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Fraudulent Vote Dilution

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ARTICLES

FRAUDULENT VOTE DILUTION

*Jason Marisam**

In recent years, the Republican Party and conservative groups have brought lawsuits that advance a novel type of voting claim, which this Article calls fraudulent vote dilution. This claim asserts that an election rule is unconstitutional because it makes it too easy to cast fraudulent ballots that, when tabulated, will dilute the strength of valid and honest ballots. With the 2024 election nearing, the Republican Party may again test fraudulent vote dilution claims in court, as it seeks injunctions to make liberal election rules stricter in ways that make it harder for Democratic voters to cast ballots. This Article advances several new descriptive and normative claims about fraudulent vote dilution. First, it clearly situates fraudulent vote dilution as a new conservative litigation weapon. Conservatives, who typically are on the defensive in voting rights cases, are developing fraudulent vote dilution to give them an offensive weapon they can deploy against liberal election rules. Second, the Article explores the relationship between fraudulent vote dilution and race. For decades, the Supreme Court has recognized vote dilution claims that protect the rights of Black voters. This Article shows that, by co-opting dilution language associated with racial justice claims, conservatives can attempt to shield their project from moral criticism and advance their goal to decenter race from voting rights disputes. Third, this Article provides an institutional analysis that examines the capacity of courts to review fraudulent vote dilution claims and identifies facets of the claims that create a high risk of erroneous judicial decisions. Finally, to guide courts and guard against judicial errors, this Article proposes three necessary elements for a fraudulent vote dilution claim.

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INTRODUCTION

In 2020, the Republican Party and the Trump campaign brought a series of lawsuits that advanced a novel type of voting claim, which this Article calls fraudulent vote dilution.¹ This claim asserts that an election rule is unconstitutional because it makes it too easy to cast fraudulent ballots that, when tabulated, will dilute the strength of valid and honest ballots. While these claims were not successful in 2020, in the years since, fraudulent vote dilution theories have gained some traction in federal district courts.² With the 2024 election nearing, the Republican Party again may test fraudulent vote dilution claims in court, as it seeks injunctions to make liberal election rules stricter in ways that make it harder for Democratic voters to cast their ballots.

This Article advances several new descriptive and normative claims about fraudulent vote dilution. First, it clearly situates fraudulent vote dilution as a new conservative litigation weapon. Conservatives, who typically are on the defensive in voting rights litigation, are developing fraudulent vote dilution as an offensive weapon they can deploy against liberal election rules. Second, the Article explores the relationship between fraudulent vote dilution and race. For decades, the Supreme Court has recognized vote dilution claims that protect the rights of Black voters.³ This Article shows that, by co-opting dilution language associated with racial

¹ See *infra* Part I.C.

² See *infra* Part I.D.

³ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986).

justice claims, conservatives can attempt to shield their project from moral criticism and advance their goal to decenter race from voting rights disputes. Third, this Article provides an institutional analysis that examines the capacity of courts to review fraudulent vote dilution claims and identifies facets of the claims that create a high risk of erroneous judicial decisions.

Professor Nicholas Stephanopoulos's important and insightful 2021 article, *The New Vote Dilution*, was the first to discuss the phenomenon of claims that challenge election rules to facilitate fraud.⁴ Digging into the case law and doctrine, he showed that these claims are not cognizable under current law.⁵ He argued that "courts should hold that electoral policies may be unconstitutionally dilutive if they induce significant fraud," because fraudulent ballots are "a threat to the franchise."⁶ He cautioned that, because there is little fraud in contemporary elections, recognizing such a cause of action does not mean that plaintiffs will often prevail.⁷

While this Article agrees that there is a theoretical basis for a fraudulent vote dilution cause of action, its institutional analysis focuses on the risk of judicial errors. It shows that fraudulent vote dilution cases present informational problems and decision-making difficulties that do not exist to the same degree in other types of voting cases. To guide courts and guard against judicial errors, this Article proposes three necessary elements for a fraudulent vote dilution claim. Specifically, to prevail, a fraudulent vote dilution plaintiff must show that: (1) there is a high probability of fraud in an upcoming election; (2) there is a causal connection between the risk of fraud and the challenged election rule—*i.e.*, the election rule is both a necessary and a sufficient condition for the fraud; and (3) the probability and magnitude of fraud outweigh other state and public interests, including any decrease in voter turnout that would result from a court order making the challenged rule more stringent.

One introductory note on terminology. What this Article calls "fraudulent vote dilution," Professor Stephanopoulos's article calls "new vote dilution."⁸ I want to move away from the word "new" because it can wrongly suggest progress, as if this generation of conservative dilution claims is an improvement on the racial vote dilution and other dilution claims that came before. This implication was obviously not Stephanopoulos's intent, as he was careful to subject the claims to healthy academic scrutiny. As a matter of semantic framing, I drop the "new" in favor of "fraudulent" because

⁴ Nicholas O. Stephanopoulos, *The New Vote Dilution*, 96 N.Y.U. L. REV. 1179 (2021).

⁵ *Id.* at 1189–94.

⁶ *Id.* at 1182.

⁷ *Id.* at 1183.

⁸ *Id.* at 1179.

it more accurately highlights the claims' distinguishing emphasis on fraud, without suggesting any improvement or progress. In addition, the "fraudulent" label will remain accurate should even newer varieties of dilution claims emerge in the coming years.

This Article proceeds as follows: Part I begins with background on two established types of voting claims relevant to this Article, vote denial claims and vote dilution claims, before describing the case law on fraudulent vote dilution. Part II provides a critical examination of the political and racial implications of fraudulent vote dilution. Part III provides an institutional analysis that examines courts' capacity to adjudicate fraudulent vote dilution claims. Part IV proposes three elements for a fraudulent vote dilution claim.

I. DOCTRINAL BACKGROUND AND RECENT DEVELOPMENTS

Two common claims in voting rights litigation are highly relevant to fraudulent vote dilution: vote denial claims and vote dilution claims.⁹ Vote denial claims assert that an election rule overly burdens access to the ballot or the right to vote.¹⁰ Vote dilution claims assert that a state or locality has diminished the influence of racial minorities, typically by adopting at-large voting schemes or district lines that dilute their strength as a voting bloc.¹¹ A fraudulent vote dilution claim borrows language from vote dilution but analytically has more in common with vote denial. Such a claim asserts that an election rule is unconstitutional because it makes it too easy to cast fraudulent ballots that, when tabulated, will dilute the strength of the valid and honest ballots. Both fraudulent vote dilution and vote denial claims involve balancing the risk of fraud against access to the ballot. The difference is that vote denial cases weigh the risk of fraud as a state interest that can support a restrictive election rule, whereas fraudulent vote dilution cases weigh the risk of fraud as a potential harm to plaintiffs that can justify judicial intervention to tighten an allegedly lax election rule.¹²

Sections A and B provide background on vote denial and vote dilution claims. Section C summarizes representative fraudulent vote dilution claims cases from 2020 to highlight two themes: First, fraudulent vote dilution plaintiffs often encountered standing problems. Second, courts' analyses, when they reached the merits, more closely resembled those of vote denial cases than racial

⁹ Fraudulent vote dilution claims also can be analogized to partisan gerrymandering. For a discussion on this comparison see *id.* at 1196–97.

¹⁰ See Daniel P. Tokaji, *The New Vote Dilution: Where Election Reform Meets the Voting Rights Act*, 57 S.C.L. REV. 689, 691 (2006).

¹¹ *Id.*

¹² See *infra* Parts I.A., I.C.

vote dilution cases. Section D touches on cases in which plaintiffs have relied on fraudulent vote dilution theories of harm to support a different underlying cause of action. While this Article focuses on fraudulent vote dilution claims, the use of fraudulent vote dilution as a theory of harm is a related development with implications for how the claims may fare in court.

A. Vote Denial Claims

Vote denial refers to laws, rules, or practices that prevent voters from casting ballots or having those ballots counted.¹³ Historically, vote denial involved racist practices like literacy tests and poll taxes.¹⁴ More recently, vote denial cases have involved challenges to burdensome voter identification laws and ballot collection or ballot harvesting laws, which limit who may return mail or absentee ballots for voters.¹⁵ The test courts apply depends on whether the claim is brought under the Equal Protection Clause of the Fourteenth Amendment¹⁶ or Section 2 of the Voting Rights Act (“VRA”).¹⁷

When brought as a constitutional claim, courts typically use a balancing test known as *Anderson-Burdick*, first articulated in *Anderson v. Celebrezze*¹⁸ and refined in *Burdick v. Takushi*.¹⁹ In *Anderson*, the Supreme Court found that Ohio’s early filing deadline for independent candidates placed an unconstitutional burden on voting rights. The Court applied a balancing test that considered “the character and magnitude of the asserted injury to the [voting] rights” and weighed that against “the precise interests put forward by the State as justifications for the burden imposed by its rule.”²⁰ In *Burdick*, the Supreme Court applied this test and upheld Hawaii’s ban on write-in voting. The Court rejected the use of strict scrutiny and emphasized that states must have some leeway in crafting their election rules, all of which “will invariably impose some burden upon individual voters.”²¹ Essentially, the *Anderson-Burdick* standard uses a sliding scale, with the rigorousness of the judicial inquiry depending on the severity of the voting rights burden. Courts have applied the standard in a variety of election and

¹³ See Tokaji, *supra* note 10, at 691.

