the constitutional safeguards of republican democracy.

Legal Analysis

I. A Decision To Postpone Or Cancel An Election For Partisan Purposes Would Infringe The First Amendment And The Equal Protection And Due Process Clauses Of The Fourteenth Amendment

Several provisions of the Constitution would be implicated when the timing of an election is threatened with manipulation for partisan gain. In the case of a special election to fill a Senate vacancy, as occurred in Alabama, the Seventeenth Amendment requires that the election be conducted in accordance with state statutory law, “as the legislature may direct,” and

⁵ Jeremy Diamond & Kevin Liptak, *White House waits for McConnell to spell out Alabama options*, CNN, Nov. 17, 2017, available at <http://www.cnn.com/2017/11/17/politics/trump-mcconnell-moore-alabama/index.html> (“Senate Majority Leader Mitch McConnell is set to deliver a memo to the White House that spells out ways the December 12 special election could be delayed, including by applying pressure to Alabama's Republican governor ...”).

⁶ See, e.g., Art. I, Sec. 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations ...”).

⁷ *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

is best understood to limit how long a state may wait without holding a special election.⁸ Beyond that particular circumstance, the First and Fourteenth Amendments embody a broad set of rights that must be respected in the conduct of any election.

A. First Amendment

Postponing or canceling an election would burden Americans' First Amendment rights to associate with their fellow citizens in support of the candidates and causes of their choice. As the Supreme Court has explained:

[Some state election] laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”⁹

More concretely, “First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views,” or when the government burdens representational rights “for reasons of ideology, beliefs, or political association.”¹⁰ The First Amendment is also implicated when government action frustrates “the constitutional interest of like-minded voters to gather in pursuit of common political ends.”¹¹

⁸ See *Valenti v. Rockefeller*, 292 F. Supp. 851, 856 (“We would have difficulty, for example, squaring ... [‘temporary appointments’] with a statute providing that the Governor’s appointee is to serve out the remainder of a term regardless of its length.”), *aff’d*, 393 U.S. 405 (1969); see also *id.* at 876-877 (Frankel, J., dissenting) (explaining how, at the time the Seventeenth Amendment was enacted, no senatorial vacancy would go unfilled for more than one year); Zachary D. Clopton & Stephen E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 N.W. Law. Rev. 1181, 1223 (2013) (“One year, on the other hand, is enough time to allow the electoral machinery of the states to function in a deliberative fashion, and it has some basis in the original understanding of the Constitution and the legislative history of the Seventeenth Amendment.”).

⁹ *Williams*, 393 U.S. at 30-31 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (footnotes omitted); see also *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (recognizing that “state election law[s] [can] violate[] First and Fourteenth Amendment associational rights”).

¹⁰ *Vieth v. Jubelirer*, 541 U.S. 267, 314-315 (2004) (Kennedy, J., concurring in the judgment).

¹¹ *Norman v. Reed*, 502 U.S. 279, 288 (1992).

For example, if the government attempted to cancel or reschedule a federal or state election to improve one candidate's prospects of winning at the expense of the other's, that action would burden a voter's First Amendment right to band together with like-minded voters to elect their desired candidate. The First Amendment does not permit government officials to burden voters' expressive and associational rights simply because they dislike the viewpoint or electoral consequences of that expressive and associational conduct.

B. Equal Protection Clause

Postponing or canceling an election with the intent and effect of disfavoring one group of voters would also implicate the Fourteenth Amendment's Equal Protection Clause. The government has an "obligation to avoid arbitrary and disparate treatment of the members of its electorate," and "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."¹²

While the government might take the position that all voters are affected equally when an election is canceled or postponed, that would not be the case if the government postponed or canceled an election to favor one political party or viewpoint over another. Postponing an election because the government's preferred candidate is struggling in the polls would provide that candidate's party and supporters with an accommodation—the time necessary to choose a new candidate or to permit the candidate's liabilities to fade from voters' memories—that was denied to competing candidates and their supporters and that was indeed intended to harm the electoral prospects of those competing candidates. Rescheduling the election would amount to an act of treating similarly situated groups of voters, and their parties and candidates, differently based on their political views: If the disfavored party is poised to win an election, the government affords the favored party more time to rehabilitate or replace its nominee; but if the favored party is poised to win, the election proceeds as normal.

