

NEW JERSEY'S CONSTITUTIONAL RESIDENCY
REQUIREMENT FOR STATE LEGISLATURE
CANDIDATES: A ROADMAP FOR CHALLENGERS AND A
CRY FOR REFORM DURING RE-DISTRICTING YEARS*

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I. INTRODUCTION

New Jersey's constitution provides, in article IV, section 1, paragraph 2, that "[n]o person shall be a member of the Senate who shall not . . . have been a citizen and resident of the State for four years, and of the district for which he shall be elected one year, next before his election."¹ Additionally, "[n]o person shall be a member of the General Assembly who shall not . . . have been a citizen and resident of the State for two years, and of the district for which he shall be elected one year, next before his election."² For over a decade, however, the New Jersey Attorney General³ and the Secretary of State⁴ have been barred from

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1. N.J. CONST. art. IV, § 1, ¶ 2.

2. *Id.*

3. Under New Jersey's constitution, the Attorney General "shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor." N.J. CONST. art. V, § 4, ¶ 3.

4. Under New Jersey's constitution, the Secretary of State "shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor, except the Governor may appoint the Lieutenant Governor to serve as Secretary of State without the advice and consent of the Senate." *Id.* New Jersey statutory law further provides that the Secretary of State "is designated the chief State

enforcing this constitutional provision due to a federal district court's injunction in *Robertson v. Bartels (Robertson I)*.⁵ *Robertson I* concluded that the one-year-in-district residency requirement violated the Equal Protection Clause under a strict scrutiny analysis because it impeded on the fundamental right of "persons to run for public office [combined with] the right of voters to vote for candidates of their choice."⁶ Thereafter, New Jersey Attorneys General and Secretaries of State relied on this opinion when supervising and enforcing the state's election process, and allowed candidates to pursue and succeed in becoming elected to public office without meeting the in-district requirement.

In recent years, however, the injunction proved artificial in plugging the flow of litigation stemming from the provision. Prior to November 8, 2011—Election Day—the provision succeeded in keeping Olympic gold-medalist Carl Lewis from running for State Senate in New Jersey's Eighth Legislative District.⁷ In *Lewis v. Guadagno*,⁸ perhaps the highest-profile⁹ state legislative race in the country, the United States Court of Appeals for the Third Circuit denied Mr. Lewis's bid to run in part

election official." N.J. STAT. ANN. § 19:31-6a (West 2008). As such, he or she is tasked with, among other things:

[C]ertify[ing] the names of the persons indorsed in the petitions filed in his office to the clerks of counties concerned thereby not later than the 54th day prior to the holding of the primary election, specifying in such certificate the political parties to which the persons so nominated in the petitions belong. In the case of candidates for offices other than federal office, the Secretary of State shall also transmit this information to the Election Law Enforcement Commission in the form and manner prescribed by the commission and shall notify the commission immediately upon the withdrawal of a petition of nomination.

N.J. STAT. ANN. § 19:23-21 (West 2011).

5. *Robertson v. Bartels*, 150 F. Supp. 2d 691 (D.N.J. 2001) [hereinafter *Robertson I*]; see *infra* Section III-A for further analysis.

6. *Robertson I*, 150 F. Supp. 2d at 696–98.

7. Following the 2011 re-districting process, the municipalities that make up New Jersey's Eighth Legislative District now consist of: Berlin Borough, Eastampton, Evesham, Hainesport, Hammonton, Lumberton, Mansfield (Burlington County), Medford, Medford Lakes, Mount Holly, Pemberton Borough, Pemberton Township, Pine Hill, Pine Valley, Shamong, Southampton, Springfield (Burlington County), Waterford, Westampton, and Woodland. See *Districts by Number*, NEW JERSEY LEGISLATURE, <http://www.njleg.state.nj.us/districts/districtnumbers.asp#8> (last visited Sept. 2, 2014) [hereinafter *Districts by Number*]. Mr. Lewis resided in Medford. See *Lewis v. Guadagno*, 837 F. Supp. 2d 404 (D.N.J. 2011).

8. *Lewis v. Guadagno*, 445 F. App'x 599 (3d Cir. 2011); see *infra* Section III-B for further analysis.

9. National news coverage of the race included the *Associated Press*, the *New York Times*, the *Philadelphia Inquirer*, the *Wall Street Journal*, the *Huffington Post*, the *Los Angeles Times*, *CNN*, *ESPN*, and various local media outlets.

because he had not resided in the state for the requisite four years.¹⁰ After Election Day 2011, the provision struck again via the New Jersey Supreme Court, which invalidated the election of Gabriela Mosquera to the General Assembly in *In re Contest of November 8, 2011 General Election of Office of New Jersey General Assembly*¹¹ due to the fact that she had not lived in the Fourth Legislative District¹² for the requisite one year.¹³ The facts of the case made the decision more complex because Ms. Mosquera moved to her new residence during 2011—a year in which legislative re-districting occurred—affecting which municipalities constituted the Fourth Legislative District.¹⁴ This drew a lengthy dissent from Chief Justice Stuart Rabner, who objected to the requirement’s application to candidates during re-districting years.¹⁵ The decision flew in the face of *Robertson I*, and drew criticism for invalidating the votes of 19,000 citizens for a candidate who was certified by the Secretary of State and ran in reliance on a long-standing injunction.¹⁶

Thereafter, the New Jersey Attorney General petitioned the district court to annul the *Robertson I* injunction, citing the *In re Contest* decision for support.¹⁷ Various groups intervened,¹⁸ seeking to modify the scope of the original injunction, rather than annul it, in light of *In re Contest*.¹⁹ In a caustic opinion, Judge Dickinson Debevoise concluded not only that the durational residency requirement was again invalid under a strict scrutiny analysis, but also that *In re Contest* was an “improper collateral attack” by a state court on the district court’s original injunction in *Robertson I*.²⁰ At the interveners’ behest, however, the court narrowed the scope of the injunction to preclude enforcement of the one-year-in-

10. *Lewis*, 445 F. App’x at 602–04.

11. *In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly*, 40 A.3d 684, 713 (N.J. 2012); see *infra* Section III-C for further analysis.

12. Following the 2011 re-districting process, the municipalities that make up New Jersey’s Fourth Legislative District now consist of: Chesilhurst, Clementon, Gloucester Township, Laurel Springs, Lindenwold, Monroe (Gloucester County), Pitman, Washington (Gloucester County), and Winslow. See *Districts by Number*, *supra* note 7.

13. *In re Contest*, 40 A.3d at 713.

14. See *Districts by Number*, *supra* note 7.

15. *In re Contest*, 40 A.3d at 714 (Rabner, C.J., dissenting).

16. See *infra* notes 219–20.

17. *Robertson v. Bartels*, 890 F. Supp. 2d 519, 522 (D.N.J. 2012) [hereinafter *Robertson II*].

18. These intervening groups included the *New Jersey Democratic State Committee*, the *Communications Workers of America* (CWA), the *American Federation of Labor and Congress of Industrial Organizations* (AFL-CIO), the *Latino Action Network*, the *Latino Coalition of Monmouth County*, the *Latinos United for Political Empowerment Political Action Committee*, and the *Women’s Political Caucus of New Jersey*. See *id.* at 519.

19. *Id.* at 533.

20. *Id.* at 528.

district requirement “only during years where the state undergoes legislative re-apportionment.”²¹

This Note seeks to comment on this recent flow of litigation stemming from the New Jersey Constitution’s residency requirements for candidates for public office: *Robertson I*, *Lewis*, *In re Contest*, and *Robertson II*. In so doing, I revisit the history of the New Jersey residency requirement in its constitution and in its court system. I then critique how modern cases have worked in tandem, and to each others’ detriment, and argue that, during re-districting years, the one-year-in-district residency requirement clashes with re-districting in a manner that violates equal protection: allowing the requirement to oust political enemies via the hands of the unelected. Candidates whose residency is challenged during these years will likely be able to prevail against such claims within the court system—especially those whose resident municipalities are re-districted into another district, and who seek to move their residence into the newly-formed district, the majority of which they formerly represented. However, I argue that during other years where re-districting is not an issue, the requirement still serves the non-violative purpose it has served since 1776: allowing voters to become familiar with a candidate, as well as allowing the candidate to become familiar with voters. I conclude that the New Jersey Legislature should seek to abolish the one-year residency requirement during re-districting years, and that otherwise, candidates may bring valid challenges to the requirement, provided they meet the specific circumstances of what I deem a “perfected claim.”

II. HISTORY OF NEW JERSEY’S RESIDENCY REQUIREMENT

By the time New Jersey enacted its first constitution—the New Jersey Constitution of 1776—the state’s Legislature was bicameral: composed of an upper-chamber Legislative Council²² and a lower-chamber Assembly.²³ Article III of the New Jersey constitution of 1776

21. *Id.* at 534.

22. During the Constitutional Convention of 1844, the name “Legislative Council” was replaced with “Senate,” which was then implemented in the New Jersey Constitution of 1844. See NEW JERSEY WRITERS’ PROJECT OF THE WORK PROJECTS ADMINISTRATION, PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844 (1942) [hereinafter PROCEEDINGS], available at <http://catalog.hathitrust.org/Record/006252168>; N.J. CONST. of 1844, art. IV, § 1, cl. 1 (amended 1947). The term “Senate” is used to this day to refer to New Jersey’s upper-chamber legislative body. See N.J. CONST. art. IV, § 1, cl. 1.

23. N.J. CONST. of 1776, art. IV, § 1 (amended 1844).

spelled out, in relevant part, the residency time-period qualification for candidates for those legislative offices:

That on the said second Tuesday in October, yearly and every year forever²⁴ . . . the counties²⁵ shall severally choose one person to be a member of the [L]egislative [C]ouncil of this [C]olony, who shall be and have been, *for one whole year next before the election, an inhabitant and freeholder in the county in which he is chosen* . . . that, at the same time, each county shall also choose three members of [A]ssembly; provided, that no person shall be entitled to a seat in the said [A]ssembly, unless he be and have been, *for one whole year next before the election, an inhabitant of the county he is to represent* . . .²⁶

Thus, the people who sought election to either house “must have been inhabitants of the Colony and of the county from which chosen ‘for one whole year next before the election,’” meaning for one year prior to the particular year’s election day, which occurred annually.²⁷ This appears to be the first instance that a time period baseline was applied to a voting district residency requirement for legislative candidates in New Jersey.²⁸

24. Thus, elections for the Legislative Council and Assembly were held annually. *Id.* at art. III. In his Princeton University dissertation, Charles Erdman qualifies the importance of annual elections as the “*sine qua non* of political liberty” in the minds of the framers of the New Jersey Constitution of 1776. CHARLES R. ERDMAN, JR., *THE NEW JERSEY CONSTITUTION OF 1776* 57 (1929). Furthermore, as such a provision was not included in prior colonial governments, Erdman concludes that “its selection by the author of the new constitution must have been due to contemporary political theory rather than to [c]olonial precedent.” *Id.*

25. Via this provision, voting districts consisted of the then-contemporaneous New Jersey counties. N.J. CONST. of 1776, art. III.

26. *Id.* (emphasis added). Erdman notes that the in-county inhabitancy qualification present in New Jersey’s 1776 Constitution was “attained by usage and not by law in the Federal House of Representatives.” ERDMAN, *supra* note 24, at 53 n.56.

27. *Id.* at 53 (quoting N.J. CONST. of 1776, art. III).

28. Previous qualifications for candidates for public office prior to the New Jersey Constitution of 1776 were considered more lenient, and if residency was included in the qualifications, it included no time period. *See id.* at 54. For example, in the *Royal Charter of New Jersey of 1664*, “Assemblymen and Councillors . . . were simply to be ‘freemen,’ subject to and subscribing allegiance to, the King of England.” *Id.* After the Colony was split into East and West Jersey, the unicameral West Jersey required Assemblymen to be “Proprietors or Freeholders” as of 1677—Freeholders referring to county governing officials. *Id.* Conversely, the bicameral East Jersey required Councillors and Assemblymen to be “Planters or Inhabitants” residing within the Province per the “Fundamental Constitutions” of East Jersey of 1683. *Id.* Finally, when the Colony was whole, the “Commissions” and “Instructions” to the Royal Governors dictated that, from 1702–1776, Assemblymen were to

The requirement was tailored specifically so that Councillors and Assemblymen would be entitled to suffrage—a requirement that is expressly provided for in later constitutions.²⁹ Furthermore, the qualifications were generally based on previous colonial government and the prevailing political thought of the era.³⁰

In the next constitutional revision—the New Jersey Constitution of 1844—the framers saw fit to change and break up the residency qualifications for legislative office within the constitution. Article IV, section 1, clauses 1 and 2 now provided for these qualifications:

The legislative power shall be vested in a [S]enate and [G]eneral [A]ssembly No person shall be a member of the Senate who shall not . . . *have been a citizen and inhabitant of the state for four years, and of the county for which he shall be chosen one year, next before his election*; and no person shall be a member of the General Assembly who shall not . . . *have been a citizen and inhabitant of the state for two years, and of the county for which he shall be chosen one year, next before his election*; provided, that no person shall be eligible as a member of either house of the [L]egislature, who shall not be entitled to the right of suffrage³¹

be freeholders owning one-thousand acres within the division from which chosen, while Councillors could simply be appointed from the county's "Principle Freeholders." *Id.*

29. Article IV of the New Jersey Constitution of 1776 provided that in order to be eligible to vote, among other things, inhabitants of the Colony must "have resided within the [c]ounty in which they claim a vote for twelve months immediately preceding the election," which paralleled the one-year provision for Councillors and Assemblymen. N.J. CONST. of 1776, art. IV. The state's current constitution now expressly provides that "no person shall be eligible for membership in the Legislature unless he be entitled to the right of suffrage." N.J. CONST. art. IV, § 1, cl. 2.

30. ERDMAN, *supra* note 24, at 54, 55. Erdman states that the precedents for these qualifications, including the residency requirement, "are to be found in the earlier government of the Colony." *Id.* at 54. Additionally, the qualifications were "founded upon well-known constitutional precedents" and kept "with the political theory and practice of the time." *Id.* at 55.

31. At the time, in order to be eligible to vote, the requirements to do so included, among other things, residence within the state for one year, and residence in the county one sought to vote in for five months prior to the election. N.J. CONST. of 1844, art. IV, §§ 1–3 (emphasis added).

Members of the Senate and General Assembly shall be elected yearly and every year, on the second Tuesday of October³²

Thus, the New Jersey Constitution of 1844 now required Senators to have lived in the state for four years, and within their respective counties for one year prior to their election.³³ Assemblymen were required to have lived within the state for two years, and within their respective counties for one year prior to their election.³⁴ It is significant that members of the Legislature at this juncture were now expressly required to have the right to suffrage, as it provided for the principles behind residency requirements: that elected officials would have the opportunity to observe the state's laws, its institutions, and its form of government—even more so than the average citizen eligible to vote.³⁵ At the Proceedings of the New Jersey State Constitutional Convention of 1844, there was very little debate on the subject of residency qualifications after the amendment “on the Qualification of Persons To Be Elected” had been introduced from the “Committee on the Right of Suffrage.”³⁶ There was some discussion on whether to “strike out the word inhabitant, and insert resident” and whether to “add the word resident,” but such motions were voted down.³⁷ A motion to “require a person to have been ‘a citizen of the

32. N.J. CONST. of 1844, art. IV, § 1. Delegate Thompson via the “Committee on the Right of Suffrage” first proposed the changes to this article at the New Jersey State Constitutional Convention of 1844 on May 16, 1844. See PROCEEDINGS, *supra* note 22, at 39–40.

33. N.J. CONST. of 1844, art IV, § 2, cl. 2.

34. *Id.*

35. See N.J. CONST. of 1844, art. IV, § 1, cl. 2. In his proceedings debate, Delegate Ogden stated that “[t]he object of [one] year’s residence is that no one shall be qualified to vote until he is identified in feelings, principles and occupation with the citizens of N[ew] Jersey for one year.” PROCEEDINGS, *supra* note 22, at 81. Delegate Field later remarked that the residency period for suffrage rights was so “that [citizens] may have an opportunity to observe our laws, our institutions, and our form of government.” *Id.* at 85. Thus, it stands to reason that since the framers saw fit to expressly place the right to suffrage in the requirements for public office, the principles behind providing residency requirements for members of the Legislature stemmed in part from the principles behind residency requirements for suffrage rights. It is telling that the right to suffrage was taken up at the same time as the qualifications of persons to be elected.

36. See PROCEEDINGS, *supra* note 22, at 39–40, 99–101, 104–11.

37. *Id.* at 99–101. This debate centered around whether the terms “resident” and “inhabitant” were synonymous for purposes of being elected to office. See *id.* However, the motion was voted down after the remarks of Delegate Vroom, who concluded that it was well understood in the law that “[t]he terms are synonymous, and . . . we had better not make a distinction between them.” *Id.* at 100–01.

United States for [ten] years' before he [could] be elected to Council"³⁸ was also voted down.

Interestingly, in the New Jersey Constitution of 1844, Senators³⁹ continued to be elected as one-per-county for three-year terms.⁴⁰ However, Assembly seats were now "apportioned among the said [c]ounties as nearly as may be according to the number of their inhabitants."⁴¹ This apportionment took into account the recently-created United States Census,⁴² and provided that, after every ten years when the census was taken, the counties' Assembly seats would be re-apportioned to provide proper representation to any population shifts.⁴³ Each county was "at all times . . . entitled to one [Assembly] member; and the whole number of members [was to] never exceed sixty."⁴⁴ This was the first time that the New Jersey Constitution included express language about census apportionment with regard to its elected officials and municipalities, something that would serve to provoke litigation in future constitutions.⁴⁵

In the most recent constitutional convention, which occurred in 1947, the residency requirements went unchanged, except that the word

38. *Id.* at 109. This motion was introduced by Delegate Elmer, who believed that ten years—a longer period of time than originally proposed—was proper to ensure that an elected official "understood the nature of our institutions and laws, and what could suit the wishes and wants of the people." *Id.* Further conclusive of the point that the principles behind the right to suffrage mirrored those behind the qualifications for elected office, Delegate Ogden immediately remarked that such "principle[s] had already been decided," and the motion was "not agreed to." *Id.* at 110.