¹⁴ See *id.*

¹⁵ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

¹⁶ U.S. CONST. amend. XIV, § 1.

¹⁷ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702).

¹⁸ 460 U.S. 780 (1983).

¹⁹ 504 U.S. 428 (1992).

²⁰ *Anderson*, 460 U.S. at 789.

²¹ *Burdick*, 504 U.S. at 433.

voting lawsuits.²² The state interest side of the equation typically includes concerns about fraud or orderly election administration.²³ The voting burdens side can include factors such as the increased resources needed to access and cast a ballot. Like any balancing test, though, there remains imprecision and subjectivity in its use.²⁴

*Crawford v. Marion County Election Board*²⁵ is the highest-profile case to use the balancing test and exemplifies how the test often involves weighing decreased access to the ballot against a state's interest in preventing voter fraud.²⁶ *Crawford* involved an Indiana law that required a voter to show government-issued photo identification in order to cast a ballot at their precinct.²⁷ The controlling opinion viewed the burden as modest because the state provided proper identification free of charge.²⁸ It held that the state interest—preventing voter fraud and protecting voter confidence—outweighed this burden.²⁹ However, the dissent placed more weight on the burdens, emphasizing the tens of thousands of citizens, many of them racial minorities, who did not have proper identifications and would need time and money to obtain them.³⁰ The dissent also would have required the state to put forward some evidence of in-person voter fraud that the identification law would have prevented, rather than just assert fraud as an interest.³¹

Plaintiffs can also bring vote denial claims under Section 2 of the VRA, which prohibits voting rules or practices that deny or abridge the right to vote based on race.³² In 2021, in *Brnovich v. Democratic National Committee*,³³ the Supreme Court first addressed how Section 2 applies in a vote denial case.³⁴ The Democratic National Committee and other plaintiffs had used Section 2 to challenge two new Arizona election law provisions: an out-of-precinct policy that rejected a voter's ballot if cast in person at the wrong precinct, and a prohibition on third-party ballot collection that limited who may collect and return voters' mail

²² See, e.g., Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 592 (2018); Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 779 (2016); Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1897 (2013).

²³ See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

²⁴ See, e.g., Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1861 (2013).

²⁵ 553 U.S. 181 (2008).

²⁶ *Id.*

²⁷ *Id.* at 185–86.

²⁸ *Id.* at 198–200.

²⁹ *Id.* at 193–203.

³⁰ *Id.* at 211–21 (Souter, J., dissenting).

³¹ *Id.* at 229–37 (Souter, J., dissenting).

³² 52 U.S.C. § 10301.

³³ 141 S. Ct. 2321 (2021).

³⁴ *Id.*

ballots.³⁵ The DNC presented evidence that the ballot collection rule would have a discriminatory impact on Navajo voters.³⁶ In rejecting the challenge, the Court announced a multi-factor test, which included common factors like the strength of the state interest but also “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982.”³⁷ The Court emphasized the state interest in maintaining precinct-based voting and in preventing voter fraud from ballot harvesting.³⁸

For this Article’s purposes, there are two key takeaways from *Crawford* and *Brnovich*: preventing voter fraud is a strong state interest, and courts will defer to defendant states invoking that interest, even in the absence of concrete evidence to support it.

B. Vote Dilution Claims

Racial vote dilution claims attack features of legislative districting maps on the grounds that they dilute the strength of Black voters or other racial minorities and prevent them from electing their chosen candidates to represent them.³⁹ These claims are typically brought under Section 2 of the VRA and developed in response to states’ use of at-large districting schemes, by which people elect multiple representatives from a single district.⁴⁰ At-large districting makes it nearly impossible for a minority group to secure representation because the majority can always outvote them.⁴¹ These schemes are particularly problematic in states with racially polarized voting. The Supreme Court recognized that at-large districts were “diluting” Black votes and could be remedied by replacing them with single-member districts that gave Black voters a majority in at least one district.⁴² Such claims rest on the theory that an effective vote depends on a voter’s ability to aggregate their vote with like-minded voters and that democracy should offer opportunities for minorities to have some meaningful representation.⁴³

In *Thornburg v. Gingles*,⁴⁴ the Supreme Court explained that a racial vote dilution injury occurs when an “electoral structure operates to minimize or cancel out” racial minority voters’ “ability

³⁵ *Id.* at 2330.

³⁶ *Id.* at 2370.

³⁷ *Id.* at 2338–43.

³⁸ *Id.* at 2340.

³⁹ See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁴⁰ See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665, 1671–76 (2001).

⁴¹ *Id.*

⁴² *Rogers v. Lodge*, 458 U.S. 613, 615–22 (1982).

⁴³ See Gerken, *supra* note 40, at 1672–77.

⁴⁴ 478 U.S. 30 (1986).

to elect their preferred candidates.”⁴⁵ The *Gingles* Court held that plaintiffs must satisfy three conditions to prove vote dilution in violation of Section 2: (1) the state could have drawn a geographically compact majority-minority district; (2) the minority group is politically “cohesive,” meaning its members tend to vote for the same candidates; and (3) the white electorate also tends to vote as a bloc and can usually defeat the minority group’s preferred candidates at the polls.⁴⁶ While racial vote dilution arose as a claim to challenge at-large districts, the Supreme Court recently held that Alabama’s congressional map violated Section 2 because the state could have drawn an additional, reasonably configured congressional district with a Black majority, and there was no dispute the state has racially polarized voting.⁴⁷

C. Fraudulent Vote Dilution Claims

In 2020, the Trump campaign and the Republican Party brought several fraudulent vote dilution claims to challenge state measures intended to improve access to the ballot during the COVID-19 pandemic.⁴⁸ These suits tried to halt states from mailing ballots to all registered voters and establishing drop boxes for voters to deposit their ballots without worrying about postal delays, among other measures.⁴⁹ All the suits failed, often on standing grounds, though the courts sometimes addressed the merits.⁵⁰ Some courts questioned whether a fraudulent vote dilution claim is a cognizable voting rights claim and analyzed the merits under a rational basis review that would apply to any run-of-the-mill due process or equal protection case under the Fourteenth Amendment.⁵¹ Others used a balancing test that resembled an inverted application of *Anderson-Burdick*.⁵² These courts balanced the same factors as in a standard *Anderson-Burdick* case but with a different framing—instead of balancing the burden on voters’ access to the ballot against a state interest in preventing fraud, the courts balanced the risk of fraud against a state interest in facilitating voters’ access to the ballot.

⁴⁵ *Id.* at 48.

⁴⁶ *Id.* at 48–51.

⁴⁷ *Allen v. Milligan*, 599 U.S. 1, 19–20, 22–23 (2023).

⁴⁸ *See* Stephanopoulos, *supra* note 4, at 1183–89.

⁴⁹ *See, e.g.,* Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331 (W.D. Pa. 2020); Cook Cnty. Republican Party v. Pritzker, 487 F. Supp. 3d 705 (N.D. Ill. 2020); Donald J. Trump for President, Inc. v. Cegavske, 488 F. Supp. 3d 993 (D. Nev. 2020).

⁵⁰ *See* Stephanopoulos, *supra* note 4, at 1183–89.

⁵¹ *See, e.g.,* Boockvar, 493 F. Supp. 3d 331.

⁵² *See, e.g.,* Pritzker, 487 F. Supp. 3d 705.

This section summarizes three representative fraudulent vote dilution cases from 2020.⁵³ These suits typify the kinds of allegations in these cases, the standing problems confronting plaintiffs, and the merits as addressed by the courts.