The Equal Protection Clause would also be implicated by a decision to postpone or reschedule an election where early voting, absentee voting, or military voting is already underway. Depending on whether the government allowed time for those voters to cast new ballots, the already-cast ballots would either be thrown out, denying to those who had already voted the right for their vote to be counted, or would be counted in an election with a fundamentally different dynamic and possibly even different candidates than the election in which the voters intended to cast those ballots. Either way, voters who had already cast their ballots before the decision to postpone the election would have been treated differently from voters who had not yet headed to the polls.

C. Due Process Clause

Finally, postponing or canceling an election would implicate the Due Process Clause of the Fourteenth Amendment by infringing on the fundamental right to cast a valid vote.

¹² *Bush v. Gore*, 531 U.S. 98, 104-105 (2000).

“It is certain that the right to vote—the wellspring of all rights in a democracy—is constitutionally protected,” and, indeed, the “Supreme Court long ago described that right as a ‘fundamental political right.’”¹³ The Due Process Clause protects “the right to be free from the purposeful decision of state officials to deny the citizens of a state the right to vote in an election mandated by law” and “prohibits actions by state officials which seriously undermine the fundamental fairness of the electoral process.”¹⁴ And where “the election process itself [has] reache[d] the point of patent and fundamental unfairness,” voters may seek redress from the courts for the denial of Due Process.¹⁵

Canceling or postponing an election for partisan purposes—especially one in which early, absentee, or military voters had already begun casting ballots—would present precisely the sort of “fundamental unfairness” that gives rise to a constitutional deprivation. When the decision is predicated on political gamesmanship, it would implicate far more than an “ordinary dispute over the counting and marking of ballots,” but would instead evince “a fundamental breakdown of the democratic system.”¹⁶ Because such a move would work a “total and complete disenfranchisement of the electorate as a whole,” the government would be in violation of the Due Process Clause—a violation “amenable to rectification in a federal court.”¹⁷

II. Postponing Or Canceling An Election To Obtain A Partisan Advantage Would Violate the Constitution

When government action regulating elections is challenged as violating constitutional rights, courts must “weigh the ‘character and magnitude’ of the burden” imposed by the regulation, “the interests the [s]tate contends justify that burden,” and the extent to which those “concerns make the burden necessary.”¹⁸ Under this sliding-scale approach, “the rigorousness of [the court’s] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”¹⁹ If a regulation

¹³ *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); see also *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (holding that the Constitution “protects the right of all qualified citizens to vote, in state as well as in federal elections”).

¹⁴ *Id.* at 703, 704; see also *Bonas*, 265 F.3d at 74 (“[A] federal court may not inject itself into the midst of every local electoral dispute,” but its “involvement ... may be proper when a denial of substantive due process occurs, that is, ‘[i]f the election process itself reaches the point of patent and fundamental unfairness.’” (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978))); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (“The Due Process Clause is implicated, and § 1983 relief is appropriate, in the exceptional case where a state’s voting system is fundamentally unfair.”); *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) (“[N]ot every election irregularity ... will give rise to a constitutional claim,” but “wilful conduct which undermines the organic processes by which candidates are elected” infringes voting rights to “a constitutional level.”).

¹⁵ *Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B 1981) (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978)).

¹⁶ *Duncan*, 657 F.2d at 703-704 (quoting *Griffin*, 570 F.2d at 1077).

¹⁷ *Bonas*, 265 F.3d at 75.