39. The constitution of 1844 was the first New Jersey Constitution to change the term "Legislative Council" to "Senate" and thus the term "Councillor" changed to "Senator." *See* N.J. CONST. of 1844, art. IV, § 1, cl. 1; *see also* PROCEEDINGS, *supra* note 22, at 110–11 ("Mr. Vroom having stated that the Committee on the Legislative Department had agreed to recommend the names of 'Senate' and 'General Assembly,' the [a]mendment was agreed to.").

40. *See* N.J. CONST. of 1844, art. IV, § 2, cl. 1.

41. *Id.* at § 3, cl. 1.

42. The first United States Census was carried out in 1790, but the Census Act of 1840 authorized the establishment of a centralized census office during each enumeration, which obviously was on the minds of the framers of the New Jersey Constitution of 1844. *See 1790 Overview*, UNITED STATES CENSUS BUREAU, http://www.census.gov/history/www/through_the_decades/overview/1790.html (last visited Dec. 29, 2012); *1840 Overview*, UNITED STATES CENSUS BUREAU, http://www.census.gov/history/www/through_the_decades/overview/1840.html (last visited Dec. 29, 2012).

43. *See* N.J. CONST. of 1844, art. IV, § 3, cl. 1. Mr. Vroom via the "Committee on the Legislative Department" first proposed this as a part of the New Jersey Constitution of 1844 on May 28, 1844. *See* PROCEEDINGS, *supra* note 22, at 111–12.

44. *See* N.J. CONST. of 1844, art. IV, § 3, cl. 1.

45. *See infra* Sections III-A, III-D for further analysis.

“inhabitant” was changed to “resident.”⁴⁶ Indeed, the proceedings for the residency requirements for Senate and General Assembly read as follows:

Section I . . . Paragraph 2—1st clause: The Committee was of the opinion that the qualifications for a member of the Senate should be retained as presently set forth in the Constitution, with the exception that the word “inhabitant” should be changed to “resident”; and Mr. Jorgenson felt that a Senator should be a resident of the State for at least ten years.

2nd clause: The Committee was of the opinion that the present qualifications for membership in the House of Assembly should be retained, with the exception that the word “inhabitant” should be changed to “resident”; and Mr. Jorgenson felt that the qualifications for residence in the State for a member of the Assembly should be five years.⁴⁷

In 1947, New Jersey voters overwhelmingly ratified the constitution prescribed by the Convention of 1947, as well as the residency requirement that went with it, and the constitution took effect in 1948.⁴⁸

Subsequently, however, the United States Supreme Court in *Reynolds v. Sims*⁴⁹ changed the provision by announcing that “seats in both houses of a bicameral [S]tate [L]egislature must be apportioned on a population basis.”⁵⁰ Thereafter, on May 10, 1965, a statute was enacted that provided for a new Constitutional Convention to be convened in 1966 to address re-apportionment, in part to address how re-apportionment was to affect the qualifications of Legislators.⁵¹ Ultimately, the constitution was amended in 1966 to prescribe re-apportionment of legislative districts with the decennial census, doing away with the former county system of representation.⁵² This is what ultimately became article IV, section 2, paragraphs 1 and 3.⁵³

46. See STATE OF NEW JERSEY, CONSTITUTIONAL CONVENTION OF 1947 481 (1947).

47. *Id.*

48. See ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 17 (Oxford Univ. Press, Inc., 2d ed. 2012).

49. 377 U.S. 553 (1964).

50. *Id.* at 568.

51. See Arthur J. Sills & Alan B. Handler, *The Imbroglia of Constitutional Revision—Another By-Product of Reapportionment*, 20 RUTGERS L. REV. 1, 9 (1965).

52. ERNEST C. REOCK, JR., UNFINISHED BUSINESS: THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1966 2, 192 (2003); Brief for Plaintiffs-Intervenors at 25–30, *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012) (No. 01-2024).

53. N.J. CONST. art. IV, § 2, ¶¶ 1, 3.

However, nowhere in the Proceedings did the Convention of 1966 drafters mention a change to the residency requirement; rather, the change in the language of the residency requirement—replacing “county” with “district”—came as a result of the Committee on Arrangement and Style’s draft of “Proposal Number 45.”⁵⁴ The Committee on Arrangement and Style was utilized during the Constitutional Convention of 1966 in order to make the proper arrangement of language for the amendment, however, the Committee was not authorized “to change the sense or purpose of any proposal referred to it.”⁵⁵ Therefore, the framers of the constitutional amendment neither debated, discussed, nor even referred to the residency requirement’s change—by extension, the voters’ subsequent ratification did not take into account this change either.

III. LITIGATION CHALLENGING RESIDENCY REQUIREMENTS

A. *Litigation in New Jersey*

Residency requirements for elected officials in New Jersey have a litigious history at both the state and local level. In 1951, the New Jersey Supreme Court, in *Stothers v. Martini*,⁵⁶ held that residency requirements prescribed for local officials by the State Legislature under the Walsh Act,⁵⁷ which consisted of being “a citizen and resident of the municipality for at least two years immediately preceding his election, or [having] voted in such municipality at the two general elections immediately preceding his election[.]” were constitutional under the Fourteenth Amendment.⁵⁸ *Stothers* found that since this requirement was statutory in nature, rather than drawn from the constitution, and as the constitution did not provide an “inherent right to be elected or appointed to office or public position, it is appropriate for the appropriate law-making body to prescribe *reasonable* qualifications.”⁵⁹ Interestingly, the *Stothers* court saw fit to note that:

54. State of New Jersey, *Proposal No. 45*, in CONSTITUTIONAL CONVENTION OF 1966 MISCELLANEOUS PAPERS (1966); Brief for Plaintiffs-Interveners at 25–30, *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012) (No. 01-2024).

55. STATE OF NEW JERSEY, NEW JERSEY CONSTITUTIONAL CONVENTION OF 1966 OFFICIAL RULES 7 (1966); Brief for Plaintiffs-Interveners at 25–30, *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012) (No. 01-2024).

56. 79 A.2d 857 (N.J. 1951).

57. Walsh Act, 1948 N.J. Laws 82 (codified as amended N.J. REV. STAT. § 40:72-1 (1948)). It is worth noting that the citizenship and residency requirements under the Walsh Act were later amended by the State Legislature. See S.B. 1282, 1980 Leg. (N.J. 1980).

58. *Stothers*, 79 A.2d at 860.

59. *Id.* at 859 (emphasis added).

[i]ndeed, the [New Jersey] Constitution itself by providing residence requirements for key officers in State government has enunciated the principle that the persons who are to make and execute the laws of the State should have a substantial period of residence in this State in order to familiarize themselves with its conditions and needs.⁶⁰

In a similar case, *Gangemi v. Rosengard*,⁶¹ the New Jersey Supreme Court held that the Faulkner Act's requirements for local officials, which included a two-year residency requirement *and* a two-year voter registration requirement, were unconstitutional due to the requirement of voter registration.⁶² However, the *Gangemi* court differentiated the facts from *Stothers*, and once again reiterated the aforementioned *Stothers* language on the constitutionality and principles behind residency requirements on the state and local levels.⁶³ The *Gangemi* court further asserted that the "citizenship and residence" requirements for state officials "offer evidence respectively of . . . loyalty, and either an acquaintance with local problems or a stake in their solution."⁶⁴

Seemingly, however, the first time that the New Jersey courts took up a direct challenge to the residency requirement for State Legislators was in *Ammond v. Keating*.⁶⁵ In *Ammond*, the appellate division of the New Jersey Superior Court dealt with a prospective candidate for State Senate in the Sixth Senatorial District who, undisputedly, had not been a resident of the district for the requisite year.⁶⁶ The defendant asserted that the requirement was offensive to the Fourteenth Amendment, and the trial court agreed.⁶⁷ The appellate division disagreed with the trial

60. *Id.* at 860. This language is strikingly similar to that of the framers of the 1844 constitution when referencing the principles behind the right to suffrage, and by extension, the principles behind the qualifications to be elected to public office. *See supra* note 35.

61. 207 A.2d 665 (N.J. 1965).

62. *Id.* at 668–69.

63. *Id.* at 668.

64. *Id.* at 669. This language is an addition of the *Stothers* language, and a reaffirmation of the principles asserted by the framers of the New Jersey Constitution of 1947.

65. 374 A.2d 498 (N.J. Super. Ct. App. Div. 1977), *certif. denied*, 377 A.2d 689 (N.J. 1977).

66. *Id.* at 499. The plaintiff-appellant was an incumbent State Senator from the Sixth Senatorial District who was running against the defendant-appellee in the Democratic Primary of 1977. *Id.*; *see also* N.J. CONST. art. IV, § 1, cl. 2. It is of note that 1977 was not a re-districting year, and the requirement was not challenged on such a basis.

67. *Ammond*, 374 A.2d at 498–99. The trial court held that "the right to seek elective office is a fundamental right necessitating application of the so-called 'compelling interest' test to determine its constitutional validity" and proceeded to strike down the requirement

court, however, relying upon precedent, including United States Supreme Court precedent, which upheld residency requirements in other states.⁶⁸ It should be noted, however, there is a difference between the Supreme Court precedent—upholding *in-state* residency requirements—and *Ammond*, which upheld an *in-district* residency requirement.⁶⁹ *Ammond* emphasized that precedent, including the *Stothers* decision, provided that “the one-year district residency requirement . . . at least bears a rational relation to legitimate state goals,” and upheld its constitutionality.⁷⁰

In *Matthews v. City of Atlantic City*,⁷¹ a Walsh Act case concerning a candidacy for the office of City Commissioner, the New Jersey Supreme Court held that a two-year residency requirement for such public offices⁷² violated equal protection.⁷³ The *Matthews* court asserted new and important language regarding the principles behind residency requirements:

[A] durational residency requirement is directed at maintaining the integrity of the ballot by preventing fraudulent and frivolous candidacies. It ensures that candidates have some knowledge of local affairs and, conversely, that local voters have an opportunity to learn about a candidate to intelligently assess his fitness for office. Properly drawn, a

by “[f]inding no compelling state interest” to justify its imposition. *Id.* at 499. Thus, defendant-appellee’s name was “ordered placed on the primary election ballot.” *Id.*

68. *Id.* The *Ammond* court relied upon *Sununu v. Stark*, 383 F. Supp. 1287 (D.N.H. 1974), *aff’d mem.*, 420 U.S. 958 (1975); *Chimento v. Stark*, 353 F. Supp. 1211 (D.N.H. 1973), *aff’d mem.*, 414 U.S. 802 (1973); and *Walker v. Yucht*, 352 F. Supp. 85 (D. Del. 1972). *Ammond*, 374 A.2d at 499–500. The first two cases, as described *infra* in Section II-B, upheld that a durational residency requirement of seven years is state imposed upon those seeking election to the New Hampshire Senate, and the same durational residency requirement of seven years in-state imposed upon those seeking election to the office of Governor of New Hampshire. *Sununu*, 383 F. Supp. at 1290; *Chimento*, 353 F. Supp. at 1218. In *Walker*, a three-year-in-state and one-year-in-district residency requirement imposed upon those seeking election to the Delaware General Assembly was upheld against equal protection challenges. 352 F. Supp. at 99.

69. *Ammond*, 374 A.2d at 498–99; *Sununu*, 383 F. Supp. at 1289; *Chimento*, 353 F. Supp. at 1218. *Sununu* and *Chimento* again concerned requirements of residency in the state of New Hampshire, and *Chimento*, in particular, could not have concerned an in-district residency because the provision dealt with the office of the Governor. *Chimento*, 353 F. Supp. 1211. *Ammond*, by contrast, dealt with an in-senatorial-district requirement. *Ammond*, 374 A.2d at 498–99.

70. *Ammond*, 374 A.2d at 499–500.

71. 417 A.2d 1011 (1980).

72. The requirement provided that in a Walsh Act municipality, which is run by a board of commissioners, “the elected governing body, ‘shall have been a citizen and resident of the municipality for at least two years immediately preceding his election.’” *Id.* at 1012.

73. *Id.* at 1012–13. The challengers of the particular provision had brought suit under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1012.

durational residency requirement is directed at providing a sufficient period of time for these two “educational” functions to take place.⁷⁴

However, the court chose not to resolve “whether a two-year residency requirement passes constitutional muster” and instead decided the case on narrow grounds tailored to the requirements as they related to the Walsh Act.⁷⁵ Interestingly, in his concurring opinion, Justice Mark A. Sullivan argued for a different approach in striking down the residency requirement:

[I]n this day and age a two-year period no longer subserves the purpose of a residency requirement as outlined in *Stothers v. Martini* In 1911, when the Walsh Act was originally enacted, the pace of life was slower, means of transportation and travel were not what they are today and persons did not change their residences as frequently as they do at the present time. The increasing transience of the average individual today, however, calls for reconsideration of extended residency requirements such as the one here involved. I would hold that a two-year period, such as the Walsh Act calls for, is unduly burdensome and restrictive.⁷⁶

Justice Sullivan’s acknowledgement that residency requirements may have lost their purpose in modern governance underscored what would be a litigious future for such requirements in New Jersey.

74. *Id.* at 1020. This again mirrors, if not adds to, the principles behind residency requirements found in the New Jersey Constitution.

75. *Id.* at 1022. The *Matthews* court decided that any “justifications for the residency requirement [within the Walsh Act] . . . lose meaning when it is observed that the statute applies to only [forty] out of 567 municipalities in the State with commission form of government.” *Id.* (citing FITZGERALD, LEGISLATIVE MANUAL 891–904 (1980)). Thus, because “[t]he vast majority of municipalities have no durational residency requirement for candidacy,” the court decided that the facts of the case could not escape the similar rationale and tenets of the *Gangemi* decision—there was no showing that “an additional two years [was] reasonably necessary for a candidate to become familiar with local problems or for the voters to become familiar with the candidate.” *Id.* at 1022. The court harshly pointed out that “[n]o other justification for this distinction has been advanced, nor does one exist.” *Id.* Therefore, the court concluded that the provision was offensive to the Fourteenth Amendment’s Equal Protection Clause. *Id.*

76. *Id.* at 1022–23 (Sullivan, J., concurring) (emphasis added). Justice Sullivan did not, however, believe that there was an equal protection basis for invalidating the residency requirement at issue in *Matthews*. *Id.* Sullivan reasoned that this was because the electorate of Atlantic City had repeatedly voted to continue their governance under the Walsh Act. *Id.*

B. Critical Residency Problems and Solutions Elsewhere

The relevant state and federal litigation that has occurred over the years makes it evident that a clear trend is emerging that may eventually be taken head-on by the Supreme Court. Specifically, residency requirements that offer a number of years of *voting-district* residency pose a myriad of problems that cause them to be struck down—particularly during re-districting years—and mirror real issues in New Jersey. However, residency requirements that offer a number of years of *state* residency are consistently upheld.

In *Wenke v. Hitchcock*,⁷⁷ the California Supreme Court unanimously held that, when an elector of the First Supervisorial District⁷⁸ had his resident municipality moved from his original political district via re-districting—and, by extension, he himself was removed from the vast number of constituents he had served for eighteen years—he was entitled to candidacy after relocating back into his original district before the next election, and a one-year residency requirement was not applicable to him.⁷⁹ In fact, the *Wenke* court found that:

77. 493 P.2d 1154 (Cal. 1972).

78. Supervisors are elected officers of the county government in California, with numerous individual political district boundaries depending on the county. See, e.g., *Orange County Supervisorial Districts*, OC ALMANAC, <http://www.ocalmanac.com/Government/g101a.htm#5Dist> (last visited Aug. 19, 2014).

79. *Wenke*, 493 P.2d at 1157–58. The re-districting process in *Wenke* culminated in October of 1971 with a re-districting ordinance known as “Government Code section 25001,” which provided that:

[f]ollowing each decennial federal census, and using the census as a basis, the board shall adjust the boundaries of any or all of the supervisorial districts of the county so that the districts shall be as nearly equal in population as may be. In establishing the boundaries of the districts the board may give consideration to the following factors: (a) topography, (b) geography, (c) cohesiveness, continuity, integrity, and compactness of territory, and (d) community of interests of the districts.