First, the Trump campaign challenged several aspects of Pennsylvania's election rules, including a facial challenge to the use of drop boxes for returning ballots.⁵⁴ The state had expanded the use of drop boxes during the pandemic as a "direct and convenient way for voters to deliver cast ballots to their county boards of elections, thereby increasing turnout."⁵⁵ The Trump campaign claimed that, without stringent drop box security measures, "potential fraudsters may attempt to commit election fraud through the use of drop boxes or forged ballots, or due to a potential shortage of poll watchers."⁵⁶ The district court found a lack of standing because the injury was too speculative and not "certainly impending."⁵⁷ Moreover, the court went on to reject the challenges on the merits as well, because of the novelty of the claims and a potential appeal close to election day.⁵⁸ In reaching this decision, the court firstly analyzed the merits under a rational basis test, rather than the sliding scale used in many voting cases. The court reasoned that rational basis review was appropriate because an alleged failure to fully safeguard "drop boxes doesn't directly infringe or burden Plaintiffs' rights to vote at all."⁵⁹ Then, the court assumed, for the sake of the district court record, that plaintiffs' voting rights were burdened and thus analyzed the claim under the *Anderson-Burdick* standard.⁶⁰ It found that the "attenuated" burden plaintiffs had identified—"an increased risk of vote dilution created by the use of unmanned drop boxes"—was more than justified by the state interest in increasing ballot access during the pandemic.⁶¹

Second, the Cook County Republican Party challenged an Illinois law that made election day a holiday for all state government workers and closed government offices.⁶² They claimed vote

⁵³ Other cases that involved fraudulent vote dilution theories included *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 834 (D. Mont. 2020); *Martel v. Condos*, 487 F. Supp. 3d 247 (D. Vt. 2020); *Wood v. Raffensperger*, 501 F. Supp. 3d 1310 (N.D. Ga. 2020); *Donald J. Trump for President, Inc. v. Way*, No. 20-10753, 2020 WL 6204477 (D.N.J. Oct. 22, 2020); *King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020); Complaint at 21–22, *Republican Nat'l Comm. v. Newsom*, No. 20-cv-01055 (E.D. Cal. May 24, 2020).

⁵⁴ *Boockvar*, 493 F. Supp. 3d 331.

⁵⁵ *Id.* at 356 (internal quotation marks omitted).

⁵⁶ *Id.* at 342.

⁵⁷ *Id.* at 343.

⁵⁸ *Id.* at 381–82.

⁵⁹ *Id.* at 391–92.

⁶⁰ *Id.* at 385.

⁶¹ *Id.* at 392.

⁶² *Cook Cnty. Republican Party v. Pritzker*, 487 F. Supp. 3d 705 (N.D. Ill. 2020).

dilution on the fanciful theory that by giving state workers—mostly Democrats—the day off on election day, “an army of workers to harvest the ballots” would be created.⁶³ These partisan ballot harvesters “could show up to the polls on election day,” cast a provisional ballot under someone else’s name, and then “find the actual voters they impersonated and convince them to present their proper identification to the election authority, so the fraudulent vote would be counted.”⁶⁴ In addressing the plaintiffs’ motion for an injunction, the court avoided the standing issue and, rather, directly assessed the likelihood of success on the merits. Using the *Anderson-Burdick* standard, the court balanced an unsupported, speculative claim of an increased risk of fraud against a state interest in ensuring government buildings are available as polling places and a state policy judgment on how to cure provisional ballots.⁶⁵ The court concluded the Cook County Republican Party failed to meet its burden.⁶⁶

Third, the Trump campaign and Republican Party also challenged a Nevada law that directed election officials to mail paper ballots to all registered voters for the 2020 election due to the COVID-19 pandemic and allowed a voter to authorize any person to return their ballot for them, including by depositing it in an official drop box.⁶⁷ The Trump campaign alleged that these provisions “facilitate fraud and other illegitimate voting practices” and “dilute the value of honest, lawful votes.”⁶⁸ The federal district court dismissed the case for lack of standing because the plaintiffs’ “alleged injury of vote dilution is impermissibly generalized and speculative at this juncture.”⁶⁹ The court did not reach the merits.

D. Fraudulent Vote Dilution as a Cognizable Injury

This section discusses three cases where plaintiffs used fraudulent vote dilution theories to show harm in support of a different cause of action. In two of the cases, the courts accepted the theory as sufficient to establish standing. While these cases did not involve a fraudulent vote dilution claim, they did involve theories that could be relevant to such claims in the future, as courts continue to figure out what type of injuries they are willing to accept for standing.

⁶³ *Id.* at 719.

⁶⁴ *Id.*

⁶⁵ *Id.* at 719–20.

⁶⁶ *Id.* at 722.

⁶⁷ *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993 (D. Nev. 2020).

⁶⁸ *Id.* at 997–98.

⁶⁹ *Id.* at 1000 (internal quotation marks omitted).

Carson v. Simon involved a challenge to Minnesota’s absentee ballot deadline for 2020.⁷⁰ While Minnesota’s statute provided an election day deadline, a state court had entered a consent decree establishing that, for the pandemic election, officials should count ballots that were postmarked by election day and arrived within seven days.⁷¹ Two electors for Donald Trump claimed the order violated the Constitution because the Electors Clause requires state legislatures, not state courts or any other state official, to set the deadline for presidential election ballots.⁷² They relied on two theories of harm: First, they argued that because ballots arriving after election day are legally invalid, counting them is an irreparable harm.⁷³ Second, they used vivid language to present a harm of fraudulent vote dilution: “[P]ersons watching the elongated ballot-counting unfolding under this new ‘Election Week’ will face strong incentives to cast a ballot, and those who already cast their ballot will find new incentive to vote again. This is not a ‘specter;’ it’s called ‘human nature.’”⁷⁴ The plaintiffs lost on standing at the district court and dropped the vote dilution theory of harm on appeal.⁷⁵ The Eighth Circuit ultimately accepted the counting of legally invalid ballots as a harm, holding that plaintiffs were likely to succeed on the merits.⁷⁶ For fraudulent vote dilution purposes, this case is notable because it shows that conservative plaintiffs see some advantage, whether short-term or long-term, in pushing a theory of harm rooted in fraudulent vote dilution, even when they have more concrete theories of harm at their disposal.

Two recent federal district court cases involved claims that states are not following the National Voter Registration Act’s obligations for purging voters from rolls.⁷⁷ A district court in Colorado found that individual voters had a sufficient injury to bring this claim because the alleged failure to purge rolls “undermin[es] their confidence in the integrity of the electoral process, discourag[es] their participation in the democratic process, and instill[s] in them the fear that their legitimate votes will be nullified or diluted.”⁷⁸ A district court in North Carolina similarly found that individual voters have standing on the theory that plaintiffs’ “votes

⁷⁰ 978 F.3d 1051 (8th Cir. 2020).

⁷¹ *Id.* at 1053–56.

⁷² *Id.*

⁷³ *Id.* at 1061.

⁷⁴ Plaintiffs made this argument at the district court. *Carson v. Simon*, 494 F. Supp. 3d 589, 602 n.12 (D. Minn. 2020).

⁷⁵ *See id.* at 592; Appellants’ Brief, *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) No. 20-3139, 2020 WL 6530990.

⁷⁶ *Carson*, 978 F.3d at 1059–63.

⁷⁷ *See* 52 U.S.C. § 20507.

⁷⁸ *Jud. Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1097 (D. Colo. 2021), *reconsideration denied*, No. 20-CV-02992, 2022 WL 3681986 (D. Colo. Aug. 25, 2022).

are being diluted and *their* confidence is being undermined” by the failure to purge.⁷⁹

If more courts accept these theories of harm, it will make it easier for fraudulent vote dilution plaintiffs to overcome the standing hurdles they encountered in 2020. Plaintiffs often failed in 2020 because the courts found the risk of actual fraud too speculative. But, in contrast, these district court cases show plaintiffs establishing standing without making any showing of an objective and significant risk of fraud, suggesting that plaintiffs’ subjective fear of fraud, and resulting loss of confidence in elections, is sufficient. If these types of allegations are enough to establish standing, more courts will have to wrestle with the merits of fraudulent vote dilution claims in the future.

II. A CRITICAL EXAMINATION OF FRAUDULENT VOTE DILUTION: POLITICS AND RACE

This part shifts from a doctrinal frame to a critical examination of the political and racial implications of fraudulent vote dilution. Section A situates fraudulent vote dilution as a conservative litigation weapon, arguing that conservatives, who often play defense in voting rights cases, are crafting fraudulent vote dilution to use as a new offensive mechanism in election litigation. Section B explores connections between fraudulent vote dilution and race; by co-opting dilution language associated with legal claims for racial justice, conservative proponents of fraudulent vote dilution can attempt to shield their project from moral criticism and decenter race from voting rights disputes.