¹⁸ *Timmons*, 520 U.S. at 358 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

¹⁹ *Burdick*, 504 U.S. at 434.

imposes “reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters,” then “the [s]tate’s important regulatory interests are generally sufficient to justify’ the restrictions.”²⁰ But where a regulation severely restricts voting rights, then the government must satisfy strict scrutiny by demonstrating that its regulation is “narrowly drawn to advance a state interest of compelling importance.”²¹ For example, laws making it extremely difficult for new political parties to secure a place on the ballot call for the application of strict scrutiny.²²

Postponing or canceling an election that has already been scheduled and may already be underway due to partisan reasons—which delays or denies access to the vote for all—would constitute a severe burden that should be subject to strict scrutiny. As one court has explained, “[i]nterference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.”²³ The court reached that conclusion because, after an election is scheduled, both the government and the public invest “enormous resources . . . in reliance on the election’s proceeding on the announced date.” The government must expend “[t]ime and money . . . to prepare voter information pamphlets and sample ballots, mail absentee ballots, and hire and train poll workers.” And voters must “give[] their attention to the candidates’ messages and prepare[] themselves to vote,” or, in the case of early, absentee, and military voters, may have already voted. If the election is canceled or postponed, those “investments of time, money, and the exercise of citizenship rights” cannot be returned, and those who had already cast their ballots would “effectively be told that the vote does not count and that they must vote again.” In such cases, the burden imposed is not a light one; thousands of voters could have their votes rejected, candidates would have to continue campaigning for an unexpectedly extended period, and voters would have to engage (or re-engage) their attention and schedules on a fundamentally redefined election that no longer appears fair.

That analysis aligns with the Supreme Court’s treatment of laws burdening First and Fourteenth Amendment rights. Where the government “impose[s] burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the [s]tate shows some compelling interest” justifying the burden.²⁴ Likewise, the Equal Protection Clause does not permit the government to place “substantially unequal burdens on both the right to vote and the right to associate” without a “compelling interest.”²⁵

²⁰ *Id.* (quoting *Anderson*, 460 U.S. at 788).

²¹ *Id.* (quoting *Norman*, 502 U.S. at 289).

²² See *Norman*, 502 U.S. at 289; *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring) (explaining that “[b]urdens are severe if they go beyond the merely inconvenient”).

²³ *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc) (citation omitted). Although the Ninth Circuit’s observation in *Shelley* arose in the context of rejecting a request for *judicial* interference into an ongoing election, it follows that *executive* interference in an ongoing election is equally “extraordinary” and “unprecedented.” Remaining quotations in this paragraph are from *Shelley*.

²⁴ *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment).

²⁵ *Williams*, 393 U.S. at 31.

Even under a less rigorous level of scrutiny, however, the government must still provide some legitimate justification for canceling or rescheduling an election.²⁶ In some circumstances, government interests might justify rescheduling—but not canceling—an election. Many states, for instance, have statutes that permit government officials to postpone elections in response to events creating a state of emergency, such as a natural disaster or terrorist attack that would not be foreseeable at the time the election was scheduled.²⁷ But these examples are the exception, not the rule. Affording one party or candidate an advantage over the other can never be a legitimate justification for postponing or canceling an election. Under the First and Fourteenth Amendments, the government may not pick its favored party or candidate to win an election and then change its rules to promote that viewpoint or tilt the playing field.²⁸ And the interests of a political party cannot substitute for the interests of the government.²⁹ Although the Supreme Court has given some license to consideration of partisan interests in drawing electoral districts, that precedent cannot be stretched so far as to legitimize a decision to cancel or postpone an election.³⁰

Moreover, even if the government could identify a legitimate interest, it would still need to demonstrate that its chosen means of furthering that interest was appropriately tailored to

²⁶ See, e.g., *Crawford*, 553 U.S. at 191 (opinion of Stevens, J.) (“In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, ... it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”) (quoting *Norman*, 502 U.S. at 288-289).

²⁷ See, e.g., NEW YORK ELEC. LAW § 3-108 (permitting the state or county board of elections to hold “an additional day of election” if, as “the direct consequence of a fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack or other disaster,” fewer than 25% of the registered voters in a jurisdiction “actually voted in any general election”); *State v. Marcotte*, 89 A.2d 308, 312 (Me. 1952) (“There was a storm of such unusual proportions and such unexpected violence that it might well be considered that there was no election due to ‘an act of God.’ There was no constitutional or statutory prohibition of an election to be held on a later date.”).