Id. at 1156 n.1. At that time, an election for Supervisor in the First Supervisorial District was planned for 1972—the following year—due to the expiration of the incumbent’s regular term of office. *Id.* at 1156. However, due to re-districting, Petitioner’s resident municipality, along with those of 3,000 other residents, was moved into the Fourth Supervisorial District, where the next election for Supervisor was not planned until 1974 due to staggered elections. *Id.* The residency requirement in question required that “to qualify for election as a member of the board of supervisors, a candidate ‘shall have been an elector of the district which he represents for at least one year immediately preceding his election’” *Id.* at 1157–58.

the purpose of the residency requirement would be promoted by permitting a candidate who, prior to his removal therefrom by a re-districting enactment, has resided in a given district for the necessary period of time to run for office in his former district providing he relocates his residence within its boundaries.⁸⁰

Thus, an unfortunate candidate in these situations was held to be able to apply his previous period of residence to his new or old Supervisory District during re-districting years.⁸¹ However, should the candidate choose to move back into his former district, he had to “relocate his residence in his former district by moving it to a location” that remained within its boundaries.⁸²

In perhaps the landmark case foreshadowing others to come, the Supreme Court of Appeals of West Virginia in *Martin v. Jones*⁸³ upheld the candidacy of two delegates over a one-year-in-district requirement.⁸⁴ The delegates showed an intention to move back into their original district after their respective municipalities were re-districted out,⁸⁵ due to a legislative re-apportionment⁸⁶ that occurred less than one year prior

80. *Id.* at 1159–61. The *Wenke* court reasoned, based on the rationale behind residency requirements, that to ensure “a reasonable knowledge by a proposed candidate of the general requirements of his [constituency][,]” it made sense for Petitioner to be allowed to relocate back in order to run as a candidate where he was familiar with local problems and needs. *Id.* at 1160 (alteration in original) (quoting *Zeilenga v. Nelson*, 484 P.2d 578 (Cal. 1971)). Petitioner would certainly be as familiar “as the candidate who by [sheer good luck] remains in the district unaffected by the change in boundaries.” *Id.* at 1160. Furthermore, the court went so far as to suggest that “indeed it may thwart the democratic process to insist that he may run only in his new district,” which would be totally unfamiliar to him, and vice-versa. *Id.*

81. *Id.*

82. *Id.*

83. 414 S.E.2d 445 (W. Va. 1992).

84. The one-year-in-district residency requirement at issue in *Martin* was article VI, section 12 of the West Virginia Constitution, which provided:

No person shall be a [S]enator or delegate who has not for one year next preceding his election, been a resident within the district or county from which he is elected; and if a [S]enator or delegate remove from the district or county for which he was elected, his seat shall be thereby vacated.

Martin, 414 S.E.2d at 446 (quoting W. VA. CONST. art. VI, § 12).

85. Petitioners-Candidates were residents of Ohio County, West Virginia and Wood County, West Virginia, and sitting delegates in the Third District and Eighth District of the West Virginia Legislature, respectively. *Id.* at 446. Petitioners sought to “move into different and ‘new’ delegate districts within their current counties” in order “to remain with the bulk of their current constituents.” *Id.* at 446 n.2.

86. Article VI, section 10 of the West Virginia Constitution provides:

to the general election.⁸⁷ The *Martin* court, after considering the rationale behind residency requirements,⁸⁸ concluded that “[n]one of the evils our [c]onstitution seeks to avoid by [the implementation of a] residency requirement . . . are even vaguely suggested by the facts of either petitioners’ cases.”⁸⁹

The *Martin* court further reasoned that because “the drafters [of the West Virginia Constitution of 1872] never envisaged this situation where a technical impediment would prevent serving [L]egislators from continuing to represent their own constituents or prevent challengers in like circumstances from filing[,]” to hold otherwise would be to “exalt[] . . . form over substance” and “invite frequent visits by that most common of political friends, the gerrymander.”⁹⁰ Likewise, because the re-

The arrangement of the senatorial and delegate districts, and apportionment of delegates, shall hereafter be declared by law, as soon as possible after each succeeding census, taken by authority of the United States. When so declared they shall apply to the first general election for members of the Legislature, to be thereafter held, and shall continue in force unchanged, until such districts shall be altered, and delegates apportioned, under the succeeding census.

W. VA. CONST. of 1872, art. VI, § 10; *Martin*, 414 S.E.2d at 446. Pursuant to this provision of the West Virginia Constitution, the Legislature in 1992 “re[-]apportioned the delegate districts,” resulting in Petitioners’ districts being “substantially rearranged.” *Martin*, 414 S.E.2d at 446.

87. The West Virginia Legislature adopted “the re[-]districting statute, Enrolled Committee Substitute for House Bill No. 301 and Enrolled House Bill No. 4043 . . . , less than one year before the 1992 general election.” *Martin*, 414 S.E.2d at 447.

88. *Id.* The Supreme Court of Appeals of West Virginia had previously considered the merits of residency requirements in *White v. Manchin*, 318 S.E.2d 470 (W. Va. 1984). The *White* court found that such requirements “promote candidate familiarity with the needs and problems of the people to be represented . . . promote voter familiarity with the character, intelligence and reputation of the candidates . . . [and] further the goal of precluding frivolous or fraudulent candidacy by those who are more interested in public office than public service.” *Id.* at 446 (quoting *White*, 318 S.E.2d at 489).

89. *Id.* at 446–47. As applied to the rationale behind the residency requirement, the *Martin* court found that Petitioners’ “constituents [were] already familiar with [their] character, intelligence and reputation” and Petitioners “d[id] not wish to engage in frivolous or fraudulent candidacies,” but rather “wish[ed] to *continue* in their current laudable enterprise of public service.” *Id.* at 447.

90. *Id.* at 447. The *Merriam-Webster Dictionary* defines “gerrymandering” as

1. to divide (a territorial unit) into election districts to give one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible;
2. to divide (an area) into political units to give special advantages to one group.

Gerrymandering, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/gerrymandering> (last visited Aug. 17, 2014). The *Martin* court was clearly concerned that, if allowed to stand, the re-districting provision combined with the residency provision would

apportionment occurred so close in time to the general election, it was not feasible for “[L]egislators or challengers in like circumstances to rearrange their residences within the one year spoken of by [the West Virginia Constitution] [a]rt[icle] VI, [section] 12.”⁹¹ Again, to uphold such a restriction would invite “outrageous and destructive political maneuvering every ten years[.]” contradictory to “the intent of the drafters of [the West Virginia] Constitution.”⁹² Thus, the remedy the Supreme Court of Appeals of West Virginia conjured was to uphold the satisfaction of the residency requirement “[i]n those cases in which a person moves to a new district, a part of which was in his old district, after a legislative re-apportionment occurring so close to election day that less than a year remains before the general election.”⁹³ However, to be eligible for placement on the ballot, the court concluded that the candidate “must actually reside in the district he seeks to serve on or before the day of the general election.”⁹⁴

Contrasting *Wenke* and *Martin* are two federal district court cases from District of New Hampshire, *Chimento v. Stark*⁹⁵ and *Sununu v. Stark*,⁹⁶ that were both affirmed directly in memorandum opinions by the United States Supreme Court, as well as a federal district court case from the Western District of Oklahoma: *Draper v. Phelps*.⁹⁷ In *Chimento*, a three-judge district court panel found that a seven-year-in-state residency requirement for the office of Governor⁹⁸ did not violate, *inter*

allow the hands of the re-districting process to concentrate[] the voting strength of the opposition in as few districts as possible. *Martin*, 414 S.E.2d at 447.

91. *Martin*, 414 S.E.2d at 447.

92. *Id.*

93. *Id.* The *Martin* court therefore granted Petitioners’ writ and directed Respondents—the West Virginia Secretary of State and county election officials—“to accept the petitioners’ ‘Candidate Certificates of Announcement for the 1992 Election.’” *Id.* Furthermore, the West Virginia Secretary of State was mandated to “revise his official documentation regarding elections accordingly.” *Id.* The court also directed that “others in similar situations”—such as other potential candidates and election officials—should be guided by this opinion. *Id.* This can easily be applied to other courts dealing with the merits of similar factual situations.

94. *Id.*

95. 353 F. Supp. 1211 (D.N.H.), *aff’d mem.*, 414 U.S. 802 (1973).

96. 383 F. Supp. 1287 (D.N.H. 1974), *aff’d mem.*, 420 U.S. 958 (1975).

97. 351 F. Supp. 677 (W.D. Ok. 1972).

98. The seven-year-in-state requirement is found in the New Hampshire Constitution, part II, article XLII, which provides: “Qualifications for Governor . . . And no person shall be eligible to this office, unless at the time of his election, he shall have been an inhabitant of this state for [seven] years next preceding, and unless he shall be of the age of [thirty] years.” N.H. CONST. pt. II, art. XLII. Notably, there is no in-district requirement as the office of Governor is a statewide position. Members of the New Hampshire Legislature—Senators and Councillors—must comply with the seven-year-in-state requirement as well as an in-district requirement, which provides only that Legislators “at the time thereof . . .

alia, the Equal Protection Clause of the Fourteenth Amendment.⁹⁹ Up to the time of the litigation, no other case had yet considered the merits of a durational residency requirement that appeared in a state constitution.¹⁰⁰

Weighing the facts of the case, the judges applied the “compelling state interest” test,¹⁰¹ and concluded that “the seven[-]year residency requirement acts only as a minimal infringement upon the ability of the plaintiff to participate in the election process and that its limiting effect upon the voters’ choice of candidates is more hypothetical than real.”¹⁰² The “compelling state interests”—“to ensure that the chief executive officer . . . is exposed to the State and its people,” “giving the voters . . . an opportunity to gain by observation and personal contact some firsthand knowledge of the candidates for Governor[,]” and “to prevent frivolous candidacy by persons who have had little previous exposure to the problems and desires of the people of New Hampshire”—far outweighed what the court viewed as a minimal restriction tailored to those specific state interests.¹⁰³ “It [did] not seriously impair the participation of the plaintiff in the election process and [had] only a negligible impact on the voters’ right to have a meaningful choice of candidates for Governor.”¹⁰⁴ Importantly, the *Chimento* court noted its place among the branches of government, stating clearly that if this particular residency requirement

shall be an inhabitant of the district for which he shall be chosen.” N.H. CONST. pt. II, art. XXIX. However, there is no timeframe required in order to comply with this provision. The *Chimento* court noted that the provision had been included in the New Hampshire Constitution since 1784—a model of other state constitutions, including Massachusetts. *Chimento*, 353 F. Supp. at 1217–18.

99. *Chimento*, 353 F. Supp. at 1211.

100. *Id.* at 1215.

101. The *Chimento* court relied upon *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); and *Ciprano v. City of Homa*, 395 U.S. 701 (1969) for the proposition that “if the state’s exercise of this right [to impose candidate restrictions] invades an individual’s constitutional rights, the restrictions become unconstitutional unless there is a showing of a compelling state interest justifying them.” *Chimento*, 353 F. Supp. at 1215.

102. *Chimento*, 353 F. Supp. at 1215–16.

103. *Id.* The *Chimento* court found that this, of all restrictions, was the “least” as far as limiting candidate availability. *Id.* at 1216. Furthermore, the requirement “[did] not act as an outright ban on anyone’s candidacy . . . rather, it delays the eligibility of the candidate . . . until a time when he has been a resident of the State for seven years.” *Id.* Instead, the requirement “insures that the chief executive officer of New Hampshire is exposed to the problems, needs, and desires of the people whom he is to govern,” and also gives the voters “a chance to observe him and gain firsthand knowledge about his habits and character.” *Id.* at 1217.

104. *Id.*

was to be eliminated, “it should be accomplished by the voters through the constitutional amending process.”¹⁰⁵

Sununu then took up the seven-year-in-state residency requirement as it related to State Senators,¹⁰⁶ and found that it similarly was not offensive to equal protection.¹⁰⁷ The *Sununu* court then repeated the “compelling state interest” test and rationale for holding as much, utilizing the language of *Chimento*, and upheld the requirement in the same manner.¹⁰⁸ Thus, the *Sununu* court was “unable to state that the seven-year durational residency requirement [was] not constitutionally ‘tailored’ to the state’s legitimate objectives.”¹⁰⁹ The court further

105. *Id.* (emphasis added).

106. The specific provision as it relates to Senators is found in article XXIX, clause 1 of the New Hampshire Constitution: “Qualifications of Senators. Provided nevertheless, that no person shall be capable of being elected a [S]enator . . . who shall not have been an inhabitant of this state for seven years immediately preceding his election” N.H. CONST. pt. II, art. XXIX, cl. 1; *Sununu*, 383 F. Supp. at 1289. The *Sununu* court engaged in some historical recounting to assert that “[i]t would be presumptuous for this court to engage in judicial hypothesizing in order to hold unconstitutional a provision of the New Hampshire Constitution which has been unchallenged since 1784” *Sununu*, 383 F. Supp. at 1291. The residency requirement survived multiple challenges to its length: a change from seven to four years via constitutional amendment submitted to the voters failed in 1966 and, although not available at the time, later in 1978. *Id.*; see also N.H. CONST. pt. II, art. XXIX.

107. *Sununu*, 383 F. Supp. at 1292.

108. *Id.* at 1290. It is interesting to note that the “compelling state interest” test asserted in *Chimento* was taken up as applied to State Senators in *Sununu*, since *Chimento* stated quite clearly that “[t]he rationale asserted by the State for such a residency requirement carried far greater weight [for the office of Governor] than if it applied to candidacies for lesser public offices”—Senator being one of them. See *Chimento*, 353 F. Supp. at 1216. In fact, *Chimento* went so far in finding its rationale for Governors to be different than cases for candidates for lower public offices that it found previous precedent to be “inapposite” to the facts in that matter. *Id.* at 1216 n.10. The court cited the following cases as example precedent: *Hadnott v. Amos*, 320 F. Supp. 107 (M.D. Ala. 1970), *aff’d* without opinion, 401 U.S. 968 (1971) (Office of State Circuit Judge); *Bolanowski v. Raich*, 330 F. Supp. 724 (E.D. Mich. 1971) (Mayor); *Green v. McKeon*, 335 F. Supp. 630 (E.D. Mich. 1971) (all elective/appointive city offices); *Mogk v. City of Detroit*, 335 F. Supp. 698 (E.D. Mich. 1971) (City Charter Revision Commission); *McKinney v. Kaminsky*, 340 F. Supp. 289 (M.D. Ala. 1972) (County Commissioner); *Wellford v. Battaglia*, 343 F. Supp. 143 (D. Del. 1972) (Mayor); *Zeilenga v. Nelson*, 484 P.2d 578 (Cal. 1971) (Office of County Supervisor); *Stapleton v. Clerk for City of Inkster*, 311 F. Supp. 1187 (E.D. Mich. 1970) (involving property ownership requirement for the office of City Clerk). *Chimento*, 353 F. Supp. at 1216 n.10. Seemingly, the *Sununu* court wrote this argument off by stating that “[a]lthough durational residency requirements for local offices have been held unconstitutional, no court has held unconstitutional a residency requirement for statewide elective office.” 383 F. Supp. at 1290 n.3.

109. *Sununu*, 383 F. Supp. at 1291.

reiterated the rationale from *Chimento* that any such change should come from the voters via a constitutional amendment.¹¹⁰

Additionally, in *Draper v. Phelps*,¹¹¹ a federal district court upheld a six-month-in-district residency requirement¹¹² for candidates for the Oklahoma House of Representatives against equal protection challenges.¹¹³ This court, like *Chimento* and *Sununu*, pursued its analysis under the “compelling [state] interest standard”¹¹⁴ and likewise concluded that the durational residency requirement was “reasonably necessary to the accomplishment of legitimate state objectives,” which included, again, “preventing frivolous and fraudulent candidacy by persons who have had no previous exposure to the problems and desires of the electorate of a representative district[,]” giving the problems of a district considerable weight and consideration, making plans for candidacy in advance of election, and preventing harm to the voter.¹¹⁵

C. Relevant United States Supreme Court Precedent

While the Supreme Court has yet to grant certiorari in a case stemming from the intersection of durational residency requirements and a state’s re-apportionment process, there are several cases dealing with election requirements that have guided lower courts in deciding these issues for multiple decades. These cases foreshadow how the Supreme Court may rule in the future, but still, they merely deal with the relevant

110. *Id.*

111. 351 F. Supp. 677 (W.D. Ok. 1972).

112. The Oklahoma Constitution provides, in article III, section 1, that “[q]ualified electors of this state shall be . . . citizens of the state . . . who have resided in the state at least six months, in the county two months, and in the election precinct twenty days next preceding the election at which such elector offers to vote.” OK. CONST. art. III, § 1; *Draper*, 351 F. Supp. at 679. To be qualified as a candidate for the House of Representatives of the Legislature of Oklahoma, “the candidate must have been a qualified registered elector in such district for at least six (6) months immediately preceding the filing period prescribed by law . . .” *Draper*, 351 F. Supp. at 679 (citing OKLA. STAT. tit. 14, § 108 (1971)).

113. *Draper*, 351 F. Supp. at 686. Importantly, however, the residency requirement was not challenged involving a situation where the candidate’s municipality was re-districted out of his voting district. Rather, Plaintiffs in this matter simply stipulated that they did not comply with the residency requirements and sued in the hopes of relief from the courts. *Id.* at 680. However, the *Draper* court still mentioned the re-apportionment process in detail in order to prop up the rationale that “[t]he exposure of candidates to voters . . . must necessarily be personal and personalized” because, particularly in Oklahoma, the re-apportionment process must look to the different districts together in order to maintain proper representation. *See id.* at 684–85.

114. This standard was asserted by the United States Supreme Court in *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

115. *Draper*, 351 F. Supp. at 682–83.

scrutiny standard for equal protection challenges. *Dunn v. Blumenstein* found that a durational residency requirement could be subject to strict scrutiny when it directly impacted the right to vote and to travel.¹¹⁶ The Court asserted that lower courts are to look to three things when reviewing equal protection claims of these matters: “[1] the classification in question; [2] the individual interests affected by the classification; and [3] the governmental interests asserted in support of the classification.”¹¹⁷ Likewise was *Bullock v. Carter*, which involved a required filing fee as a means for running for public office.¹¹⁸ The Court found that heightened scrutiny could apply when such a requirement “has a real and appreciable impact on the exercise of the franchise [of candidacy], and because this impact is related to the resources of the voters supporting a particular candidate . . . the laws must be ‘closely scrutinized’”¹¹⁹

IV. MODERN CHALLENGES CONCERNING RESIDENCY REQUIREMENTS IN NEW JERSEY

A. *The 2001 Legislative Re-apportionment Process*

In 2001, the decennial re-apportionment process wreaked havoc in the court system as partisan gamesmanship¹²⁰ fueled claims that the legislative re-districting map violated the First, Fourteenth, and

116. *Dunn v. Blumenstein*, 405 U.S. 330 (1972).