A. Fraudulent Vote Dilution as a Conservative Litigation Weapon

Conservatives are attempting to use fraudulent vote dilution claims to fill a gap in their arsenal. While conservatives typically play defense in voting rights cases, fraudulent vote dilution gives them a weapon to deploy against liberal voting rules. The Trump campaign brought fraudulent vote dilution claims because of a short-term interest in shaping the election rules for 2020. But conservatives are playing a long game too. The more that courts accept fraudulent vote dilution theories, the more weapons conservatives have at their disposal to attack liberal election rules. The assumptions underlying this claim are unpacked below.⁸⁰

⁷⁹ Green v. Bell, No. 3:21-CV-00493, 2023 WL 2572210, at *4 (W.D.N.C. Mar. 20, 2023).

⁸⁰ One note on terminology. I recognize that conservative and Republican are not synonymous. Conservative is an ideology or political leaning, while Republican

The claim begins with the presupposition that political parties, as well as their affiliates and ideological allies, want power. They pursue strategies, including legal strategies, designed to increase their chances of winning elections.⁸¹ Those strategies include influencing and molding election rules to give the political parties the best chances at electoral success.⁸² Both conservatives and liberals want rules that will benefit them at the ballot box.⁸³

Some conservatives believe that rules that make it harder to vote improve their chances of winning elections, thus designing election rules toward this end.⁸⁴ For example, earlier in this century, multiple Republican-controlled legislatures enacted restrictive voter identification laws; these restrictions were thought to electorally benefit Republicans by making it harder for young people and Black voters to cast ballots.⁸⁵ More recently, after the 2020 election,

refers to a political party. However, in recent decades, conservative views and interests have been strongly aligned with Republican interests, while liberal or progressive interests have been aligned with Democratic interests. *See, e.g.,* Anthony J. Gaughan, *The Influence of Partisanship on Supreme Court Election Law Rulings*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 553, 587–89 (2022). The interests are sufficiently aligned that it is accurate to say that conservative interests generally have sought power and to have their policy ideas implemented through Republicans. More specifically, a conservative movement to place conservative judicial nominees on the bench used Republican presidents to achieve those ends. *See* Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 338 (2016).

⁸¹ For an account of the role of partisanship in shaping election rules, see Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1810–19 (2014).

⁸² *See, e.g.,* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015) (describing how political parties use election law to entrench themselves in power); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 703 (1998) (explaining how political parties use redistricting in the competition for political power).

⁸³ However, their beliefs about what laws will benefit them, or how large the benefit will be, might be misguided and lack empirical support. *See, e.g.,* Justin Grimmer & Eitan Hersh, *How Election Rules Affect Who Wins* (Hoover Inst. Working Paper, 2023), <https://www.hoover.org/research/how-election-rules-affect-who-wins> [perma.cc/C5WU-U98J] (discussing how many election laws have only a marginal impact on turnout and an ambiguous effect on which party wins).

⁸⁴ *See, e.g.,* Nick Corasaniti & Alexandra Berzon, *Under the Radar, Right-Wing Push to Tighten Voting Laws Persists*, N.Y. TIMES (May 8, 2023), <https://www.nytimes.com/2023/05/08/us/politics/voting-laws-restrictions-republicans.html> [perma.cc/6KV9-S8LH].

⁸⁵ *See* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 103 (2013); *South Carolina v. United States*, 898 F. Supp. 2d. 30, 40 (D.D.C. Oct. 10, 2012) (“[T]he evidence reveals an undisputed racial disparity of at least several percentage points: About 96% of whites and about 92–94% of African Americans currently have one of the [valid] photo IDs.”); JON C.

Republican-controlled legislatures enacted a slew of restrictive voting laws.⁸⁶ One corollary is that Democrats have a self-interest in expanding access to the ballot, particularly for groups that tend to vote for them. For example, Democratic-controlled legislatures have enacted reforms to facilitate the exercise of the franchise, such as enfranchising people with felony convictions and setting up automatic voter registration that may increase turnout among young voters.⁸⁷

Another basic assumption underlying this claim is that the battle for politically favorable election rules is won or lost in the courts, through litigation. In this forum, the parties and their affiliates want legal rules and standards that will tend to produce judicial outcomes they like.⁸⁸ For conservatives, this historically has meant rules and standards that make it harder for voting rights plaintiffs to succeed.⁸⁹ In vote dilution cases, conservatives are often on defense because “it is commonly thought that granting relief to minority voters in many types of section 2 claims . . . benefits the Democratic Party in addition to minority voters.”⁹⁰ In vote denial cases, conservatives similarly play defense: relief typically means removing barriers to voting that most significantly impact racial minorities and young voters, groups that historically have favored Democrats.⁹¹ For example, *Brnovich* involved a Democratic challenge to an Arizona policy that evidence showed would invalidate ballots for Black and Hispanic voters at a rate twice that of white voters.⁹² To be clear, conservatives have been on the offensive in some voting cases.⁹³ But, generally, the legal landscape in voting rights cases tends to favor Democratically aligned constituencies, such that conservatives are often left on their back foot.

In pursuing rules and standards that make it harder for plaintiffs to bring and prevail in voting rights cases, conservatives have focused on gutting protections in the VRA. This effort goes

ROGOWSKI & CATHY J. COHEN, TURNING BACK THE CLOCK ON VOTING RIGHTS, BLACK YOUTH PROJECT 2 (2012), <https://youthtoday.org/wp-content/uploads/sites/13/hotdocs/Youth-of-Color-and-Photo-ID-Laws1.pdf> [perma.cc/E6PL-VGAZ] (discussing the disparate impact voter ID laws have on young Black voters compared to young white voters).

⁸⁶ See Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 87–88 (2022).

⁸⁷ See *id.*

⁸⁸ For an account of how partisanship can drive election litigation, see Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561 (2021).

⁸⁹ See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

⁹⁰ Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 22 (2008).

⁹¹ See, e.g., Tokaji, *supra* note 10.

⁹² *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2344–45 (2021).

⁹³ See, e.g., *Bush v. Vera*, 517 U.S. 952 (1996).

back to the Reagan administration. President Ronald Reagan, both while campaigning and in office, complained that the VRA created “unequal burdens” on southern states.⁹⁴ Justice Scalia expressed the view that VRA provisions were a “racial entitlement” that would continue “in perpetuity” unless a court struck them down.⁹⁵ Conservatives have had major, but not unqualified, successes in their efforts to roll back parts of the VRA. In 2013, in *Shelby County v. Holder*, the Supreme Court effectively ended the VRA’s preclearance requirements, under which states and localities with a history of discrimination had to obtain approval from the Department of Justice before changing their election rules and practices.⁹⁶ In 2021, in *Brnovich*, the Court made it harder for VRA plaintiffs to prove violations of Section 2.⁹⁷ However, in 2023, the Court in *Allen v. Milligan* rejected an opportunity to gut Section 2 further, instead reaffirming the *Gingles* framework for racial vote dilution cases and holding that Section 2 is constitutional.⁹⁸

Other Supreme Court doctrine has also made it harder for voting rights plaintiffs, most notably the much-criticized *Purcell* principle. The principle, from the 2006 case *Purcell v. Gonzalez*, holds that courts should avoid enjoining election rules close to an election.⁹⁹ While seemingly sensible on its face, the opaqueness of the theory has allowed courts to invoke it to thwart challenges months before election day and when the plaintiffs have had no meaningful opportunity to challenge the rule any sooner.¹⁰⁰

⁹⁴ See Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 72 (2013).

⁹⁵ Transcript of Oral Argument at 47, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

⁹⁶ 570 U.S. 529 (2013); see also Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1198 (2014) (“The preclearance provisions of the Act, which were crippled by the Court’s decision, were long a bête noire of conservatives.”). For an analysis of *Shelby County*’s destabilizing effects, see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481 (2014).

⁹⁷ See *Brnovich*, 141 S. Ct. 2321. For example, recall that the Court held that courts reviewing Section 2 challenges to election rules must consider whether such rules were on the books when Section 2 was amended in 1982. *Id.* at 2338–39. By anchoring review to 1982, the opinion freezes in place old discriminatory rules despite the Act’s purpose to eradicate discrimination.

⁹⁸ *Allen v. Milligan*, 599 U.S. 1, 19–20, 22–23 (2023).

⁹⁹ 549 U.S. 1 (2006).

¹⁰⁰ For this and other critiques of the *Purcell* Principle, see Wilfred U. Codrington III, *Purcell in Pandemic*, 96 N.Y.U. L. REV. 941 (2021); Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1087 (2007); Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 440 (2016); Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, TAKE CARE (Sept. 27, 2020), <https://takecareblog.com/blog/freeing-purcell-from-the-shadows> [perma.cc/3F7B-QE6Z].