²⁸ See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628-629 (1969) (“The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment [O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”) (internal quotation marks omitted); *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1449-1450 (2014) (“The degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such ad hoc balancing of relative social costs and benefits We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to level the playing field, or to level electoral opportunities”) (internal quotation marks omitted).

²⁹ See, e.g., *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (“[C]are must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice.”).

³⁰ See, e.g., *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (“[W]e have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.”); *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (“If a State passed an enactment that declared ‘All future apportionment shall be drawn so as most to burden Party X’s rights to fair and effective representation, though still in accord with one-person, one-vote principles,’ we would surely conclude the Constitution had been violated.”).

advancing that interest without imposing unnecessary burdens on constitutional rights.³¹ As a practical matter, it is difficult to imagine circumstances in which partisan manipulation of the timing of an election could pass muster under that test.

III. Courts Can And Should Step In To Protect Our Elections From Partisan Manipulation and Delay

Some government actions regarding elections are not easily addressed by courts. There may not always be an identifiable plaintiff who has suffered sufficient individualized harm to bring a lawsuit. Or a court may not be able to provide a remedy. Or there may be no judicially manageable standard for evaluating whether the government action is unconstitutional.³² None of those problems would exist where the government attempted to cancel or postpone an election for political reasons.

An organization or an individual voter with some personalized interest beyond that of the general public in enforcing the originally scheduled election date should be able to seek relief.³³ Several types of individuals or organizations would fit the bill. Individual voters might have a personalized injury if they intended to vote in the election in person on the original date, but have irrevocable plans to be away from their polling location on the rescheduled date. Those plans might include military deployment, long-term business travel, or plans to move out of the jurisdiction after the originally scheduled election. Additionally, individuals with serious, life-endangering medical conditions might have a special interest in voting on the original election date because any change to a later date would diminish their opportunity to cast a vote. Organizations, on the other hand, would have a special interest in enforcing the original election date if they have produced and disseminated literature or voter guides encouraging people to vote on that original election date or have otherwise expended resources in anticipation of an election to be held on that particular date.³⁴

As to the remedy, a federal court would have the authority to stop the government from unconstitutionally canceling or postponing an election. Specifically, the court could enter an injunction requiring the election to proceed as planned, thereby preventing the government from inflicting irreparable harm on the plaintiff by violating her or his constitutional rights.³⁵

³¹ See *Anderson*, 460 U.S. at 789 (explaining that courts must “consider the extent to which [a State’s asserted] interests make it necessary to burden the plaintiff’s rights”).

³² See *Vieth*, 541 U.S. at 277-291 (opinion of Scalia, J.).

³³ See *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2663 (2015) (citing *Arizonians for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

³⁴ See *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (“For standing purposes, a loss of even a small amount of money is ordinarily an ‘injury.’”); see also *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) (“Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes.”).

³⁵ *Elrod*, 427 U.S. at 373 (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

Finally, unlike contexts in which no judicially manageable standard exists, in this instance a court would face a simple question no more difficult than any other First or Fourteenth Amendment issue.³⁶ Is it constitutionally permissible for the government to postpone or cancel an election to tilt the playing field in favor of one candidate or party over the other? If the answer were yes, a core premise of our democracy would be under threat. Fortunately, the answer is no. And should it be attempted, the courthouse doors would be open to remedy or prevent the constitutional violation and to safeguard the regular conduct of elections as a bulwark of republican democracy.

Conclusion

A healthy democracy depends on both political parties being committed to something more than simply maintaining political power at all costs. Accordingly, the fact that some even considered delaying an election because of fears of the eventual result should be a deeply troubling warning sign to all concerned about the present state of democratic governance in the United States.

Nonetheless, should anyone in the United States ever attempt to delay or cancel an election, they should not expect to succeed. Moving an election for partisan purposes would violate the First and Fourteenth Amendments—a violation that would prompt judicial intervention and correction.

³⁶ *Cf. New York v. United States*, 505 U.S. 144, 184-185 (1992) (suggesting that some claims under the Guarantee Clause may be proper for judicial resolution).