117. *Id.* at 335.

118. *Bullock v. Carter*, 405 U.S. 134 (1972).

119. *Id.* at 144.

120. The map that was voted on essentially created a New Jersey Legislature that swept control out of Republican hands, and into that of Democrats. Lawmakers blamed this, in part, on the map that sided with the Democrats. For example, State Senator Kevin O’Toole, a Republican, was quoted as saying “[t]he map gave the Democrats an illegitimate majority” and “blew out the concept of the two-party system in New Jersey.” Josh Margolin, *State’s Controversial Voting District Maps May Be Challenged*, NJ.COM (Mar. 15, 2009, 7:30 AM), http://www.nj.com/news/index.ssf/2009/03/states_controversial_voting_di.html. News reports foresaw this conclusion as soon as the 2001 map came out. For example, the *New York Times* reported that “David Rebovich, a professor of political science at Rider University in Lawrenceville, N.J., said the new map makes the Democrats competitive in several districts.” See Robert Hanley, *New Districts Imperil G.O.P. in New Jersey*, N.Y. TIMES, May 8, 2001, at B5. Prior to his governorship, State Senator Richard Codey—then a member of the 2001 re-apportionment committee—likewise stated that “[t]he new Assembly clearly will be Democratic” and expected Democrats to capture the Senate. *Id.* Over the course of the next decade, this would come to pass. See Margolin, *supra* (“The New Jersey GOP . . . has been the minority party after the district lines were re-drawn nearly a decade ago . . .”).

Fifteenth Amendments.¹²¹ A federal district court took up a parallel challenge to the map in the matter of how the newly-apportioned districts affected sitting Legislators and candidates for the State Legislature vis-à-vis the state constitutional residency requirement for such offices in *Robertson v. Bartels*¹²² (“*Robertson I*”).

Robertson I concerned two plaintiffs—Dennis E. Gonzalez and Jay R. Schwartz¹²³—and defendant John Farmer, then the New Jersey Attorney General.¹²⁴ Both plaintiffs were candidates for the New Jersey General Assembly who were considered ineligible to run for office in 2001 due to the one-year-in-district residency requirement in article IV, section 1, clause 2 of the New Jersey Constitution.¹²⁵ Both Gonzalez and Schwartz

121. See *Robertson v. Bartels*, 148 F. Supp. 2d 443, 445 (D.N.J. 2001), *aff'd*, 534 U.S. 1110 (2002). The three-judge panel consisting of Third Circuit Judge Morton I. Greenberg and District Judges Dickinson R. Debevoise and Harold A. Ackerman undertook the initial challenge of the 2001 re-districting map. See *id.*

122. 150 F. Supp. 2d 691 (2001) [hereinafter *Robertson I*]. The third count of the plaintiffs’ complaint in the first *Robertson* case, 148 F. Supp. 2d 443 (2001), addressing the residency requirement, was referred solely to Judge Debevoise for disposition and thus was never a part of the *Robertson* litigation adjudicated at the United States Supreme Court level. The *Robertson* three-judge panel found that the standard they were to follow for addressing the residency challenge together with the challenge to the re-districting map was for the residency challenge to be “inextricably intertwined” with the constitutional challenges. *Robertson*, 148 F. Supp. 2d at 461 (emphasis omitted) (citing *Page v. Bartels*, 248 F.3d 175, 190 (3d Cir. 2001)). Based on the facts, delineated *infra* in this Note, the court concluded: “[I]t is plain that the re-districting and residency issues are so distinct that the sound exercise of discretion should lead us to refer the voting rights issue to a single judge for disposition,” and therefore referred the claim to a single judge, decided in *Robertson I*. *Robertson*, 148 F. Supp. 2d at 461–62; see also *infra*. As Judge Debevoise was an original member of the three-judge panel, he did not require oral argument for the disposition in the latter case. See *Robertson I*, 150 F. Supp. 2d at 693.

123. Then-Assemblyman Gerald H. Zucker had, at one point, joined the litigation as a plaintiff. *Robertson I*, 150 F. Supp. 2d at 693 n.2. However, as he remained “eligible to run because he continue[d] to reside in the newly configured Thirty-fourth District,” Judge Debevoise concluded that he did not “face the barrier caused by the residency requirement” and was therefore not party to the action. *Id.* at 693. Moreover, the lead plaintiff—Senator Norman Robertson—then the sitting Senator from the Thirty-fourth District, did not assert that the residency requirement applied to him as his municipality had not been moved out of the district in the 2001 re-apportionment map. *Robertson*, 148 F. Supp. 2d at 460 n.14.

124. *Robertson I*, 150 F. Supp.2d at 693.

125. *Id.* at 693–94; N.J. CONST. art. IV, § 1, cl. 2. The relevant provision provides that:

[n]o person shall be a member of the Senate who shall not have attained the age of thirty years, and have been a citizen and resident of the state for four years, and of the district for which he shall be elected one year, next before his election. No person shall be a member of the General Assembly who shall not have attained the age of twenty-one years and have been a citizen and resident of the State for two years, and of the district for which he shall be elected one year next before his

moved their residences from one municipality to another in 2001, and, regardless of the fact that the re-apportionment process changed the district map layout for these municipalities, could not meet the requirement's demands, causing them to challenge the requirement's constitutionality on equal protection grounds.¹²⁶ Relying upon United States Supreme Court precedent,¹²⁷ the *Robertson I* court determined that the residency requirement was subject to the Fourteenth Amendment Equal Protection Clause based on "the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification."¹²⁸ The court conceded that courts across the country had rejected¹²⁹ and upheld¹³⁰ residency requirements on an equal protection basis, asserting that "the weighing process in each case is fact

election. No person shall be eligible for membership in the Legislature unless he be entitled to the right of suffrage.

N.J. CONST. art. IV, § 1, cl. 2.

126. Gonzalez moved in January 2001 from Paterson, New Jersey, to Clifton, New Jersey—under both the previous and 2001 re-apportionment maps, Paterson and Clifton were in the Thirty-fourth and Thirty-fifth Districts, respectively. See *Robertson I*, 150 F. Supp. 2d at 693–94. Thus, Gonzalez's barrier to candidacy remained intact. *Id.* at 694. Schwartz moved in March 2001 from West Paterson, New Jersey to Little Falls, New Jersey. *Id.* Under the previous re-apportionment map, West Paterson was in the Thirty-fifth District and Little Falls was in the Thirty-fourth District. *Id.* Then, under the 2001 map, West Paterson was in the Thirty-fourth District and Little Falls was in the Fortieth District. *Id.* Thus, his barrier similarly remained intact. *Id.* The court found that the case "implicate[d] primarily equal protection considerations," "[a]lthough plaintiffs advance[d] free speech and right to travel contentions" in their complaint. *Id.*

127. The *Robertson I* court relied primarily upon *Dunn* and *Bullock* for the proper rationale behind determining the constitutionality of "restrictions on the right of persons to run for office." *Id.*

128. *Id.* (citing *Dunn v. Blumenstein*, 405 U.S. 330, 335 (1972)).

129. The *Robertson I* court listed the following cases as, to that point, had rejected residency requirements in the face of equal protection challenges: *Bolanowski v. Raich*, 330 F. Supp. 2d 724 (E.D. Mich. 1971) (three-year residency requirements for mayoral candidates violated Equal Protection Clause); *Green v. McKeon*, 335 F. Supp. 2d 630 (E.D. Mich. 1971) (three-judge panel) (three-year residency requirement for City Charter Revision Commission was unconstitutional); *McKinney v. Kaminsky*, 340 F. Supp. 2d 289 (M.D. Ala. 1972) (five-year residency requirement for County Commissioner violated Equal Protection Clause); *Wellford v. Battaglia*, 485 F.2d 1151 (3d Cir. 1973) (five-year residency requirement for office of Mayor violated Equal Protection Clause). *Id.*

130. The *Robertson I* court listed the following cases that, to that point, had upheld residency requirements against equal protection challenges: *Beil v. City of Akron*, 660 F.2d 166 (6th Cir. 1981); *Hadnott v. Amos*, 320 F. Supp. 107 (M.D. Ala. 1970) (three-judge panel), *aff'd mem.*, 401 U.S. 968 (1971); *Walker v. Yucht*, 352 F. Supp. 85 (D. Del. 1972) (three-judge panel); *Draper v. Phelps*, 351 F. Supp. 677 (W.D. Okla. 1972) (three judge panel). *Robertson I*, 150 F. Supp. 2d at 705.

sensitive.”¹³¹ The court noted that “a fundamental right [was] at stake,” but not that of the right to travel or the right to free speech, but rather “the combined right of persons to run for public office and the right of voters to vote for candidates of their choice.”¹³²

The *Robertson I* court noted that the state Attorney General’s office asserted rationales for the residency requirement equivalent to those of *Matthews* and *Stothers*.¹³³ However, it quickly did away with that argument, finding that “in a number of cases these [rationales] have not been found to represent compelling state interests when weighed against residency requirements imposed upon voters or potential candidates.”¹³⁴ The court rejected the idea that residency requirements were needed by the state to allow voters to familiarize themselves with the candidates, preventing fraudulent candidacies, and “for the voters to recognize the new resident of the district,” writing that these rationales required “a considerable stretch of the imagination,” and utilizing *Dunn* as significant precedent.¹³⁵ Additionally, the *Robertson I* court found that the “lack of substance to the State’s interest in the one year residency requirement” stemmed from the fact that both candidates were separated from districts that knew them well, or because of the re-districting process, not at all.¹³⁶ The *Robertson I* court thus held that the one-year

131. *Id.*

132. *Id.* at 695–96. The Attorney General had argued, seemingly successfully, that this matter did not affect the rights to free speech and travel. *Id.*

133. These rationales included:

i) “[T]he one year requirement allows the people of New Jersey the necessary opportunity to become familiar with a potential candidate” . . . ii) “preventing political carpet bagging” and iii) “. . . for the benefit of all the [s]tate’s residents, [the residency requirement] allows a candidate the opportunity to become familiar with the issues and concerns that are important to the people he or she seeks to represent.”

Id. at 696.

134. *Id.* The *Robertson I* court found that the ability of voters to familiarize themselves with a political candidate was rejected by the Second Circuit in *Billington v. Hayduk*—that mandating a residency requirement “appear[ed] unrelated” to whether the voters “could satisfy themselves of [a] candidate’s sincerity and knowledgeableness.” *Billington v. Hayduk*, 439 F. Supp. 975, 979 (S.D.N.Y. 1977), *aff’d*, 565 F.2d 824 (2d Cir. 1977). Likewise, *Dunn*, “rejected both the prevention of fraud and ensuring knowledgeable voters as sufficiently compelling to justify a voter residency requirement.” *Robertson I*, 150 F. Supp. 2d at 696 (citing *Dunn v. Blumenstein*, 405 U.S. 330, 335 (1972)).

135. *Id.* at 696–97.

136. *Id.* Adding to the *Robertson I* court’s rationale was the fact that re-districting in New Jersey’s two largest municipalities—Newark and Jersey City—creates political boundaries that literally “run down the middle of streets and through the heart of local neighborhoods.” *Id.* at 698.

residency requirement “d[id] not survive a strict scrutiny analysis” and “[was], therefore, violative of the Constitution’s Equal Protection Clause.”¹³⁷ The decision in *Robertson I* enjoined the ability for state election officers to enforce the article IV provision against those who may not have met its requirement, and was left untouched for over a decade. This would not have a tangible effect until the next time that the legislative districts were re-apportioned in 2011. In the meantime, however, the provision succeeded in keeping Olympic superstar Carl Lewis off the ballot.

B. Carl Lewis and the Solidified Difference Between In-District and In-State

On April 11, 2011, Olympic gold-medalist Carl Lewis announced his candidacy for State Senator of New Jersey’s Eighth District.¹³⁸ However, only a few days later, Lieutenant Governor Kim Guadagno—New Jersey’s chief election official—removed him from consideration on the ballot, concluding that there was “credible evidence” that he had not lived

137. *Id.* at 698–99. The *Robertson I* court distinguished the facts of the matter from those of *Chimento v. Stark*, 353 F. Supp. 1211, 1213 (D.N.H. 1973) (three-judge panel), *aff’d*, 414 U.S. 802 (1973); and *Sununu v. Stark*, 383 F. Supp. 1287, 1291 (D.N.H. 1974) (three-judge panel), *aff’d*, 420 U.S. 958 (1975) by utilizing the language from *Chimento* finding that the rationale for upholding residency requirements for a state’s highest office “carries far greater weight than if applied to candidacies for lesser public offices”—the New Jersey General Assembly being one of lower status than a Governor or a Senator—those “elected from political subdivisions of much smaller geographical dimensions, the precise boundaries of which are subject to periodic revision.” *Robertson I*, 150 F. Supp. 2d at 698–99. The *Robertson I* court finally asserted that, despite the provision being in the New Jersey Constitution akin to the provision in the New Hampshire Constitution referenced in *Chimento* and *Sununu*, the New Jersey Constitution “is of much more recent vintage” and lacks the “venerable heritage of New Hampshire’s charter.” *Id.* at 699. This language was cleared up in *Robertson II*, which stated that while the New Jersey Constitution dates back to 1776, the relevant provision providing for political re-districting only dates back to 1966, “when the New Jersey Constitution was amended in order to comply with the Supreme Court’s one-person, one-vote requirement set forth in *Baker v. Carr*, 369 U.S. 186 (1962).” *Robertson v. Bartels*, 890 F. Supp. 2d 519, 532–33 (D.N.J. 2012).

138. See Statehouse Bureau Staff, *Olympic Gold Medalist Carl Lewis Announces Plan to Run for N.J. Senate*, STAR-LEDGER (Apr. 12, 2011), http://www.nj.com/news/index.ssf/2011/04/olympic_gold_medalist_carl_lew.html. Predicting a strategy that would soon play out in the courts, Lewis’s opponent, sitting Senator Dawn Marie Addiego’s spokesman was quoted at the time as saying, among other things, that “we still don’t know much else other than that he just registered to vote in New Jersey today.” *Id.* Lewis was the highest profile candidate for State Senate at the time, and the preferred candidate of the New Jersey Democratic Party. See also New Jersey Democratic State Committee, *Wisniewski on Carl Lewis: A Leader Who Transcends Politics*, POLITICKERNJ (Apr. 11, 2011), <http://www.politickernj.com/46720/wisniewski-carl-lewis-leader-who-transcends-politics>.

in New Jersey for the four years required by the state constitution, including the critical fact that he recently lived in California.¹³⁹ Lewis then petitioned both state and federal court for relief from Guadagno's decision.¹⁴⁰

In *Lewis v. Guadagno* ("Lewis I"),¹⁴¹ the district court relied heavily upon *Sununu* and denied Lewis's motion seeking an injunction against the removal of his name from the ballot.¹⁴² The *Lewis I* court found specifically that Lewis "failed to demonstrate a likelihood of success on the merits, in that *Sununu v. Stark* . . . [were] binding and controlling

139. See Max Pizarro, *Ruling That He Fails NJ Residency Requirement, Guadagno Tosses Lewis Off LD 8 Ballot*, POLITICKERNJ (Apr. 26, 2011), <http://www.politickernj.com/node/47092>. Guadagno found that Lewis "was not a resident of New Jersey for the constitutionally-required four years prior to the date of the election for the office he now [sought]." *Id.* Guadagno relied upon the fact that Lewis "owned three homes in California, filed his taxes in California; was registered to vote in California; voted in at least four elections in California; certified under penalty of law that he was a resident and domiciliary of California each time he voted; and had his business and his business offices in California" in her determination. *Id.* Her decision came even though an Administrative Law Judge ("ALJ") had ruled that Republican Party petitioners seeking to have Lewis's name removed "[had] not met their burden to demonstrate respondent has not attained resident status to seek [S]tate [S]enate office." *Layton v. Lewis*, OAL DKT. STE 4223-11, 2011 WL 1601325, at *4 (N.J. Adm. Apr. 20, 2011). However, the ALJ's finding was not that Lewis "[had] attained such status, however, because the severely limited time constraints in hearing and deciding this matter [had] not permitted a fully developed record." *Id.*

140. Lewis initially petitioned the New Jersey Superior Court, Appellate Division, in relation to the ALJ's initial decision in *Layton v. Lewis*, A-4047-10T1, 2011 WL 1632039 (N.J. Super. Ct. App. Div. May 2, 2011). However, the appellate division took issue with the ALJ's findings and agreed with Guadagno, concluding that "considering the totality of all of the evidence presented as to domicile and our limited review function . . . the [s]ecretary's decision was supported by adequate evidence in the record that [the] appellant was not domiciled in New Jersey for the past four years." *Id.* at *6. Lewis's petition for certification to the New Jersey Supreme Court was then denied. *Layton v. Lewis*, 23 A.3d 912 (N.J. 2011). Therefore, the only relief left available to him was in federal court, which is what this Note will focus on.

141. *Lewis v. Guadagno*, 837 F. Supp. 2d 393 (D.N.J. 2011) [hereinafter *Lewis I*].