It is predictable that ambitious conservatives, having established strong election law defenses, would seek a voting rights offensive arsenal as well. Given the current Supreme Court's strong conservative majority, conservative election activists may see these years as a prime opportunity to pursue an offensive strategy and make significant inroads. This is where fraudulent vote dilution claims come in. Consider two reforms that voting rights advocates often cite as ways to improve turnout and expand access to the ballot: make election day a holiday and mail ballots to all active voters.¹⁰¹ The Trump campaign and the Republican Party brought fraudulent vote dilution claims against both these types of reforms in 2020.¹⁰² While their lawsuits failed, it is likely conservatives will keep pushing fraudulent vote dilution claims to develop case law that allows them to target election rules and laws that purportedly favor Democrats.

Conservatives are already seeking to further develop fraudulent vote dilution theories post-2020. The Honest Elections Project, a voting group founded by a conservative fundraiser, advocate, and Trump confidant, is pressing fraudulent vote dilution theories of harm in federal court.¹⁰³ The conservative advocacy group Judicial Watch has done the same.¹⁰⁴ Recently, Republican Kari Lake—a failed 2022 Arizona gubernatorial candidate and staunch Trump acolyte—lost a fraudulent vote dilution lawsuit in federal court.¹⁰⁵ These suits, coupled with their 2020 analogs, represent a larger project to establish fraudulent vote dilution as a conservative tool for attacking election rules and practices.

¹⁰¹ See, e.g., Justin Levitt, “*Fixing That*”: *Lines at the Polling Place*, 28 J.L. & POL’Y. 465, 476 (2013). Making election day a holiday would allow people more time to vote during the day and cut back on the long lines immediately before and after standard work hours, and mailing ballots to all registered voters would ensure that every active voter has a relatively easy way to access and cast a ballot. *Id.*

¹⁰² See *Cook Cnty. Republican Party v. Pritzker*, 487 F. Supp. 3d 705 (N.D. Ill. 2020); *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993 (D. Nev. 2020).

¹⁰³ See *Green v. Bell*, No. 3:21-CV-00493, 2023 WL 2572210 (W.D.N.C. Mar. 20, 2023); Kira Lerner, *Conservative Groups Target State, Local Voter Registration Rolls with Multiple Lawsuits*, GA. RECORDER (Jan. 10, 2022), <https://georgiarecorder.com/2022/01/10/conservative-groups-target-state-local-voter-registration-rolls-with-multiple-lawsuits> [perma.cc/KDP7-HDS4]; Danny Hakim & Stephanie Saul, *The Rising Trump Lawyer Battling to Reshape the Electorate*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/06/15/us/elections/voting-william-consvooy-trump.html> [perma.cc/2KNY-ZVNU].

¹⁰⁴ See *Jud. Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1103–04 (D. Colo. 2021), *reconsideration denied*, No. 20-CV-02992, 2022 WL 3681986 (D. Colo. Aug. 25, 2022).

¹⁰⁵ See *Lake v. Fontes*, 83 F.4th 1199 (9th Cir. 2023).

B. Co-opting Racial Vote Dilution

For decades, racial vote dilution has been at the center of voting rights contests. Writing in 1998, Professor Samuel Issacharoff observed that by recognizing racial vote dilution claims, the Supreme Court had brought a “racially polarized voting inquiry into the undisputed and unchallenged center” of voting rights litigation.¹⁰⁶ Once we recognize the centrality of race-to-vote dilution, it raises the question of what supporters of fraudulent vote dilution claims might gain by appropriating dilution language. One answer is that it can help shield their conservative project from moral criticism and advance their goal of decentering race from voting rights law.

In his work on critical race theory, Professor Jonathan Feingold has observed that “anti-egalitarian forces coopt the language of equality to shield regressive projects from moral or historical critique.”¹⁰⁷ This dynamic appears at play here, with conservatives co-opting dilution language to imply that fraudulent vote dilution claims protect the same kinds of rights as racial vote dilution and are just as important. One can even read conservative rhetoric as giving greater weight to fraudulent vote dilution concerns than racial vote dilution concerns. The rhetorical move is to emphasize that while racial vote dilution claims seek to equalize the voting strength of one particular racial group, fraudulent vote dilution claims purport to protect the strength of all votes.

Whether intentionally or not, the majority opinion in *Brnovich* uses this rhetoric. Justice Alito explained that, in racial vote dilution cases, “plaintiffs claimed that features of legislative districting plans, including the configuration of legislative districts and the use of multi-member districts, diluted the ability of *particular voters* to affect the outcome of elections.”¹⁰⁸ In contrast, Justice Alito explained, “fraudulent votes dilute the *right of citizens* to cast ballots that carry appropriate weight” and “can also undermine *public confidence* in the fairness of elections and the perceived legitimacy of the announced outcome.”¹⁰⁹ He added that this dilution can have serious consequences by “affect[ing] the outcome of a close election.”¹¹⁰ Notice how the racial dilution harm is limited to “particular voters,” while fraudulent vote dilution is

¹⁰⁶ Samuel Issacharoff, *Polarizing Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992).

¹⁰⁷ Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 738 (2022).

¹⁰⁸ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2331 (2021) (emphasis added).

¹⁰⁹ *Id.* at 2340 (emphasis added).

¹¹⁰ *Id.* at 2340, 2348.

said to harm “citizens” and the “public” writ large. Racial vote dilution involves a representational harm that only affects one group of voters, while fraud is said to have high stakes for all.¹¹¹

The dissent in *Brnovich* took issue with the majority’s framing and provided more context to show how fraud prevention has long been used as a pretext for discrimination in election rules: “Throughout American history, election officials have asserted anti-fraud interests using voter suppression laws. Poll taxes, the classic mechanism to keep black people from voting, were often justified as ‘preserv[ing] the purity of the ballot box [and] facilitat[ing] honest elections.’”¹¹² The dissent also looked at the facts in the particular case to show that the Arizona legislature enacted the challenged provisions “with full knowledge of the likely discriminatory consequences,” and even though “no fraud involving ballot collection has ever come to light in the State.”¹¹³ Without an understanding of this background, though, the type of rhetoric in the Court’s majority opinion can seem to send the message that fraudulent vote dilution is more worrisome than racial vote dilution.

This appropriation of dilution language also furthers a conservative goal to deemphasize the centrality of race to voting rights litigation. Decentering race from voting rights cases has long been the project of some conservatives.¹¹⁴ The Reagan administration and conservative critics often compared the VRA to racial affirmative action, and Justice Scalia called the VRA’s preclearance provisions a “racial entitlement” before voting to invalidate them.¹¹⁵ More recently, conservatives have continued to advocate for less race-conscious interpretations of the VRA,¹¹⁶ such as a “long-standing conservative dream of certified race neutrality in redistricting.”¹¹⁷ Fraudulent vote dilution claims can be seen as an extension of this project to decouple voting rights and race. By making it seem that all voters experience vote dilution, it downplays the significance of a long history of legislatures enacting laws to

¹¹¹ Cf. Angela Onwuachi-Willig, *The CRT of Black Lives Matter*, 66 ST. LOUIS U. L.J. 663, 672 (2022) (“Through protests and other events, Black Lives Matter supporters have educated the public about the damaging effects of pretending that all individuals, regardless of race, face the same hostilities.”).

¹¹² *Brnovich*, 141 S. Ct. at 2365 (Kagan, J., dissenting).

¹¹³ *Id.* at 2370.

¹¹⁴ See, e.g., Siegel, *supra* note 94, at 25 n.122 (“The comparison between voting rights and affirmative action was prominent in conservative critiques of the [Voting Rights] Act.”).

¹¹⁵ See Siegel, *supra* note 94, at 72–73 & n. 367–68; Transcript of Oral Argument at 47, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

¹¹⁶ Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 YALE L.J. 862, 865–66 (2021).

¹¹⁷ Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 YALE L.J. 744 (2021). The Supreme Court rejected this interpretation in *Allen v. Milligan*, 599 U.S. 1 (2023).

deny Black people the right to vote and, when those failed, diluting their voting strength.

At its most troubling, fraudulent vote dilution rhetoric does not simply decenter race from voting rights; it places Black people as the perpetrators of the fraud that is diluting others' votes. In 2020, to garner support among the conservative base for a legal strategy centered on allegations of fraud, the Trump campaign repeatedly stated that fraud was occurring in cities with large Black populations, implying Black people were at the center of the problem. Former President Trump declared that Detroit, a majority-Black city, was one of "the most corrupt political places anywhere in our country, easily" and should not be allowed to "engineer[] the outcome of a presidential race, a very important presidential race."¹¹⁸ Trump made these remarks shortly before a group of Michigan Republican voters sued state election officials, claiming they were harmed by voter fraud that diluted the strength of their votes.¹¹⁹ Similarly, as Republicans and the Trump campaign were litigating fraudulent vote dilution claims about the 2020 Pennsylvania election rules,¹²⁰ Trump declared on a presidential debate stage that "bad things happen in Philadelphia," a city with a large Black population and Black political leaders.¹²¹ He used that stage to reiterate the false, debunked claim that the city would not let poll watchers observe the count, insinuating that massive voter fraud could be underway.¹²² Trump's racist rhetoric was obviously not just about bolstering support for Republicans' fraudulent vote dilution claims in court. Rather, both racist rhetoric and fraudulent vote dilution claims were an intertwined part of Trump's larger political and legal campaign to win reelection in 2020, a campaign worthy of multiple books beyond the scope of this Article.