142. *Id.* at 395. The *Lewis I* court found that courts across the country, despite the United States Supreme Court's memorandum opinion, still "found *Sununu* binding and controlling precedent." *Id.* at 399. These included: *Clements v. Fashing*, 457 U.S. 957, 967 (1982) (Rehnquist, J., plurality); *Beil v. City of Akron*, 660 F.2d 166, 168 (6th Cir. 1981); *Billington v. Hayduk*, 565 F.2d 824, 826 (2nd Cir. 1977); *Joseph v. City of Birmingham*, 510 F. Supp. 1319, 1326 (D. Mich. 1981). *Id.* The *Lewis I* court ultimately concluded that, although Lewis "attempt[ed] to differentiate the present matter from *Sununu*, his efforts [were] futile because any distinction is immaterial." *Id.* at 400. This was because the court found many differences between the New Hampshire and New Jersey constitutions with regard to legislative structure to be insubstantial; rather, the two constitutions' "minor differences are far outweighed by [their] similarities," which included the heightened powers for Senators, a bicameral Legislature, and the residency requirement's direct affirmance by the voters and existence for a substantial amount of time. *Id.*

precedent.”¹⁴³ The court went further in stating that even if *Sununu* was not binding, Lewis still would not prevail on the merits because—even under a strict scrutiny standard—the state still asserted proper rationale for why durational in-state residency requirements “furthered a compelling interest,” particularly for Senators: the desire for familiarity with district needs, senatorial powers above and beyond those of lower-house Legislators,¹⁴⁴ and the fact that “the entire State is affected by [a Senator’s] decisions.”¹⁴⁵

However, most importantly, the *Lewis I* decision parsed around the “intrastate/interstate dichotomy” that properly distinguishes the facts in *Lewis* from other cases.¹⁴⁶ The court ruled that precluding Lewis from the ballot due to a failure to satisfy the *interstate* eligibility requirement comported with existing case law, but conceded, *inter alia*, that “the federal constitutional concerns and the opportunity for an improper motive to bar an otherwise legitimate candidate[] may be more pronounced where the case involves a narrowly defined geographical area and a less significant political subdivision,” also known as *intrastate* eligibility.¹⁴⁷ The *Lewis I* court then put forth as an example of when a “compelling justification or discernable reason” would necessitate a court to strike down a residency requirement: the *Robertson I* decision.¹⁴⁸ Thus, arguably, the *Robertson I* decision’s rationale was upheld and utilized by the *Lewis I* court to a large extent in order to distinguish its facts on Lewis’s facial challenge. However, on an initial appeal in *Lewis II*,¹⁴⁹ the Third Circuit ordered a preliminary injunction mandating that Lewis’s

143. *Id.* at 395.

144. These include, as listed by the *Lewis I* court: impeachment trials, advice and consent for the appointment of judges, executive cabinet officials, and prosecutors, voting for Governor and Lieutenant Governor in the event of a tie, and the exercise of executive power when the Governor is out-of-state. *Id.* at 401.

145. *Id.*

146. *See id.* at 402.

147. *Lewis I*, 837 F. Supp. 2d at 402. The court addressed its reasoning by utilizing a hypothetical example relevant to this Note:

Imagine a city which annexes an adjoining municipality and imposes a durational residency requirement to run for office. This action would essentially disenfranchise the residents of the annexed municipality because they would be precluded from running for municipal office or city government by the simple fact of having been annexed.

Id. at 402. This example, according to the court, showed an instance where the hypothetical state or city could not possibly assert a “compelling justification” for the residency requirement’s application. *Id.*

148. *Id.* at 402.

149. *Lewis v. Guadagno*, 11-2109, 2011 WL 1740608 (3d Cir. 2011) (“*Lewis II*”).

name appear on the ballot, but remanded to the district court for an analysis on Lewis's challenge to the residency requirement on "as-applied" equal protection grounds.¹⁵⁰

On remand, the district court in *Lewis III*¹⁵¹ applied a "rational basis" standard of review to Lewis's as-applied challenge, and found that the in-state residency requirement was, once again, reasonably related to legitimate state interests.¹⁵² The *Lewis III* court significantly relied upon *Bullock* for the proposition that "[a] restriction placed upon political candidates does not warrant heightened scrutiny unless the restriction substantially interferes with or disrupts the right to vote, *severely distorts the political playing field*, or otherwise offends another constitutional right."¹⁵³

Thereafter, the court found that since the requirement "governs all individuals fairly and equally, without regard to or reliance on any suspect classification," and only had an "appreciable impact" on candidates who had not resided in the state for more than four years, the requirement must simply pass rational basis muster, which it easily did.¹⁵⁴ On Lewis's as-applied challenge, the court simply found that the requirement did not "discriminate against . . . or deprive [Lewis] of fundamental rights," but, instead, "[t]he only impediment [Lewis] suffer[ed] as a result of the residency requirement is enjoinderment from pursuing the New Jersey office of State Senator, and only then until he has been a citizen and resident in New Jersey for four years."¹⁵⁵

On the final appeal, the Third Circuit affirmed the district court's opinion in *Lewis IV*.¹⁵⁶ The Third Circuit found that, while Lewis

150. *Id.* at *1. To ascertain an idea of how well publicized even this initial Third Circuit ruling was, the *Associated Press* and *Philadelphia Inquirer* hosted coverage, among others. See, e.g., *Court Puts Carl Lewis Back on NJ Primary Ballot*, ASSOCIATED PRESS (May 5, 2011), <http://sports.espn.go.com/espn/wire?section=trackandfield&id=6486867>; Cynthia Burton, *Carl Lewis is Back on New Jersey Ballot*, PHILADELPHIA INQUIRER (May 5, 2011), http://articles.philly.com/2011-05-06/news/29516640_1_residency-requirement-state-senate-candidates-kim-guadagno.

151. *Lewis v. Guadagno*, 837 F. Supp. 2d 404, 410–11 (D.N.J. 2011) ("*Lewis III*").

152. *Id.* at 413, 416.

153. *Id.* at 411 (emphasis added); see *infra* Section IV-A.

154. *Lewis III*, 837 F. Supp. 2d at 412–14.

155. *Id.* at 416.

156. *Lewis v. Guadagno*, 445 F. App'x 599, 604 (3d Cir. 2011) [hereinafter *Lewis IV*]. Interestingly, the Third Circuit panel, consisting of Judges Anthony Joseph Scirica, Thomas L. Ambro, and Thomas Ignatius Vanaskie, initially ordered that the district court opinion be reversed in a 2-1 decision (Judge Scirica dissented for reasons never explained by the court), because it "incorrectly applied a rational basis standard of review of this as-applied challenge, rather than the stricter compelling interest standard." See Order, *Lewis v. Guadagno*, 445 F. App'x 599 (3d Cir. Sept. 13, 2011). The Third Circuit thus initially placed Lewis back on the ballot, stating that "[t]he state . . . failed to demonstrate a compelling

“appear[ed] to [have] argue[d] that he has a fundamental right to run for office,” such an argument was rejected by the United States Supreme Court, and as the *Lewis IV* court did not want to re-litigate the state-law issues found by other courts or address a facial challenge, it instead concluded that Lewis “failed to show that, as applied to him, the four-year state residency requirement . . . treated him unfairly.”¹⁵⁷ The *Lewis* matter showed that the case law regarding interstate residency requirements is, for the most part, closed; especially when dealing with offices of power that implicate a statewide presence, like Governor or Senator, because courts are much more likely to uphold them under equal protection, and do so under intermediate scrutiny. However, as *Lewis I* pointed out, when dealing with intrastate residency requirements, the law is still ripe to be challenged should the right litigant come along.¹⁵⁸ Many believed that litigant might have very well been New Jersey General Assembly candidate and election winner Gabriela Mosquera.

state interest in the application of this durational residency requirement to this particular candidate.” *Id.* This Order was covered far and wide in the news media. *See, e.g.*, Matt Friedman, *Federal Appeals Court Panel Puts Carl Lewis Back on Ballot for State Senate Race*, STAR-LEDGER (Sept. 14, 2011), http://www.nj.com/news/index.ssf/2011/09/federal_judge_puts_carl_lewis.html; *Carl Lewis is Back on N.J. Senate Ballot*, NEW YORK POST (Sept. 13, 2011), http://www.nypost.com/p/news/local/carl_lewis_aims_again_at_spot_on_T9fw3ETmDBEDDgIyYMIKTL. However, on September 20, 2011, it was reported that the three-judge panel, which had not issued their formal opinion yet, was reconsidering their Order. *See Judges Reconsidering Carl Lewis Election Case*, ASSOCIATED PRESS (Sept. 20, 2011) [hereinafter *Reconsidering Carl Lewis*], <http://usatoday30.usatoday.com/sports/olympics/story/2011-09-20/carl-lewis-election/50479726/1>. The appellees had made clear that they would seek for the Third Circuit to hear the case en banc or appeal to the United States Supreme Court; but for the panel itself to reconsider is “rare.” *Id.* In a second Order dated September 19, 2011, the panel ordered a rehearing, and thus vacated its previous Order, to address the questions: “(1) Can a person be a citizen of two states?[] (2) What are the requirements of California law for a person to vote in that State?[] [and] (3) To what extent can a federal court interpret a state constitution?” Order, *Lewis v. Guadagno*, 445 F. App’x 599 (3d Cir. Sept. 19, 2011). Foreshadowing the Third Circuit’s ultimate opinion, Judge Ambro stated at oral argument for the second Order that “[t]he more you look at it . . . the more concern I have.” *See Reconsidering Carl Lewis, supra.*

157. *Lewis IV*, 445 F. App’x at 603–04. The *Lewis IV* court made a point to state that the facial challenge posed by Lewis was controlled by *Sununu*, and that the district court was correct in that respect in *Lewis I*. *See id.* at n.5. After the Third Circuit ruled against him, Lewis abandoned his run for the State Senate seat in New Jersey, precluding a Third Circuit ruling en banc or an appeal to the United States Supreme Court. *See* Matt Friedman, *Carl Lewis Gives Up Fight to Run for N.J. State Senate*, STAR-LEDGER (Sept. 28, 2011), http://www.nj.com/news/index.ssf/2011/09/carl_lewis_gives_up_fight_to_r.html.

158. *Lewis v. Guadagno*, 837 F. Supp. 2d 393, 402 (D.N.J. 2011).

C. Gabriela Mosquera and the Creation of a Perfect Intrastate Claim

1. Ms. Mosquera's Claims Were Imperfect

On November 8, 2011,¹⁵⁹ the voters in New Jersey's Fourth District¹⁶⁰ cast their ballots to elect their State Senator and two Assembly members. Incumbent Senator Fred Madden was re-elected, as was incumbent Assemblyman Paul D. Moriarty. In addition, candidate Gabriela Mosquera was certified as the second Assembly winner, with a tally of 19,845 votes to her next closest challenger, Shelly Lovett's 14,316 votes.¹⁶¹ Yet, barely a month after her election, Mosquera's decisive win was challenged by Lovett in state court on grounds that Mosquera had not met the one-year residency requirement enjoined a decade prior by *Robertson I.*¹⁶²

In the initial case, *In re Contest of Nov. 8, 2011 General Election of Office of New Jersey General Assembly, Fourth Legislative District* ("In re Contest I"),¹⁶³ Mosquera stipulated that she did not meet the one-year-in-district residency requirement prior to her election, but argued that the *Robertson I* injunction prevented the provision from being enforced, and that the provision otherwise was violative of equal protection.¹⁶⁴ Crucially, however, Mosquera admitted that she had not failed to satisfy the in-district residency requirement due in any part to the 2011 re-

159. 2011 was also a re-districting year, with the New Jersey re-districting commission completing their work on April 3, 2011. See Matt Friedman, *Re-districting Commission Approves Democratic-Proposed Legislative Map*, STAR-LEDGER (Apr. 3, 2011), http://www.nj.com/news/index.ssf/2011/04/re-districting_committee_approv.html.

160. *In re Contest of Nov. 8, 2011 Gen. Election of Office of New Jersey Gen. Assembly*, 40 A.3d 684, 713 (N.J. 2012).

161. See Joe Green, *Democrats Win in Fourth Legislative District*, SOUTH JERSEY TIMES (Nov. 8, 2011), http://www.nj.com/gloucester-county/index.ssf/2011/11/democrats_win_in_4th_legislati.html.

162. See Jessica Bautista, *Assemblywoman-Elect Challenged on Her Residency*, SOUTH JERSEY TIMES (Dec. 14, 2011), http://www.nj.com/gloucester-county/index.ssf/2011/12/assemblywoman-elect_challenged.html. Previewing the attorneys' arguments about the facts of Mosquera's case and the re-districting process that occurred in the same year, the attorney for Lovett posited at oral argument that "[Mosquera] was from the seventh district. She wasn't on the border of the fourth district and she wasn't in the district either way." *Id.* To reiterate, New Jersey's residency requirement for candidates for the General Assembly is found in article IV, section 1, paragraph 2 of the modern New Jersey Constitution.

163. *In re Contest I*, 48 A.3d 1164, 1167 (N.J. Super. Ct. Law Div. 2012).

164. *Id.* at 1169.

districting process; in other words, her resident municipality was not transferred out of the Fourth District.¹⁶⁵

Mosquera and Lovett, as well as the New Jersey Attorney General, agreed that the *Robertson I* opinion was not binding on the New Jersey state court system since it was a federal district court opinion.¹⁶⁶ This created the need for the Superior Court of New Jersey to decide the merits of whether the provision violated equal protection in spite of a district court ruling.¹⁶⁷ Contrary to *Robertson I*, the *In re Contest I* court determined that the residency requirement in this matter was subject to intermediate scrutiny, rather than strict scrutiny, and utilized the *Matthews* standard because it found that the requirement was not based on a suspect criterion, and that there exists no fundamental right to candidacy.¹⁶⁸

Thus, the majority opinion made it clear that, if a challenger could show that her candidacy was rendered invalid by virtue of her failure to meet the residency requirement because her resident municipality was moved out of her resident district, an as-applied challenge would be perfected, and judicial surgery of the provision may be required, “were the [c]ourt to first find that the . . . requirement operated unconstitutionally in that context”¹⁶⁹ The *In re Contest I* court then criticized the *Robertson I* opinion for “read[ing] *Dunn* and *Bullock* too broadly,” not acknowledging that strict scrutiny only applies to restrictions that interfere with fundamental rights, being unrepresentative of a “uniform position on the part of the federal lower courts,” and failing to persuade the *Lewis* courts.¹⁷⁰

Ultimately, however, the *In re Contest I* court upheld the residency requirement under intermediate scrutiny.¹⁷¹ The court reiterated the “legitimate state interests”¹⁷² in the requirement’s continued existence (as mentioned in *Matthews*), found that the requirement was “reasonably and suitably tailored” to those interests, and therefore refused to “strike down a constitutional provision that was drawn by the framers of New

165. *Id.* at 1168–69. Mosquera’s resident municipality was previously Maple Shade, New Jersey, which was never a part of the Fourth District, but she moved to the Fourth District’s municipality of Blackwood in December 2010. *Id.* at 1169–70.

166. *Id.* at 1168.

167. *Id.* at 1178–82.

168. *Id.* at 1182–84.

169. *In re Contest I*, 48 A.3d at 1184–85, 1191.

170. *Id.* at 1185.

171. *Id.* at 1185–89.

172. The factors are, again: “(1) a candidate’s familiarity with public issues and concerns; [] (2) the electorate’s knowledge of the candidate and his or her electoral positions . . . [] [and] (3) the prevention of ‘political carpetbagging.’” *Id.* at 1189–90 (citation omitted).

Jersey's original constitution."¹⁷³ The court offered further rationale for its position: members of the General Assembly are "key officers in the state government[.]" and it is therefore reasonable for them to adhere to a time period of residency that "imposes minimal burdens," and in addition, the constitutionality of "requir[ing] that a state elected official reside for a substantial period before election in the district in which he is running for office" has been upheld by the United States Supreme Court.¹⁷⁴

Lastly, *In re Contest I* took *Robertson I* to task on a number of issues in order to justify a ruling that did not comport with *Robertson I*'s reasoning.¹⁷⁵ The court found that *Robertson I*'s holding was an anomaly among federal courts with respect to residency requirements.¹⁷⁶ Next, unlike *Robertson I*, the *In re Contest I* court found the "legitimate [s]tate interests" more compelling and felt as though *Robertson I* "gave [those interests] short shrift."¹⁷⁷ The *In re Contest I* court also believed *Robertson I* was wrong in stating that the New Jersey Constitution "is of much more recent vintage" and lacks "venerable heritage" in distinguishing its facts from those of *Chimento* and *Sununu* since the provision dates back to New Jersey's first constitution in 1776.¹⁷⁸

173. *Id.* at 1189–93 (quoting *Chimento v. Stark*, 353 F. Supp. 1211, 1217 (1973)).

174. *Id.* at 1191–93 (quoting *Stothers v. Martini*, 79 A.2d 857 (N.J. 1951)). The *In re Contest I* court relied on *Hadnott v. Amos*, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971), *aff'd mem.*, 405 U.S. 1035 (1972) for the proposition that it is constitutional for state officials to be required to reside in the districts in which they are running for office for a time period prior to their election. *Id.* at 1174–75 n.6. *Hadnott* was a district court case summarily affirmed by the United States Supreme Court in both 1971 and 1972. 401 U.S. at 968; 405 U.S. at 1035. In *Hadnott*, the United States Supreme Court "affirmed . . . a decision upholding, against a federal a [e]qual [p]rotection challenge, a provision of the Alabama Constitution requiring that a state circuit judge reside 'for one year next preceding his election' in 'the circuit for which he is elected.'" *In re Contest I*, 48 A.3d 1164 at 1173 (quoting *Hadnott*, 320 F. Supp. at 119–20). It is worth noting the precedential value of this case—twice summarily affirmed by the United States Supreme Court, rather than decided on the merits—and its difference from *In re Contest I*, specifically that it dealt with an elected judge rather than a Legislator. Political districts are certainly different in size and alterability via re-districting than circuits for judges. In addition, as the *In re Contest I* court noted, *Hadnott* did not "decide whether one year was too long," but found only that "the state had 'a compelling interest in imposing a substantial pre-election residence requirement.'" *Id.* at 1173 n.6. (quoting *Hadnott*, 320 F. Supp. at 119, 124). This, in the author's view, represents shaky ground that the *In re Contest I* court relied upon.

175. *In re Contest I*, 48 A.3d at 1191–97.

176. *Id.* at 1196–97.

177. *Id.* at 1193–94.

178. *Id.* at 1194 (quoting *Robertson v. Bartels*, 150 F. Supp. 2d 691, 699 (D.N.J. 2001)).

Critical to the *In re Contest I* court's analysis of *Robertson I*'s decision was its discussion regarding re-apportionment and its effect on the residency requirement. The court noted that in adopting the re-apportionment amendment to the New Jersey Constitution, voters still believed "it was . . . important for the candidates and the voters to get to know each other even if, and perhaps especially because, the legislative district boundaries would be adjusted every ten years."¹⁷⁹ The court still found that the Equal Protection Clause was not violated because the government's objectives "remain legitimate, *even if those adjustments may pose practical issues every ten years.*"¹⁸⁰ The court also found *Robertson I*'s distinctions regarding the differences between Senators and lower-office-holders to be "untenable" in the face of *Chimento* and *Sununu*.¹⁸¹

In re Contest I was able to distinguish its facts, as well as those in *Robertson I*, from a proper intra-district challenge because, in both matters, "the re-apportionment did not cause the issue for the [plaintiffs]"—that is, neither had their municipality re-apportioned out of their district so that they could not meet the residency requirement in their original district.¹⁸² Such facts would otherwise represent the perfection of an equal protection challenge to the residency requirement, something that "did not cause the issue" for Ms. Mosquera. Indeed, the *In re Contest I* court noted:

[t]hat does not mean that re-apportionment might not pose an issue in ten years, after the next decennial census. As [*Robertson I*] hypothesized . . . a candidate could move to a town within his district after early November 2020, only to have the new town re-apportioned into another district before the November 2021 elections. Before 2021, that issue may be addressed in legislation or regulation implementing [the provision].¹⁸³

After the issuance of the trial court opinion, state Democrats were thrown into disarray and immediately sought an appeal.¹⁸⁴ On the initial

179. *Id.* at 1195.

180. *Id.* (emphasis added).

181. *In re Contest I*, 48 A.3d at 1194 n.21.

182. *Id.* at 1193–94.

183. *Id.* at 1194 n.21 (emphasis added). *In re Contest I* found that the time period for challenging the 2011 elections, per N.J. STAT. ANN. § 19:29-3 (West 2011), had expired by the time the court issued its opinion, meaning no further challenges due to re-apportionment would be heard until the next round in 2021. *Id.* at 1194.

184. Senator Fred Madden, the sitting Senator in New Jersey's Fourth District and the Gloucester County Democratic Party Chairman, stated, "We felt we were right. She had run under an existing law. [The injunction] had been on the books for ten or eleven years . . .

appeal to the Superior Court of New Jersey, Appellate Division, the court granted a stay of the trial decision, which allowed Ms. Mosquera to be sworn into office as the winner of her election.¹⁸⁵ Judge Anthony Parillo, writing for the appellate panel, “concluded that there [was] a likelihood [that] respondent [would] succeed.”¹⁸⁶ Lovett then filed for emergent relief from the Supreme Court of New Jersey to prevent Ms. Mosquera from taking her seat, which was thereafter supported by the New Jersey Attorney General.¹⁸⁷ In dramatic fashion, only minutes before she was to be sworn in,¹⁸⁸ the New Jersey Supreme Court stayed the panel’s decision in an interim order and took up the case on appeal, preventing Ms. Mosquera from taking her seat.¹⁸⁹

. . . She won (the election) by an overwhelming margin. She was a great candidate for office, and we will stand behind her.” See Carly Q. Romalino, *Superior Court Order Voids Mosquera of Fourth District Assembly Seat Victory*, SOUTH JERSEY TIMES (Jan. 6, 2012), http://www.nj.com/gloucester-county/index.ssf/2012/01/superior_court_order_voids_mos.html. Ms. Mosquera’s attorney, William Tambussi, was quoted at the time as saying, “It’s an unexpected outcome for sure The judge, in one swipe of the pen, erased 19,907 votes for Gabby Mosquera” and noted he was filing an “electronic appeal.” *Id.* The New Jersey Democratic State Party Chairman John Wisniewski also released a statement criticizing the judge’s decision. See Press Release, New Jersey Democratic State Committee, *Wisniewski Condemns Decision Disenfranchising Over 19,000 Fourth District Voters*, POLITICKERNJ (Jan. 7, 2012), <http://www.politickernj.com/53649/wisniewski-condemns-decision-disenfranchising-over-19000-4th-district-voters>.

185. See Matt Friedman, *Assemblywoman-Elect to be Sworn in Despite Not Living in Legislative District for One Year*, STAR LEDGER (Jan. 9, 2012), http://www.nj.com/news/index.ssf/2012/01/assemblywoman-elect_to_be_swor.html.

186. *Id.* Of course, the state Democratic Party greeted this decision with elation. See Press Release, New Jersey Democratic State Committee, *Wisniewski Praises Appellate Division Decision to Seat Mosquera*, POLITICKERNJ (Jan. 9, 2012), <http://www.politickernj.com/53744/wisniewski-praises-appellate-division-decision-seat-mosquera>.

187. See Darryl R. Isherwood, *AG Weighs in Against Mosquera Swearing In*, POLITICKERNJ (Jan. 10, 2012), <http://www.politickernj.com/53810/ag-weighs-against-mosquera-swearing>. Interestingly, New Jersey Attorney General Jeffrey Chiesa’s first action as Attorney General was to file a brief with the New Jersey Supreme Court in opposition to Ms. Mosquera’s swearing in. *Id.* Chiesa wrote: “To the extent that the [a]ppellate [d]ivision’s [s]tay Order allows Mosquera to take the oath of office in the General Assembly and said oath deprives the judiciary of available remedies, the [s]tay Order constitutes irreparable harm.” *Id.*

188. Ms. Mosquera was scheduled to be sworn in on January 10, 2012 at noon, and even had her name displayed on the Assembly Chamber voting board. See Politicker Staff, *Breaking: Court Blocks Mosquera Swearing In*, POLITICKERNJ (Jan. 10, 2012), <http://www.politickernj.com/53811/breaking-court-blocks-mosquera-swearing>.

189. See *In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, Fourth Legislative Dist.*, 37 A.3d 1089 (2012) (stating, *inter alia*, that “[n]o person shall hereafter take the oath of office as a member of the New Jersey General Assembly for the Fourth Legislative District pending disposition of this appeal or further order of the [c]ourt”). See also Carly Q. Romalino, *Mosquera Swearing in on Hold After Court Action*,

In *In re Contest of November 8, 2011 General Election of Office of New Jersey General Assembly* (“*In re Contest II*”),¹⁹⁰ the Supreme Court of New Jersey affirmed the trial court opinion, concluding that the residency requirement is properly analyzed through and constitutional under intermediate scrutiny.¹⁹¹ On Ms. Mosquera’s facial challenge, the court continued to use *Dunn* and *Bullock* standards to preclude an application of strict scrutiny, and ultimately upheld the intermediate standard in *Matthews*—bucking the *Robertson I* opinion.¹⁹² The court reiterated that “the one-year durational residency requirement advances [the aforementioned state interests] more than sufficiently to surpass a facial constitutional challenge.”¹⁹³

The *In re Contest II* court criticized *Robertson I* further: “Robertson . . . seriously undervalued the legitimacy, history, and sincerity[] of this state’s policy choice to have a one-year durational residency requirement for General Assembly office.”¹⁹⁴ Additionally, the court found, as the trial court did, that *Robertson* erred in “assum[ing] that the 1947 constitution’s durational requirement lacked the ‘venerable heritage’ of the allegedly longer-standing one of New Hampshire [in *Chimento* and *Sununu*]” which, according to the court, “exposes the questionable factual basis on which [*Robertson I*] rests.”¹⁹⁵

2. *In re Contest II* Left the Door Open to Future Challenges

In affirming the trial court’s opinion, *In re Contest II* agreed with the Superior Court judge that Ms. Mosquera’s as-applied challenge could likewise not survive.¹⁹⁶ However, the court took pains to note that the challenge did not occur based on the re-apportionment process: “[Ms. Mosquera] was not a resident rendered ineligible for candidacy for office in her district as a result of the legislative re-apportionment that took effect less than one year prior to the general election.”¹⁹⁷ The court left the door open should such a perfect challenge occur: “[*t*]o the extent that a future as-applied challenge might arise in the immediate wake of the

SOUTH JERSEY TIMES (Jan. 11, 2012), http://www.nj.com/gloucester-county/index.ssf/2012/01/mosquera_swearing-in_on_hold_a.html.

190. *In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly*, 40 A.3d 684, 695–96 (N.J. 2012) [hereinafter *In re Contest II*].

191. *Id.* at 687–89.

192. *Id.* at 695–99.

193. *Id.* at 699–700.

194. *Id.* at 701–02.

195. *Id.*

196. *In re Contest II*, 40 A.3d at 704.

197. *Id.* at 704–05.

legislative re-apportionment that must occur decennially, see [the New Jersey Constitution, article IV, section 3, paragraph 1], we do not foreclose such an action for relief."¹⁹⁸

In his dissent in *In re Contest II*, Chief Justice Stuart J. Rabner concluded "the requirement raises serious constitutional concerns during re-districting years, when a substantial number of citizens are 're-districted' out of their previous home districts."¹⁹⁹ Chief Justice Rabner first noted that, when the final result of the decennial census is completed, and the "[s]tate's [a]pportionment [c]ommission meets to re-draw district boundaries[,] . . . [a] process . . . not completed until early in the year of an election for State Senate and General Assembly," those living in towns re-districted out will not have satisfied the residency requirement "by the time of the fall election."²⁰⁰ As pointed out in *Robertson I*, this process:

affected more than one-third of New Jersey's 566 towns [and] [a]s a result, not a single adult resident in roughly one-third of the state's localities could run for the [G]eneral [A]ssembly, or vote for a neighbor who wanted to run, under the strict terms of the residency requirement. Yet[,] none of those individuals relocated to a new area, are less familiar with the issues where they continue to live, or are less well-known to their neighbors.²⁰¹

Thus, Chief Justice Rabner suggested that, even under intermediate scrutiny via *Matthews*, the scope of the residency requirement during re-districting years might not survive.²⁰² Chief Justice Rabner questioned the constitutionality of a law that "infringes on the rights of all voting-age residents in more than a third of the state's localities, for no apparent legitimate purpose," and its ability to be tailored to legitimate state interests.²⁰³

Chief Justice Rabner then made his position clear: the residency requirement does not impose "a minimal burden" on voters; it is not tailored to advance legitimate state interests; and it is "*not clear that the restriction can be saved by as-applied challenges that a quarter of the electorate could bring.*"²⁰⁴ The Chief Justice proposed multiple solutions to this problem: judicial surgery—akin to the majority opinion, or as a

198. *Id.* (emphasis added).

199. *In re Contest II*, 40 A.3d at 718 (Rabner, C.J., dissenting).

200. *Id.* at 715.

201. *Id.* at 715–16 (emphasis added).

202. *Id.* at 717.

203. *Id.*

204. *Id.* (emphasis added).

“better course,” “strik[ing down] the residency requirement insofar as it applies to people who have been moved out of their home district through the re-apportionment process, but otherwise leave the restriction intact.”²⁰⁵ However, Chief Justice Rabner admitted that it was not necessary to resolve his disputes with the law, as the matter was not squarely presented in *In re Contest II*.²⁰⁶

D. The 2011 Re-apportionment Process

The *In re Contest II* court suggested that the parties “apply to the federal district court . . . in order to resolve lingering conflicts that exist between our declaration of the constitutionality of article IV, section 1, paragraph 2 of the New Jersey Constitution and the injunction,” so the New Jersey Attorney General did just that—in *Robertson II*.²⁰⁷ Intervening parties included those who could have been affected by the residency requirement specifically during the then-recent 2011 re-apportionment process, perfecting the challenge that Chief Justice Rabner pointed to in his *In re Contest II* dissent.²⁰⁸ The *Robertson II* court

205. *In re Contest II*, 40 A.3d at 717–18 (emphasis added).

206. *Id.* at 718. The plurality responded to Chief Justice Rabner’s hypotheticals, suggesting that the possibility of an as-applied challenge via re-apportionment “is not relevant in a facial challenge, no matter the test that is employed,” is “not present in this record,” and is not “the basis of Mosquera’s as-applied challenge.” *Id.* at 705. The plurality also found Chief Justice Rabner’s argument to question, but never declare, the requirement constitutional or unconstitutional on its face, and that his “facts’ regarding a potential re-apportionment problem” to simply not be in the record to decide. *Id.* at 705–06.

207. *Id.* at 689 (majority opinion); see also *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012). *In re Contest II* stated clearly—and correctly—that it could not dissolve the *Robertson I* injunction. 40 A.3d at 689. It was also suggested that the parties petition the United States Supreme Court for certiorari, but neither party chose to do so, likely because the district court avenue was easier for the New Jersey Attorney General, and the *In re Contest* court allowed the Democratic Party in Camden and Gloucester counties to name someone to the now-vacant seat, paving the way for Ms. Mosquera to be appointed and practically speaking, allowing Ms. Mosquera’s desired result to occur. See *id.*; Editorial, *Mosquera Case: She Loses, But . . .*, GLOUCESTER COUNTY TIMES (Feb. 17, 2012), www.nj.com/gloucester/voices/index.ssf/2012/02/mosquera_case_she_loses_but.html (“Gabriela Mosquera and her Democratic supporters still may have won a half loaf (and, probably, half a two-year term).”). Some, however, believed the case was destined for the United States Supreme Court. See Donald Scarinci, *New Jersey Residency Requirements May Be Destined for the Supreme Court: Part I*, POLITICKERNJ (July 24, 2012), <http://www.politickernj.com/dscarinci/58661/new-jersey-residency-requirements-may-be-destined-supreme-court-part-i> (“The U[nited] S[tates] Supreme Court may ultimately consider what could be the most dramatic change in New Jersey politics since federal candidates were permitted to be bracketed with candidates for state and local office [an appeal of *In re Contest II*].”).

208. See *supra* note 15.

noted at the outset that its opinion was an “articulate recital of the reasons why [it] disagree[d] with *Robertson I*’s conclusion,” however, despite its “scholarly discussion,” *Robertson II* found that it amounted to an “improper collateral attack” on the *Robertson I* injunction and therefore could not serve as a basis for vacating the injunction.²⁰⁹

In further mandating that the residency requirement be subjected to heightened scrutiny, the *Robertson II* court stated that the inquiry in the matter was “whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity.”²¹⁰ The court pointed out that both parties conceded that the re-apportionment process “displaces approximately one-third of New Jersey’s residents from their previous legislative districts,” and, because it occurs seven months prior to the general election, deprives such residents of “the opportunity to satisfy the one-year residency requirement for that electorate’s district.”²¹¹

In applying heightened scrutiny, the court found that, as to the state’s proffered interests: *during re-apportionment years, the . . . residency requirement cannot possibly serve to ensure either the prospective constituency’s familiarity with a candidate, the candidate’s familiarity with the constituency, or prevent political carpetbagging, when the constituency has only existed for seven months.*²¹² In fact, the court noted, upholding the residency requirements during such years may “perversely result in carpetbagging” contrary to the state’s proffered interests in situations “where a substantial portion of an incumbent’s

209. *Robertson v. Bartels*, 890 F. Supp. 519, 528 (D.N.J. 2012). The Editorial Board of the *New Jersey Law Journal* noted that it was interesting, if not a shame, for a district court judge to be voicing criticism of the New Jersey Supreme Court. Editorial, *Federalism and the Legislature*, N.J. L.J., July 16, 2012, at 22, 23. The Editorial Board noted that “[s]tate judges simply cannot ‘destroy the rights acquired’ in federal judgments and preclude reliance on law ‘settled for ten years in determining whether or not [candidates] are eligible to run’ for the New Jersey State Senate or General Assembly . . . [.]” and that “the lesson of Mosquera’s candidacy and the litigation it begot” may very well be that “[w]hile state courts can interpret the [F]ederal [C]onstitution and federal statutes, they cannot vacate federal injunctions whether rightly or wrongly issued” *Id.* at 23. Chief Justice Rabner also previewed this issue in his dissent in *In re Contest II*: “[T]he Secretary of State and the Attorney General are still subject to a federal injunction that bars them from enforcing the residency requirement, yet they are expected to enforce the majority’s ruling as well. The majority recognizes that untenable situation and encourages the parties to take appropriate action in federal court.” 40 A.3d at 722.

210. *Robertson II*, 890 F. Supp. 519, 530 (D.N.J. 2012) (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982)). The court also distinguished its facts from those in the *Lewis* cases, because the in-district requirement “substantially limits the candidate pool during re-districting years, and, in turn, the fundamental right to vote for the candidate of one’s choice.” *Id.*

211. *Id.*

212. *Id.* at 531 (emphasis added).

constituents are re[-]apportioned into a different district” or when an incumbent’s “residence is placed in a different legislative district from that of her constituents.”²¹³ In such cases, the incumbent cannot move with her constituents because she will not satisfy the residency requirement; if she runs in her new district, she will represent a constituency that is unfamiliar with her, and vice-versa.²¹⁴

The *Robertson II* court also did away with *In re Contest IIs* characterization of *Robertson I*: that the court did not take into account the “venerable heritage” of the New Jersey Constitution; for instance, *Robertson II* acknowledged that the residency requirement dated back to 1776, but noted that, in 1966—obviously a more recent date—the term “district” was substituted for “county” in order to satisfy re-apportionment requirements stemming from *Baker v. Carr*.²¹⁵ Thus, prior to 1966, no one in the state could possibly “contemplate that a [L]egislator or candidate could be moved arbitrarily from one political subdivision to another as a result of re[-]apportionment.”²¹⁶

In view of this, *Robertson II* refused to dissolve the injunction, but—as requested by the Interveners—amended the injunction’s scope to enjoin the New Jersey Attorney General and Secretary of State from enforcing the residency requirement only during re-apportionment years.²¹⁷ Thereafter, the New Jersey Attorney General appealed the *Robertson II* court’s decision, but interestingly, dropped its appeal shortly after the November 2012 elections.²¹⁸

213. *Id.*; see *infra* Section IV-A.