III. AN INSTITUTIONAL DESIGN ANALYSIS OF FRAUDULENT VOTE DILUTION

Institutional design is concerned with how the rules and structure of an institution directly impact its capacity to produce

¹¹⁸ Daniel Dale, *Fact Check: Trump Delivers the Most Dishonest Speech of His Presidency as Biden Closes in on Victory*, CNN (Nov. 6, 2020), <https://www.cnn.com/2020/11/05/politics/fact-check-trump-speech-thursday-election-rigged-stolen/index.html> [perma.cc/8MXP-DHEC].

¹¹⁹ *King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020).

¹²⁰ *See, e.g., Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020).

¹²¹ *See* Ellie Rushing et al., *Trump Says Poll Watchers are Being Blocked from Observing Early Voting in Philly. He's Wrong.*, PHILA. INQUIRER (Sept. 29, 2020), <https://www.inquirer.com/politics/election/trump-poll-watchers-philadelphia-early-voting-20200929.html> [perma.cc/GX2E-ZE5W].

¹²² *See id.*

positive outcomes.¹²³ An institutional design analysis looks at possible legal arrangements with their expected outcomes in mind.¹²⁴ This part applies institutional design principles to address two questions: is there a potential problem with election laws that fraudulent vote dilution claims can help solve, and what is the institutional capacity of courts to solve that problem?

Section A concludes that there is a theoretical problem that fraudulent vote dilution claims could help to address—self-interested legislators enacting lax election laws while not fully internalizing the risk of fraud. Sections B and C analyze the capacity of courts to solve this problem. They look at the risks of false positives and erroneous judicial decisions. Section B shows that fraudulent vote dilution cases involve exceptional informational deficiencies for courts. Section C shows that these claims are more vulnerable to errors in the causal analysis than other types of voting claims.

A. The Theoretical Problem that Fraudulent Vote Dilution Claims Can Solve

What problem would recognizing fraudulent vote dilution as a cause of action help solve? To answer this question, it is useful to consider the problems other types of voting rights claims are designed to remedy. Racial vote dilution claims help solve the problem of a hostile white majority using its power to manipulate district lines to further diminish Black and other racial minorities' political power.¹²⁵ Fraudulent vote dilution does not implicate this concern or anything that resembles it. What about unconstitutional vote denial claims of the type analyzed under *Anderson-Burdick*? For these claims, the problem is that self-interested legislators have a strong motivation to enact rules that maximize their chances of reelection.¹²⁶ Legislators routinely enact election rules to entrench themselves in office.¹²⁷ One common strategy is to enact rules that make it difficult for their opponents' supporters to cast ballots.¹²⁸ Judicial review, in theory, can help solve this anti-democratic problem. Courts can provide a type of "anti-entrenchment review"

¹²³ See, e.g., Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 878–79 (2003).

¹²⁴ See Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1154 n.14 (2011).

¹²⁵ See Issacharoff & Pildes, *supra* note 82, at 701.

¹²⁶ See generally Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015) (exploring the challenges posed by entrenchment in the electoral and legislative realms).

¹²⁷ See generally *id.* (examining how legislators routinely rig election rules).

¹²⁸ See *id.* at 414.

that scrutinizes election rules¹²⁹ to ensure that legislators have not undemocratically crafted the ground rules for elections to their advantage.¹³⁰ Vote denial claims provide a cause of action that triggers this judicial review to determine if the rules are too restrictive.

In theory, a similar logic could apply to support fraudulent vote dilution claims. Self-interested legislators, motivated to enact rules that maximize their chances of reelection, want rules that make it easy for their supporters to vote. They might go as far as to intentionally enact rules that facilitate ballot-stuffing or other fraud by their supporters. But that is not necessary for a problem to exist that fraudulent vote dilution claims could help solve. It could be that legislators, by enacting rules that make it easy for their supporters to vote, are inadvertently making fraud easier, too. The legislators may not fully internalize the risk of fraud because the costs from that risk fall largely on others. In theory, courts' anti-entrenchment review could cover these kinds of laws.

While this problem could exist in theory, is it a problem in reality? Empirically, there is little basis to assume the problem is real. Generally, all reliable evidence points to the conclusion that "voter fraud in the contemporary United States is rare and that when such fraud occurs[,] it tends to happen on a small scale that does not tip the result of elections."¹³¹ In addition, I am not aware of evidence tying the little fraud that has occurred in our elections to lax election rules. Corrupt officials have been known to stuff ballot boxes,¹³² but restrictive rules are unlikely to curb such practices. Nevertheless, while the empirical basis for a fraudulent vote dilution cause of action is slim at best, there remains at least a theoretical basis for a fraudulent vote dilution cause of action.

B. Informational Deficiencies in Fraudulent Vote Dilution Cases

While courts must make decisions based on imperfect information all the time, informational problems can become extreme in fraudulent vote dilution cases. Fraudulent vote dilution plaintiffs seek judicial intervention on the basis that there is a high probability that unidentified, non-party actors will commit an act

¹²⁹ See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502 (1997).

¹³⁰ See Issacharoff & Pildes, *supra* note 82, at 650.

¹³¹ Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 267 (2022).

¹³² See Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 396 (1991) ("[V]oting fraud is most likely to be committed by corrupt election officials rather than by individual voters").

(fraud) in the future.¹³³ This is a context that requires courts to engage in speculative and probabilistic thinking based on incomplete and unreliable information.

Typically, the target of an injunction is a party to a case, and there is little dispute about their conduct or intended future conduct, perhaps because they have announced their plans or because the court has made an informed determination based on testimony.¹³⁴ But election fraudsters will not give the court that luxury in fraudulent vote dilution cases. Instead, the court will have to determine the actual risk of fraud by non-parties based largely on the plaintiffs' information. This information will rarely provide a basis for the court to make a confident and accurate assessment of the risk of fraud.

Consider the types of informational scenarios that could come before courts in these cases. At the one end of the spectrum are fraudulent vote dilution claims where the "evidence" of fraud consists of plaintiffs' vague and speculative assertions. This generally characterizes the cases brought by the Trump campaign and the Republican Party in 2020.¹³⁵ On this type of record, the court can have no confidence that fraud will occur. Given the lack of significant voter fraud in modern elections, if a court were to accept such speculative assertions, there would be a very high risk of a false positive—that is, the court incorrectly finding a substantial likelihood of fraud. Courts in 2020 quite sensibly rejected such assertions as insufficient.¹³⁶

What about a case where a plaintiff purports to have concrete evidence of a specific plan hatched by fraudsters? There are at least a few serious problems in designing a cause of action based on this fanciful scenario. First, it is unlikely that a plaintiff in a fraudulent vote dilution case would have reliable, firsthand information about a specific fraud conspiracy. These cases are about changing election rules. They are typically brought by candidates and parties, or voters affiliated with them, to create a rule more favorable to their electoral chances. They are not brought by informants or co-conspirators who might have reliable, firsthand information of a fraud conspiracy. Second, if a plaintiff happens to receive concrete information about a conspiracy, there is an alternative institution equipped to address it: law enforcement. The FBI's election crimes

¹³³ See *supra* Part I.C.

¹³⁴ Consider, for example, a case where an employer seeks an injunction to halt a work stoppage announced by the union. Or a resident seeks an injunction against the planned demolition of a building.

¹³⁵ See *supra* Part I.C.

¹³⁶ See *id.*

unit investigates these types of crimes.¹³⁷ If a specific fraud plan poses a real threat, the FBI is more likely to uncover and thwart the plot than a civil lawsuit proceeding on thirdhand, unreliable, and politically biased information about the fraud, and where the most the judge could do to stop the fraud is issue an injunction altering an election rule. If it is too late for the FBI to investigate because the election is near, it is likely also too late for a court to change a rule without causing election administration chaos.¹³⁸ Third, an injunction designed to stop an existing fraud plot may not work because the fraudsters are not parties to the suit. The court cannot issue an injunction directly targeting them. Rather, the court can only adjust an election rule to make it harder to commit fraud. Moreover, a committed group of fraudsters who have developed such a plan might be determined to see their plot through, even if they must adapt to the court's adjustments.¹³⁹

One can imagine cases that fall somewhere between these two extremes of vague, speculative assertions of fraud and evidence of a specific conspiratorial plot. Such a case could perhaps involve proven instances of fraud that have plagued a jurisdiction in repeated election cycles. While plaintiffs might lack evidence of a specific plot, the past fraud means there is a not insignificant probability that fraud will occur again. If a majority of state legislators have failed to act, perhaps because they believe they benefit from the lax rule leading to the fraud, the theoretical basis for a fraudulent vote dilution claim could be at its strongest in this hypothetical scenario.