214. *Robertson II*, 890 F. Supp. 519, 523 (D.N.J. 2012). The *Robertson II* court also took the position that such invalidating factors could happen not just to incumbent Legislators, but to prospective candidates as well. *Id.* at 532.

215. *Id.* at 532–33. The court also did away with other arguments by the State that this matter was similar to *Chimento* or *Sununu* by stating that, unlike an inter-state requirement, the intra-state requirement here “unquestionably relates to their district level responsibilities . . . [because] the very basis of that requirement is to ensure that . . . [that district’s] electorate is sufficiently familiar with its representative, and vice versa.” *Id.* at 532.

216. *Id.* at 533. The court noted that the census process of re-apportionment prior to 1966 “merely changed the number of representatives per [c]ounty.” *Id.* at 533 n.11.

217. *Id.* at 534.

218. The *Philadelphia Inquirer* reported the initial appeal to the Third Circuit. See James Osborne, *New Jersey’s Candidate-Residency Rule is Again the Subject of a Legal Fight*, PHILADELPHIA INQUIRER (Oct. 25, 2012), http://articles.philly.com/2012-10-25/news/34709180_1_residency-rule-residency-requirement-federal-court (“A decade after a federal court judge ordered New Jersey to stop enforcing a controversial residency requirement for state legislative candidates, Attorney General Jeffrey S. Chiesa is fighting to reinstitute it.”). However, less than a month after the November 2012 elections—where Gabriela Mosquera was re-elected, so to speak—the New Jersey Attorney General dropped its appeal. See Matt Friedman, *AG’s Office Drops Effort to Keep Obscure District Residency*

V. PRACTICAL SOLUTIONS AND RECOMMENDATIONS FOR FUTURE CHALLENGERS

This recent line of litigation caused New Jersey's residency requirement to be roundly criticized in the public sphere, notably by newspapers' editorial boards.²¹⁹ *The New Jersey Law Journal*, in particular, took note of the *In re Contest* litigation and remarked:

Stepping back, the question about the application of durational residency requirements for legislative candidates is a nonpartisan, extremely important question of public policy for New Jersey But are the durational time periods chosen in such a different era as 1844 still serving the citizens of New Jersey, or are they inhibiting our electoral process? We call on the Legislature, [A]ttorney [G]eneral, [S]ecretary of [S]tate and [G]overnor, together with the political parties, to engage in a dialogue about the current efficacy of these residency requirements. There is no

Rule on the Books, STAR LEDGER (Dec. 4, 2012), http://www.nj.com/politics/index.ssf/2012/12/ags_office_drops_effort_to_kee.html. This caused the New Jersey Democratic Party to accuse the Attorney General of playing politics with the courts. See N.J. Democratic State Comm., *AG's Office Finally Drops Politically Motivated Appeal*, POLITICKERNJ (Dec. 4, 2012), <http://www.politickernj.com/61421/ag-s-office-finally-drops-politically-motivated-appeal> ("It does not seem to be a coincidence that the Attorney General's office has finally dropped its meritless appeal after Assemblywoman Gabriela Mosquera won her election so decisively.").

219. See Editorial, *Rigors of Residency*, PHILADELPHIA INQUIRER (Feb. 19, 2012), http://articles.philly.com/2012-02-19/news/31077371_1_residency-democratic-state-senator-confirmation-hearing (detailing the challenges of public life and residency requirements, and noting that, if Gabriela Mosquera had been running for federal office rather than state office, her residency would not have mattered because "[f]ederal law lets lawmakers represent places they don't live in"); Editorial, *N.J. Should Change Candidate-Residency Law*, PHILADELPHIA INQUIRER (Jan. 26, 2012), http://articles.philly.com/2012-01-26/news/30667122_1_residency-requirement-residency-rule-state-constitution (criticizing the rationale behind challenging Gabriela Mosquera's residency after her election win, and demanding that the New Jersey Legislature "address the constitutional validity of the residency rule" after the *Robertson I* decision was left in place for ten years); Editorial, *Partisan N.J. Lieutenant Governor Should Not Rule on Which Candidates Make the Ballot*, STAR LEDGER (Sept. 19, 2011), http://blog.nj.com/njv_editorial_page/2011/09/partisan_nj_lt_governor_should.html (criticizing the fact that the Lieutenant Governor can interpret and enforce the residency requirement for candidates); Editorial, *Put Lewis on the Ballot and Let Voters Decide*, STAR LEDGER (Apr. 29, 2011), http://blog.nj.com/njv_editorial_page/2011/04/put_lewis_on_the_ballot_and_le.html ("Lewis[s] residency is sketchy, but disqualifying him could leave the Democrats without a candidate. That injures voters. In cases of ambiguity, the court should side with the candidate.").

need to wait for continued litigation, which often becomes moot in the appellate process in our state.²²⁰

I conclude that, following the litigation that has plagued New Jersey's political process over the last decade, it remains prudent to continue to keep intact the in-state requirement for candidates for public office—four years for Senators and two years for Assembly members.²²¹ The legitimate interests of the state are at their highest when dealing with candidates that come from out-of-state to run without having been a part of the locality, let alone the state as a whole. Aside from the public policy arguments, the United States Supreme Court has summarily affirmed *Chimento* and *Sununu*, and courts are rightfully reluctant to disobey those decisions despite their lack of findings on the merits. However, because of the complexities during re-apportionment years, including the still-untested ability to mount a perfected challenge of the requirement on equal protection grounds, I believe that the in-district requirement needs to be amended. Specifically, as a small iota of change, the provision should be amended to read that its requirement is lifted during such years for those candidates or incumbents whose municipalities are re-apportioned out of their resident district, but then move back to their original district in order to run, or who choose to run in their newly-apportioned district. Our political, judicial, and social systems demand as such. Using the 2011 re-apportionment process as an example, it is easy to see the practical—and astonishingly partisan—consequences that the process has on the in-district residency requirement, especially for sitting Legislators. Such a change would bring immense satisfaction to prospective candidates, sitting Legislators, political parties, and the judicial system—and would keep the hands of the appointed from determining the elected.

A. New Jersey Incumbent Legislators That Could Have Brought Perfected Challenges to the Intra-District Requirement in 2011

As Chief Justice Rabner pointed out in *In re Contest II*, the re-apportionment process that affected 190 out of 566 New Jersey municipalities in 2011 ended on April 3, 2011—roughly seven months

220. Editorial, *Residency Rules Redux*, N.J. L.J., Jan. 30, 2012, at 22.

221. See N.J. CONST. art. IV, § 1, ¶ 1, 3.

prior to the November 8, 2011 general election.²²² This partisan process created “casualties” of re-apportionment: incumbent Legislators who have fallen out of favor with one party or another, whose municipalities are moved into districts unfavorable to their views, or political parties under the guise of re-apportionment.²²³ This resulted in Legislators retiring, rather than run in elections that were unwinnable from the start, or—significant for challenging the residency requirement—moving back to municipalities that remained in their original districts or attempting to run in their newly-apportioned districts.²²⁴

222. *In re* Contest of Nov. 8, 2011 Gen. Election of Office of N. J. Gen. Assembly, 40 A.3d 684, 715 (N.J. 2012) (Rabner, J., dissenting).

223. See Max Pizarro, *Breaking: Rosenthal Chooses Democratic Map*, POLITICKERNJ (Apr. 2, 2011), <http://www.politickernj.com/46423/breaking-rosenthal-chooses-democratic-map>. For example, Assemblyman Reed Gusciora, whose resident municipality of Princeton was moved from the Fifteenth Legislative District to the more conservative Sixteenth Legislative District, reacted to the move by the re-apportionment committee by stating: “I’ve often bucked against my party. This was an opportunity for them to even the score, I guess.” Sulaiman Abdur-Rahman, *N.J. Re-districting Proposal Could Doom Political Career of Gay State Lawmaker Reed Gusciora*, TRENTONIAN (Apr. 2, 2011), <http://www.trentonian.com/article/TT/20110402/NEWS/304029987>. Likewise, it was reported that Senator John Girgenti, whose municipality of Hawthorne was moved from the Thirty-fifth Legislative District to the Thirty-eighth Legislative District—a district already represented by another Democratic Senator—was considered “expendable,” after he voted against the Democratic Party’s “marriage equality” bill in 2009. See *Winners and Losers: Week of April 4th*, POLITICKERNJ (Apr. 8, 2011), <http://www.politickernj.com/46673/winners-and-losers>; see also *Re-districting Postmortem, Ten Takeaways*, POLITICKERNJ (Apr. 22, 2011), <http://www.politickernj.com/47045/redistricting-takeaways>.

224. Legislators that retired after their resident municipality was moved into an unfavorable legislative district included Senator John Girgenti, Assemblyman Kevin Ryan, Assemblywoman Joan Quigley, Assemblywoman Denise Coyle, Assemblyman Joseph Malone, Assemblyman Jack Connors, Assemblywoman Caridad Rodriguez, and Assemblywoman Joan Voss. See Statehouse Bureau, *Turnover in N.J. Legislature is Slight*, ASBURY PARK PRESS (Jan. 10, 2012), <http://www.app.com/article/20120110/NJNEWS1002/301100014/Turnover-N-J-Legislature-slight>. Thirtieth District Assemblyman Joseph Malone initially considered running in his newly-apportioned Seventh district, which was considered more competitive, but chose retirement instead. See Matt Friedman, *After Eighteen Years in Office, N.J. Assemblyman Malone Decides to not Seek Re-Election*, STAR LEDGER (June 15, 2011), http://www.nj.com/news/index.ssf/2011/06/nj_assemblyman_malone_not_seek.html. Sixteenth District Assemblywoman Denise Coyle initially pursued moving back into her district after her resident municipality of Bernards Township was grouped into the Twenty-first district, one with two other sitting Republican Legislators, but chose retirement instead. See Matt Friedman, *N.J. Assemblywoman Coyle Decides Not to Seek Re-Election After Landing in New Legislative District*, STAR LEDGER (Apr. 14, 2011), http://www.nj.com/news/index.ssf/2011/04/nj_assemblywoman_coyle_decides.html; see also 215TH LEGISLATIVE DISTRICTS, available at <http://www.state.nj.us/transportation/gis/maps/legislative.pdf>.

Those whose resident municipalities were apportioned to new districts and chose to move back into their original districts in order to run included the following Legislators:

- Fifteenth District Assemblyman Reed Gusciora's resident municipality of Princeton was apportioned into the Sixteenth District, so he moved back to the Fifteenth District municipality of Trenton to represent the remaining 86% of his original constituents.²²⁵

- Twenty-eighth District Assemblyman Ralph R. Caputo's resident municipality of Belleville was apportioned into the Twenty-ninth District, so he moved back to the Twenty-eighth District municipality of Nutley to represent the remaining 83% of his original constituents.²²⁶

Those whose resident municipalities were apportioned into new districts and chose to run in those new districts were the following:

- Twelfth District Senator Jennifer Beck's resident municipality of Red Bank was apportioned into the Eleventh District, where she then represented 39% of her original constituents;

- Twelfth District Assemblywoman Caroline Casagrande's resident municipality of Colts Neck was apportioned into the Eleventh District, where she then represented 39% of her original constituents;

- Eleventh District Assemblyman David P. Rible's resident municipality of Wall Township was apportioned into the Thirtieth District, where he then represented 26% of his original constituents;

- Eleventh District Senator Sean T. Kean's resident municipality of Wall Township was apportioned into the Thirtieth District (where he then ran for Assembly), where he then represented 26% of his original constituents;

- Thirteenth District Assemblyman Samuel D. Thompson's resident municipality of Old Bridge was apportioned into the Twelfth District (where he then ran for Senate), where he then represented 13% of his original constituents;

225. See Brief for Plaintiffs-Intervenors at 4–5, *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012) (No. 01-2024); Carmen Cusido, *N.J. Legislative Re-districting Forces Mercer Area Shakeup, Assemblyman Gusciora to Move to Trenton*, TIMES OF TRENTON (Apr. 5, 2011), http://www.nj.com/mercer/index.ssf/2011/04/princeton_redistricting_change.html. Compare NEW JERSEY STATE LEGISLATIVE DISTRICTS, 2011–2020, available at <http://www.njleg.state.nj.us/districts/njmap210.html> (last visited Feb. 27, 2013), with NEW JERSEY STATE LEGISLATIVE DISTRICTS, 2001–2010 [hereinafter NEW JERSEY STATE LEGISLATIVE DISTRICT COMPARISON], available at <http://www.njleg.state.nj.us/districts/njmap2001.pdf> (last visited Feb. 27, 2013).

226. See Matt Friedman, *At Least Three N.J. Lawmakers Plan to Move Because of New Legislative District Map*, STAR LEDGER (Apr. 7, 2011), http://www.nj.com/news/index.ssf/2011/04/at_least_3_nj_lawmakers_plan_t.html; see also NEW JERSEY STATE LEGISLATIVE DISTRICT COMPARISON, *supra* note 225.

- Fourth District Assemblyman Domenick DiCicco, Jr.'s resident municipality of Franklin Township was apportioned into the Third District, where he then ran in order to represent 30% of his original constituents (though he lost).²²⁷

If the one-year-in-district provision was read strictly, then none of these incumbent Legislators could possibly have complied with the provision during the re-apportionment years. Indeed, they would have only been in their districts for seven months prior to the November 2011 general election, and through no fault of their own, would have violated article I, section 1, paragraph 2 of the New Jersey Constitution. This is where re-apportionment and residency clash in a way that most likely violates equal protection on a strict or intermediate scrutiny standard, and these standards call out for constitutional revision. In the meantime, come the next re-apportionment cycle, incumbent Legislators may validly rely upon *Robertson II* and Chief Justice Rabner's *In re Contest II* dissent to ward off challenges to their legitimate candidacy.

In affixing the proper standard, courts should simply look to cases in which residency and re-apportionment have mixed, and utilize a heightened scrutiny standard. When dealing with these sorts of challenges, courts relying upon *Robertson II* will ask the question from *Clements*: "whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity."²²⁸ However, even those relying upon *In re Contest II* may apply strict scrutiny by way of *Dunn* and *Bullock* "when operation of the durational requirement has a 'real and appreciable impact' on the exercise of the franchise [of candidacy]."²²⁹ *Robertson II* and Chief Justice Rabner both found that during these years, "it is undisputed that re-apportionment displaces approximately one-third of New Jersey's residents from their previous districts" and because re-apportionment occurs roughly seven months prior to the

227. See Brief for Plaintiffs-Intervenors at 5–6, *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012) (No. 01-2024); NEW JERSEY STATE LEGISLATIVE DISTRICT COMPARISON, *supra* note 225; see also Max Pizarro, *Rerouted Thompson in Pursuit of Senate Seat*, POLITICKERNJ.COM (Apr. 4, 2011), <http://www.politickernj.com/46455/thompson-pursue-senate-seat>; Statehouse Bureau Staff, *N.J. Legislative Elections Results: Democrats Fend off GOP Funding, Christie Campaigning*, STAR LEDGER (Nov. 9, 2011), http://www.nj.com/news/index.ssf/2011/11/nj_legislative_elections_resul.html ("The Democrats' sole gain came thanks to re[-]districting. Assemblyman Domenick DiCicco (R-Gloucester), the only Republican to win a Democrat-held seat two years ago, was shifted into a district with two Democratic incumbents and immediately faced an uphill battle to stay in the Legislature. He lost by about 3,500 votes . . .").

228. *Robertson v. Bartels*, 890 F. Supp. 2d 519, 530 (D.N.J. 2012) (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982)).

229. *In re Contest of Nov. 8, 2011 Gen. Election of Office of N. J. Gen. Assembly*, 40 A.3d 684, 697 (N.J. 2012) (citation omitted).

election, candidates whose residences are moved cannot satisfy the requirement in any district.²³⁰ The operation of the requirement during these particular years, then, certainly “has a ‘real and appreciable impact’ on the franchise” of candidacy in New Jersey.²³¹ As *Robertson II* found strict scrutiny to apply in such matters, courts may then shift to ask whether the residency requirement “is justified by a compelling government interest and is narrowly drawn to serve that interest.”²³² However, even if the *Matthews* intermediate standard is applied, the residency requirement must be “reasonably and suitably tailored to further legitimate governmental objectives.”²³³

After first applying either scrutiny level, courts must then apply that particular level to New Jersey’s proffered legitimate state interests: a candidate’s ability to understand the electorate’s needs and desires, the electorate’s ability to familiarize itself with a candidate, and the prevention of political carpetbagging. *Robertson II* was correct in finding that during re-apportionment years, these interests—compelling or important—could not possibly be served with the enforcement or utilization of the residency provision.²³⁴ As one can see from the districts’ shifts and the candidacies of the various incumbent Legislators whose municipalities moved districts and then chose to run, it is seemingly impossible to justify exactly how a candidate could better familiarize himself or herself with a constituency that existed for less time than the requirement, and how voters in that particular constituency could familiarize themselves with the candidate. This is particularly galling when, like *Robertson I* opined, one looks to the extreme end-of-the-spectrum municipalities of Newark and Jersey City: the district lines “run down the middle of streets and through the heart of local neighborhoods,” and re-apportionment does nothing more than change these lines.²³⁵ Moreover, when an incumbent Legislator is kept in his or her district, but the district is a shell of his or her former constituency, the proffered interest in maintaining the residency requirement for the purpose of knowing one’s constituents is left moot.²³⁶

The prevention of “political carpetbagging” rationale is likely the easiest to cast aside during re-apportionment years,²³⁷ as re-

230. *Robertson II*, 890 F. Supp. 2d at 530.