A major problem for courts in this scenario, though, would be how to accurately assess the risk of fraud. Courts are not expert forecasters—they have enough difficulty determining causal probabilities in complex cases where the injury has already happened. Here, courts would be placed in the even more difficult position of accurately determining the probability of a future injury that would directly depend on the possible actions of third parties. When courts must make these kinds of probabilistic determinations, they tend to assess risk based on “a gestalt feeling,” which is highly imprecise and subject to biases or decision-making shortcuts.¹⁴⁰ One such shortcut is the availability heuristic, under which people assess the magnitude of risk by determining whether examples

¹³⁷ See *Election Crimes and Security*, FBI, <https://www.fbi.gov/how-we-can-help-you/safety-resources/scams-and-safety/common-scams-and-crimes/election-crimes-and-security> [perma.cc/YLV2-7EQ7] (last visited Mar. 8, 2024).

¹³⁸ See, e.g., Hasen, *supra* note 100 at 441 (“Professional election administrators, especially in large jurisdictions, rely on cadres of poll worker volunteers who must be trained. It is tough to retrain these workers on new rules or procedures close to the election and to produce appropriate new written instructions the period just before the election—especially in jurisdictions using multiple languages.”).

¹³⁹ See *infra* Part III.C.

¹⁴⁰ F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 75 (2012).

readily come to mind.¹⁴¹ While this shortcut is at times a useful heuristic, it can also lead decision-makers to put too much weight on those recent examples.¹⁴² For fraudulent vote dilution cases, an availability bias might lead courts to give too much weight to recent, salient examples of fraud, treating the risk as greater than it is. Regardless of the heuristics that courts would use or develop for these cases, it would be difficult for courts to establish the actual risk of fraud with a substantial degree of certainty.

By contrast, courts in vote denial cases do not need to make such probabilistic determinations to properly adjudicate those disputes. This is in part because of the deference courts show to state defendants when they rely on the risk of fraud as a state interest. For one, the Supreme Court has made clear that states do not need any evidence of fraud, let alone sophisticated probabilistic determinations, to defend an election rule.¹⁴³ Further, the lack of probabilistic analysis in vote denial cases is also because plaintiffs tend to rely on more concrete evidence to make their cases. For plaintiffs to prevail, they need to prove that voters suffer a high burden from the election rule, and they will want to present specific facts about the scope of harm, such as the number of voters impacted and the time and dollar cost to them. For example, in *Crawford*, the plaintiffs presented evidence of the costs for voters to obtain the underlying documentation necessary to get a proper ID.¹⁴⁴ In *Brnovich*, the plaintiffs challenged the new restriction on third-party ballot collection by presenting concrete evidence about the percentage of Native voters impacted and the extra time it would take these voters to deliver their ballots under the new rule.¹⁴⁵

C. Illusory Causal Connections in Fraudulent Vote Dilution Cases

Another problem with fraudulent vote dilution cases involves a court's ability to establish a causal connection between the risk of fraud and the challenged election rule. The causal link between fraud and an election rule will often be weak to non-existent because the actual occurrence of fraud depends on the intervention of non-party fraudsters who can work around even a restrictive election rule. However, a court, perhaps bothered by the risk of fraud and insistent on its power to do something about it, may be blind to the lack of causation. I call this type of error—that is, the court seeing a causal connection between the risk and the rule when none exists or exists weakly—an illusory causal connection.

¹⁴¹ See Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 534–37 (2007).

¹⁴² See *id.* at 535.

¹⁴³ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194–203 (2008).

¹⁴⁴ *Id.* at 239 (Souter, J., dissenting).

¹⁴⁵ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2325 (2021).

The Supreme Court appears to have made this error in *Brnovich*. Recall that *Brnovich* involved a challenge to Arizona’s ballot collection law, which restricted who may return a voter’s ballot to a few categories of people, such as a postal worker or the voter’s family member.¹⁴⁶ In upholding the law, the Supreme Court referenced a recent North Carolina congressional race, where the state elections board had invalidated the results because of fraud by the Republican campaign, and stated that Arizona was justified in enacting its ballot collection law to avoid that outcome: “[T]he North Carolina Board of Elections invalidated the results of a 2018 race for a seat in the House of Representatives for evidence of fraudulent mail-in ballots. The Arizona Legislature was not obligated to wait for something similar to happen closer to home.”¹⁴⁷

The Court’s language implies that a ballot collection law like Arizona’s would have deterred the sort of fraud that happened in North Carolina. The problem is that North Carolina had, and still has, a ballot collection law that looks a lot like Arizona’s. North Carolina’s law limits ballot collection to a “near relative,”¹⁴⁸ yet the fraud happened in North Carolina despite the restriction. Per the criminal indictment against the Republican operative in North Carolina, the fraudsters worked around the restrictive ballot collection rule by “mail[ing] the absentee ballot in such a manner to conceal the fact that the voter had not personally mailed it himself.”¹⁴⁹ And, the restriction was not responsible for the detection of the fraud.¹⁵⁰ Yes, fraud occurred in the congressional race in North Carolina. But no, there was not a causal connection between the state’s ballot collection law and the occurrence of the fraud. To the extent the Supreme Court suggested otherwise, it was wrong. The point here is not to spring a “gotcha” on the Supreme Court. The point is that even a court with significant resources can erroneously link the occurrence or risk of fraud to a particular election rule. That is, they can fall prey to an illusory causal connection when it comes to fraudulent vote dilution.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2348.

¹⁴⁸ N.C. GEN. STAT. § 163-231 (2023); *see also* N.C. GEN. STAT. § 163-226 (2023) (defining “near relative” as “spouse, brother, sister, parent, grandparent, child, grandchild, mother-in-law, father-in-law, daughter-in-law, son-in-law, stepparent, or stepchild”).

¹⁴⁹ Indictment, *North Carolina v. Dowless* (N.C. Super. July 3, 2019), No. 19CRS001934.

¹⁵⁰ There were rumors and allegations that this type of fraud had occurred in that area of North Carolina for years, but an investigation did not occur until after the 2018 election when a Democratic member of the state elections board demanded one. *See* Jim Morrill, *NC Elections Board Refuses to Certify 9th District Race, Leaving It in Limbo*, CHARLOTTE OBSERVER (Nov. 27, 2018), <https://www.charlotteobserver.com/news/politics-government/election/article222263905.html> [perma.cc/HZ8Z-7NJV].

A judicial error of this sort can do significant harm. A court order enjoining an allegedly lax election rule will make it harder for honest voters to cast ballots by making the rule more restrictive. In this way, the court order can lower voter turnout.¹⁵¹ At the same time, if there is no causal connection between the high risk of fraud and the election rule, the court order will do little or nothing to prevent fraud. This can have the perverse effect of strengthening any dilution from fraud because, when turnout drops, there is a smaller pool of honest ballots for the fraudulent ones to dilute. In short, the court order can decrease turnout by honest voters and boost the weight of any fraudulent ballots.¹⁵²

Illusory causal connections are not a problem for the typical vote denial case because the evidence of harm is more concrete and traceable. Consider a challenge to a new voter ID law. Plaintiffs might be able to show the number of voters burdened because they lack the correct ID, as well as the costs for them to obtain the documentation needed to get the ID. But when a plaintiff is challenging a rule for making it too easy to vote and thus facilitating fraud, it is harder to trace the fraud risk to any one rule. This is partly because fraud is rare, and there might not be sufficient data. It is also partly because states guard against fraud with a mix of rules and it can therefore be difficult to isolate the risk generated by a single rule. An entire voting system, such as an open ballot system, might be more vulnerable to fraud and coercion than a secret ballot system. But it is difficult to show the risk of fraud from a single rule within a particular system.

IV. ELEMENTS OF THE FRAUDULENT VOTE DILUTION CLAIM

Some courts in 2020 were willing to assume that a fraudulent vote dilution claim exists and is cognizable.¹⁵³ The previous part showed that there is a theoretical basis for a fraudulent vote dilution cause of action. Professor Stephanopoulos reached the same conclusion.¹⁵⁴ But there are also significant problems with such a cause of action. This part is normative, suggesting three elements for a fraudulent vote dilution cause of action. These elements can focus the judicial analysis in ways that minimize judicial errors and avoid other problems discussed in this Article.