231. *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

232. *Id.* (citation omitted).

233. *In re Contest II*, 40 A.3d at 717 (citation omitted).

234. *See Robertson II*, 890 F. Supp. 2d at 351.

235. *Id.* (citing *Robertson v. Bartels*, 150 F. Supp. 2d 691, 697 (D.N.J. 2001)).

236. *Id.* at 531.

237. Chief Justice Rabner opined that “concerns of carpetbagging do not exist” during these years. *In re Contest II*, 40 A.3d at 717 (Rabner, J., dissenting). The *Martin*

apportionment itself often *promotes* political carpetbagging, or forces incumbents to move in order to not be viewed as carpetbaggers. For example, looking to New Jersey's Eleventh and Twelfth Districts—whose representatives prior to re-districting only represented a fraction of their constituencies, but then were subsequently allowed to run and ended up staying in office—a valid argument could be made for carpetbagging: for the sole reason that it was presumptively assumed that they would succeed in a changing political district, but had not fully represented the district for the full year.²³⁸ However, it was through no fault of their own that their “carpetbagging” occurred! It also goes without saying that, in such instances, the “familiarity” interest cannot possibly be served.

Using the examples of Assemblymen Gusciora and Caputo, who were familiar with the vast portion of their newly-created district (86% in the case of Gusciora, and 83% in the case of Caputo), but whose municipalities were re-apportioned out of their district, these Legislators' inability to run in their former districts flies in the face of the familiarity and carpetbagging interests. Moving their residences to their previously-represented district, in fact, *promotes* the familiarity interest to allow them to do as much. Moreover, should they have decided to run in their newly-formed districts, where they would have represented 14% and 17% of their former constituents, respectively, political carpetbagging would be present—again, through no fault of their own.²³⁹

When dealing with this exact issue of carpetbagging, the Supreme Court of California in *Wenke* found that moving back into the original district in the way of Assemblymen Gusciora and Caputo met the state's proffered interests because “[the candidate] will undoubtedly be familiar with [his or her former district's] problems and needs—certainly as much as the candidate who by fortuity remains in the district unaffected by the change in boundaries.”²⁴⁰ Furthermore, to not allow Gusciora or Caputo to run would “thwart the democratic process” by forcing them to run to represent a constituency with which they have little to no familiarity.²⁴¹ New Jersey's Constitution therefore calls out for revision, given that,

court noted that, like these Legislators, “[t]he petitioners did not move away from their districts; their districts moved away from them.” *Martin v. Jones*, 414 S.E.2d 445, 447 (W. Va. 1992); Brief for Plaintiffs-Intervenors at 21–34, *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012) (No. 01-2024).

238. See *Robertson II*, 890 F. Supp. 519, 530 (D.N.J. 2012); Brief for Plaintiffs-Intervenors at 25–30, *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012) (No. 01-2024).

239. See *Robertson II*, 890 F. Supp. 2d. at 531 (“Had [Gusciora] chosen to remain . . . in the [Sixteenth] District, he would have remained relatively unfamiliar with the electorate and could arguably be accused of carpetbagging.”).

240. *Wenke v. Hitckcock*, 493 P.2d 1154, 1160 (Cal. 1972).

241. *Id.*; see also *Robertson II*, 890 F. Supp. 2d at 531.

during re-apportionment years, a strict reading of the residency requirement could potentially prevent an incumbent—or really, any candidate whose residence is placed in a new district—from running in either her new or old district because of a failure to meet the one-year requirement.²⁴² Because this clash of two requirements “infringes on the rights of all voting-age residents in more than a third of the State’s localities, for no apparent purpose,” much like the Supreme Court of West Virginia in *Martin* opined, New Jersey “invites outrageous and destructive political maneuvering every ten years,” contrary to the intentions of the state and will of the people.²⁴³ As the re-apportionment commission is a partisan body,²⁴⁴ and consequently the results retain partisan elements, allowing the residency requirement to continue in such a strict manner only serves to destroy our democratic system. The “outrageous and destructive political maneuvering” is supplanted by not allowing relief for those Legislators, such as Gusciora, who were considered “casualties” of re-apportionment, to correct their own misfortune by moving back into their respective districts. This also has an appreciable effect on the voters of the district. For instance, Gusciora had represented voters in the Fifteenth District for over a decade; by not allowing him to move back to continue his representation, the voters would have been deprived of a competent and familiar Legislator who they had elected and re-elected time and time again. Undermining the electoral process in such a way has deep roots in equal protection law, and these scenarios may properly be considered a violation.²⁴⁵

242. See *Robertson II*, 890 F. Supp. 2d at n.9; *In re Contest II*, 40 A.3d at 715–16 (Rabner, J., dissenting) (noting that during re-apportionment years, “not a single adult resident in roughly one-third of the State’s localities could run for [public office], or vote for a neighbor who wanted to run, under the strict terms of the residency requirement”).

243. See *In re Contest II*, 40 A.3d at 717 (Rabner, J., dissenting); *Martin*, 414 S.E.2d at 447.

244. See N.J. CONST. art IV, § 3, ¶ 1 (“the Senate districts and Assembly districts shall be established, and the senators and members of the General Assembly shall be apportioned among them, by an Apportionment Commission consisting of ten members, five to be appointed by the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election”). The 2011 redistricting process was so acrimonious that the commission delegates from the two political parties were forced to certify to Chief Justice Rabner that they would be unable to “certify such establishment and appointment to the Secretary of State on or before the date fixed” so that he could appoint a tie-breaker: the late Rutgers University professor Alan Rosenthal. See *id.* at art. IV, § 3, ¶ 2; Max Pizarro, *Rabner Uses Redistricting Tiebreaker Case as an Example of His Problem-Solving Ability*, POLITICKERNJ (June 16, 2014), <http://www.politickernj.com/74351/rabner-uses/redistricting-tiebreaker-case-example-his-problem-solving-ability>.

245. See *Robertson II*, 890 F. Supp. 2d at 532; *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (ballot access with a “real and appreciable impact on the exercise of the franchise”

Moreover, as seen from its history, the framers of New Jersey's Constitution never envisioned that re-apportionment would impact the residency requirement because it was not until 1966 that "a [L]egislator or candidate could be moved arbitrarily from one political subdivision to another as a result of re-apportionment."²⁴⁶ As *Robertson II* noted and as the proceedings of the various New Jersey Constitutions confirm, "re[-]apportionment up to 1966 merely changed the number of representatives per county" and could not possibly have moved candidates inter-district.²⁴⁷ Indeed, candidates were to represent counties, whose boundaries never changed, rather than political districts. The residency requirement, therefore, could never strike down a candidacy based on political fortunes or misfortunes, but rather, could only strike down a candidacy based on the will of the individual candidate or incumbent Legislator to move his or her residence.

In fact, as seen from the relevant constitutional revisions, while the residency requirement has remained within the New Jersey Constitution since 1776, the potential for re-apportionment to clash with a candidate's residency only dates back to 1966. The *In re Contest II* court made a valid point on this matter: "New Jersey's voters, as recently as 1966, reaffirmed that candidates for General Assembly should live with the voters they seek to represent for at least one year before the election."²⁴⁸ However, in so proposing the amendments to the voters, nothing in the proceedings of the 1966 one-person, one-vote amendments suggests any sort of change to the residency requirement. Rather, the change of "counties" to "districts" came—without discussion by the framers—from a technical amendment, not a debated change of the historical precedent of candidates living with their potential constituencies.²⁴⁹ The people of New Jersey, therefore, did indeed ratify what *In re Contest II*'s states, but seemingly without the understanding by the framers or by the people of

may be violative of equal protection); *Clements v. Fashing*, 457 U.S. 957, 964 (1982) (finding that when a restriction "unfairly or unnecessarily burdens the availability of political opportunity," the restriction may be violative of equal protection). *See generally* Brief for Plaintiffs-Intervenors, *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012) (No. 01-2024).

246. *Robertson II*, 890 F. Supp. 2d at 533.

247. *Id.* at 533 n.11.

248. *In re Contest II*, 40 A.3d at 702.

249. *See* 1 STATE OF NEW JERSEY, CONSTITUTIONAL CONVENTION OF 1966, MISCELLANEOUS PAPERS, PROPOSAL NO. 45 (1966); 14 STATE OF NEW JERSEY, CONSTITUTIONAL CONVENTION OF 1966, PROCEEDINGS (1966); Brief for Plaintiffs-Intervenors at 26–29, *Robertson v. Bartels*, 890 F. Supp. 2d 519 (D.N.J. 2012) (No. 01-2024).

such a clash between residency and re-apportionment, which had never before occurred.²⁵⁰

Therefore, in light of the aforementioned fallacies, candidates whose residency is affected by re-apportionment—and re-apportionment only—may validly challenge the requirement, insofar as their candidacy itself is challenged. The interests asserted by the State cannot meet the strict scrutiny standard under *Dunn* or even the intermediate scrutiny under *Matthews*. However, as a practical matter, the *Robertson II* injunction stands, and barring another state court decision, the Attorney General and Secretary of State will comply.²⁵¹ Once again, however, this matter should not be constrained by the limited authority of the courts, but should be taken up by the Legislature as a constitutional amendment to prevent further widespread confusion every ten years, and to head-off action by the state courts, which have yet to deal with a direct challenge to the residency requirement and re-apportionment process after *In re Contest II* and *Robertson II*.

B. Challengers Whose Residency is Not Affected By Re-Appportionment Will Not Find Relief From the Courts

Aside from the perfected challenge to the residency requirement during re-apportionment years, challengers will likely not be able to find relief from the courts if they fail to meet the one-year-in-district requirement, or the in-state requirement. Moreover, those requirements, which have been maintained in the New Jersey Constitution for decades, still serve the purpose that they always have, and will not be held to a heightened standard under an equal protection analysis. Finally, for purposes of prospective candidate knowledge, the Secretary of State and the Attorney General can now enforce this provision and *let candidates know* about its enforcement with the tightened restriction of the scope of the *Robertson II* injunction re-apportionment.²⁵²

First, those candidates who come from out-of-state to run for public office in New Jersey must still comply with the state and in-district residency provisions in order to run. This was delineated by *Lewis IV*, which re-affirmed a facial challenge to residency requirements in *Sununu*

250. When dealing with an analogous requirement and situation, the *Martin* court found that the drafters of the West Virginia Constitution “never envisaged this situation where a technical impediment would prevent serving [L]egislators from continuing to represent their own constituents or prevent challengers in like circumstances from filing.” 414 S.E.2d at 447.

251. See *Robertson II*, 890 F. Supp. 2d at 534.

252. *Id.*

and *Chimento*, and all but did away with as-applied challenges to the four-year state residency requirement for candidates for the State Senate.²⁵³ *Lewis IV* would apply just as much to those running for the General Assembly, as the interests remain the same, albeit the time period is shorter. When dealing with as-applied equal protection challenges, the Third Circuit has adopted the principle that, in deciding whether the application of the constitutional provision is violative, the proper question is “whether the application of the constitutional provision . . . deprive[s] [the candidate] of a constitutional right [under the particular circumstances of this case].”²⁵⁴ However, in dealing with facial challenges, the courts may properly look to *Sununu* and *Chimento* for further validation of in-state residency requirements, since the United States Supreme Court has yet to hold otherwise, and their summary affirmances are the closest thing the judiciary has to a solidified ruling in these circumstances.

Although *Sununu* and *Chimento* provide that for facial equal protection challenges to in-state residency requirements for candidates, and *Dunn* can be utilized as the proper standard of review, both *Sununu* and *Chimento* found that the residency requirement was constitutionally tailored to the legitimate state objectives, as seen *supra*.²⁵⁵ That is, the residency restriction for out-of-state candidates is tailored to ensuring that residents of the political districts are familiar with someone who recently moved in from out-of-state. Certainly, political carpetbagging is the most important interest, and easiest to abuse without such a provision. Indeed, although Mr. Lewis had lived in New Jersey for most of his life, he had recently lived in California—had he never lived in New

253. *Lewis v. Guadagno*, 445 F. App'x 599, 604 n.5 (3d. Cir. 2011). Interestingly, the Third Circuit remarked that Mr. Lewis could not “point to a similarly situated person who, having voted as a citizen of another state less than three years before a general election in New Jersey, was deemed eligible to run for statewide office.” *Id.* at 602. However, Mr. Edward Forchion, also known as the “NJ Weedman,” was certified to run for office in the same district as Mr. Lewis as an independent candidate, but his candidacy went unchallenged and unnoticed by Mr. Lewis’s counsel. Colleen O’Dea, *Fight Over Residency Leaves Assembly With Vacant Seat*, NJSPOTLIGHT.COM (Jan. 13, 2012), <http://www.njspotlight.com/stories/12/0112/2329/>. It was later found that Mr. Forchion had moved to Los Angeles, California three years earlier, and Mr. Lewis’s counsel stated that “had he known about [Mr.] Forchion’s residency at the time, and that he was allowed on the ballot, the courts may have allowed Lewis on the ballot as well.” *Id.*; see also Joelle Farrell, *Most Legal Work for Lewis[s] N.J. Senate Bid Provided Free*, PHILADELPHIA INQUIRER (Oct. 25, 2011), http://articles.philly.com/2011-10-25/news/30320483_1_contribution-limits-lewis-case-new-jersey-senate.

254. *Lewis IV*, 445 F. App'x at 602.

255. *Sununu v. Stark*, 383 F. Supp. 1287, 1291 (1974); *Chimento v. Stark*, 353 F. Supp. 1211, 1213 (1973).

Jersey before, he could certainly have been characterized as a political carpetbagger attempting to capitalize on his celebrity to run for office.²⁵⁶ Furthermore, *Lewis IV* and *Chimento* found that the in-state residency requirement imposes only “minimal burdens” on candidates seeking office—such as a short waiting period, rather than an infringement on a constitutionally protected right.²⁵⁷ Finally, as the requirement has gone relatively unaltered in the New Jersey Constitution, and is unaffected by re-apportionment years, the cause for change is lacking. Thus, because of the courts’ broad-based acceptance of such requirements, there is not a pressing need for New Jerseyans to revisit this issue in the constitution, nor is there a need for courts to do anything further. Candidates, however, must ensure that they meet this requirement, especially now that *Robertson II* has limited the scope of its injunction and clarified the years to which it applies.²⁵⁸

Next, to those candidates who move their residency intra-state during years other than re-apportionment years, *Robertson II* has now accepted the idea that the residency requirement will bar such candidates from running, which *In re Contest II* certainly reaffirmed.²⁵⁹ Courts have decided that the *Matthews* intermediate standard applies to these matters, or that other lower court opinions provide sufficient guidance to ensure its tailored ability to fulfill legitimate state interests.²⁶⁰ Thus, without a stipulation that their residences were moved due to re-apportionment, candidates who move out of their resident municipality, through their own free will, less than one year before the general election, will have their candidacy barred with valid backing. Furthermore, the New Jersey Constitution’s long history of ratifying and re-ratifying this requirement suggests that the people are not ready to have it repealed. This was certainly the New Jersey Supreme Court’s take in declining to “abrogate our 235 year-old [s]tate [c]onstitution’s requirement.”²⁶¹

256. *Lewis IV*, 445 F. App’x at 602. Celebrities have, in other instances, been branded carpetbaggers when moving into a state to run for political office. For example, actress Ashley Judd, a Tennessee resident, may decide to challenge United States Senate Minority Leader Mitch McConnell for a United States Senate seat in her childhood home state of Kentucky, although she has lived in Tennessee for years. See Roger Alford, *Ashley Judd May Need to Decide Soon on Senate Race*, ASSOCIATED PRESS (Mar. 5, 2013), http://www.denverpost.com/recommended/ci_22722354. Republican groups have mocked her for having her residence in Tennessee. *Id.*

257. *Lewis IV*, 445 F. App’x at 603; *Chimento*, 353 F. Supp. at 1215–16.

258. *Robertson II*, 890 F. Supp. 2d at 534.

259. *Id.*; *In re Contest II*, 40 A.3d at 713.

260. *In re Contest II*, 40 A.3d at 707; *Ammond v. Keating*, 374 A.2d 498, 498–99 (N.J. Super. App. Div. 1977).

261. *In re Contest II*, 40 A.3d at 688–89.

VI. CONCLUSION

With the recent litigation that has plagued the New Jersey state and federal court system, New Jersey's constitutional in-district residency requirement seems here to stay, except during years in which the decennial re-apportionment occurs. During those years, equal protection concerns compelled the court in *Robertson v. Bartels II* to strike down the provision, and limit the scope of its injunction to *only* those years. This was a wise choice by the federal district court, but one that need not stay waiting for other decisions in contradiction. The New Jersey Legislature should take action in the form of a constitutional amendment to alleviate the requirement during such years. This would prevent confusion among candidates, Legislators, political parties, and the courts. Otherwise, the in-district residency requirement plays an important role in our state's political discourse to ensure that candidates are aware of their constituents' issues, concerns, and ideas. Change is needed, but small increments of alteration will go a long way towards ensuring a streamlined, principled state legislature and pool of candidates for such offices.