First, plaintiffs must provide concrete evidence showing a high probability of fraud. Evidence of a specific conspiratorial plot

¹⁵¹ For a discussion on the normative value of high voter turnout, see Jason Marisam, *Voter Turnout: From Cost to Cooperation*, 21 ST. THOMAS L. REV. 190, 196 (2009).

¹⁵² See generally Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739 (2015).

¹⁵³ See *supra* Part I.C.

¹⁵⁴ See Stephanopoulos, *supra* note 4.

for an upcoming election could suffice, although such evidence is unlikely. Evidence of fraud in recent past elections could also suffice, as would evidence of fraud in other jurisdictions with a similar election rule.

While this requirement can overlap with standing requirements, it is important that courts keep this as an essential element of the fraudulent vote dilution claim. In 2020, some courts screened out fraudulent vote dilution cases that clearly lacked sufficiency on standing grounds because there was no evidence of a high probability of fraud.¹⁵⁵ However, in a couple of recent cases, plaintiffs have established standing in election law cases using fraudulent vote dilution theories of harm that invoke the mere possibility of fraud and voters' decreased confidence based on possible dilution.¹⁵⁶ If these allegations are enough to establish standing, courts in the future may not be able to use standing rules to screen out clearly unmeritorious fraudulent vote dilution claims. The requirement I suggest would allow courts to quickly screen out bunk cases, even where the plaintiffs have some precedent on which to rely to establish standing.

Second, courts should require plaintiffs to show causation as a separate element of their claim. In voting cases, causation is not normally an important issue that generates significant disagreement. But it could be a prime issue in fraudulent vote dilution cases because the link between the asserted injury and the challenged election rule may not be clear, as discussed above. Borrowing from tort law, plaintiffs should be required to show that the lax election rule is both a necessary and sufficient condition for the high risk of fraud.¹⁵⁷ Decades ago, leading tort theorist Richard Wright explained that a necessary and sufficient causation requirement reduces the chance that a court will erroneously treat a condition as responsible for a particular injury.¹⁵⁸ Under this causation standard, courts examine the conditions that could contribute to the risk or injury and isolate how much responsibility falls on the challenged condition.¹⁵⁹ The same idea can apply in this vote dilution context.

To determine whether an adequate causal connection exists, courts should examine the circumstances that contribute to a high risk of voter fraud and determine whether the challenged rule is both

¹⁵⁵ See *supra* Part I.C.

¹⁵⁶ See *supra* Part I.D.

¹⁵⁷ See Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1823 (1985) ("A causal generalization asserts that the antecedent conditions produce or cause the subsequent event—that they are necessary elements of a set of conditions that is sufficient for the occurrence of the event."); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 & cmt. c (AM. L. INST. 2010).

¹⁵⁸ Wright, *supra* note 157, at 1804.

¹⁵⁹ *Id.*

a necessary and sufficient condition of such circumstances. A lax election rule is not necessary for the risk of fraud if the fraud is still likely to occur with a more stringent version of the rule. The example from North Carolina in 2018 illustrates this point—a lax ballot collection rule was not necessary for the risk of fraud, as the fraudsters showed they could and did work around a restrictive rule.¹⁶⁰ As for sufficiency, an election rule is not sufficient for the risk of fraud if other conditions are also needed for the fraud to succeed. Consider the example of drop boxes and the Trump campaign’s claims that “potential fraudsters may attempt to commit election fraud through the use of drop boxes or forged ballots.”¹⁶¹ Plaintiffs could only show a causal connection if they could prove that the existence of the drop boxes is by itself sufficient for a high risk of fraud. This would require showing that the state’s rules and practices for detecting fraud would fail to detect fraud via drop box. If the state’s safeguards would likely work to detect the fraudulent ballots, then the causal connection between drop boxes and fraud depends on the existence of other conditions that are not met.

Third, after meeting the threshold requirements on evidence of fraud and causation, the plaintiff must show that the risk of fraud—that is, the probability of fraud and its magnitude—outweighs the state and public interests, including any harm to turnout by honest voters. This element is similar to what some courts did in 2020, applying an inverted *Anderson-Burdick* balancing test to fraudulent vote dilution claims. However, as this Article envisions, courts can partially sidestep their probabilistic forecasting shortcomings by focusing on the magnitude of fraud and magnitude of harm, both of which can involve empirical evidence more susceptible to judicial examination.

A court can make an educated finding on the magnitude of fraud by looking at past instances of proven fraud. A plaintiff should not be able to make their case by pointing to a prior instance of fraud that involved only a dozen or so ballots.¹⁶² Rather, courts should insist on evidence showing a significant volume of fraud. A court should only substitute its judgment for the legislature’s if the magnitude of fraud appears substantial enough that an unbiased legislature would feel compelled to fix the rule.

Even where a plaintiff can point to a substantial volume of fraudulent ballots in prior elections, the court must consider how many honest voters would not vote under a more stringent court-

¹⁶⁰ See *supra* at Part III.C.

¹⁶¹ Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp.3d 331, 342 (W.D. Pa. 2020).

¹⁶² See, e.g., Paul Walsh, *Minneapolis Man Charged with Helping 13 People Cast Fraudulent Ballots in 2018*, STAR TRIBUNE (Nov. 5, 2019), <https://www.startribune.com/minneapolis-man-charged-with-helping-13-people-cast-fraudulent-ballots-in-2018/564507232/> [perma.cc/FGN7-5KP4].

imposed rule or how many honest voters would have their ballots invalidated under that rule. Suppose 1,000 honest voters would not cast valid ballots because of a court-ordered change. In that case, that order is likely to do more harm than good by reducing turnout and shrinking the pool for the fraudulent votes to dilute, as discussed.¹⁶³ To aid this analysis, courts might want to insist on expert evidence to isolate the effects that a rule change would have on expected voter turnout. There is a social science literature that studies the impact of election rules on turnout.¹⁶⁴ Just as litigation in vote denial cases involves social science experts testifying on the harms stemming from restrictive election rules, litigation in fraudulent vote dilution cases could involve social science experts testifying on the magnitude of harm from a more restrictive election rule.¹⁶⁵ Importantly, though, it would remain the plaintiff's burden to show that the magnitude of fraud outweighs any harm to voter turnout. A state should not need to invest in expert witnesses if the plaintiff does not have their own evidence that shows a substantial magnitude of fraud and minimal impact on voter turnout.

Overall, to prevail on a fraudulent vote dilution claim, a plaintiff should be required to show that: (1) there is a high probability of fraud in an upcoming election; (2) there is a causal connection between the risk of fraud and the challenged election rule—*i.e.*, the election rule is both a necessary and sufficient condition for the fraud; and (3) the probability and magnitude of fraud outweighs the state and public interests, including any decrease in turnout by honest voters, that would result from a court order making the challenged rule more stringent.

CONCLUSION

Plaintiffs are likely to keep testing novel theories of fraudulent vote dilution in courts. The stakes in such cases could be high—for example, a court may be in a position to decide whether an election rule that encourages access to the ballot will be in place in an important swing state for a presidential election. From a scholarly perspective, it is important that we have a critical understanding of the underlying dynamics of fraudulent vote

¹⁶³ See *supra* Part III.C.

¹⁶⁴ See, e.g., Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185 (2009).

¹⁶⁵ See Emily Rong Zhang, *Questioning Questions in the Law of Democracy: What the Debate over Voter ID Laws' Effects Teaches About Asking the Right Questions*, 69 UCLA L. REV. 1028, 1047–53 (2022) (discussing expert discovery in voting cases); see also Jeffrey R. Adams & Lucas I. Pangle, *The Downfall of "Incumbent Protection": Case Study and Implications*, 54 U. RICH. L. REV. 243, 260 n.89 (2019) (discussing how “expert testimony from statisticians or political scientists is indispensable” in election law cases).

dilution claims. From a practical perspective, it is important that courts get these cases right. This Article has sought to advance both goals, doctrinal and practical. Descriptively, it situates fraudulent vote dilution as a new conservative litigation weapon. It shows that, by co-opting dilution language associated with racial justice claims, conservatives can attempt to shield their project from moral criticism and advance their goal to decenter race from voting rights disputes. It also provides an institutional analysis that explores the risk of judicial errors in fraudulent vote dilution cases. Normatively, to guide courts and help guard against these errors, it proposes three necessary elements for a fraudulent vote dilution claim. If fraudulent vote dilution claims are brought ahead of the 2024 election, courts should apply these elements.