IN THE SUPREME COURT OF ALABAMA

TOMMY HANES, DAVID CALDERWOOD, and **FOCUS ON AMERICA,**	)	
Appellants,	)	
v.	)	**Case No. SC-2022-0869**
JOHN MERRILL, as Secretary of State, **BILL ENGLISH, WES ALLEN, CLAY CRENSHAW, JEFF ELROD,** and **WILL BARFOOT**, as members of the Electronic Voting Committee,	)	
Appellees.	)	

BRIEF OF AMICUS CURIAE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

Amicus Curiae Alabama Center for Law and Liberty ("ACLL") defers to Appellants' judgment as to whether oral argument is necessary in this case. ACLL believes that it has sufficiently presented its case through its brief and therefore will not file the unusual motion for an amicus curiae to participate in oral argument. *See* Rule 29(f), Ala. R. App. P. However, if the Court desires for ACLL to participate in oral argument, then it will gladly accept the invitation.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Alabama Center for Law and Liberty ("ACLL") is a nonprofit law organization based in Birmingham, Alabama, that advocates for limited government, free markets, and strong families. ACLL has an interest in this case because this case involves the fundamental right to vote, protected by both the United States and Alabama Constitutions, that is essential to limited government.

ACLL desires to file this brief because it desires to respond to the calls of Justice Mitchell and Chief Justice Parker to brief the Court on threshold issues of the Alabama Constitution's original meaning. *See Barnett v. Jones*, 338 So. 3d 757, 766 (Ala. 2021) (Mitchell, J., joined by Parker, C.J., concurring specially); *Glass v. City of Montgomery*, No. 1200240, 2022 Ala. LEXIS 19, 44 (2022) (Mitchell, J., concurring in part and concurring in the result); *see also* Jeffrey S. Sutton, *51 Imperfect*

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[1] Appellant has consented to the filing of this brief; ACLL did not ask for consent from Appellee because the typical amicus practice in Alabama is to file a motion instead of asking for consent. *See* Ala. R. App. P. 29 and comments. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than ACLL and its counsel made a monetary contribution to fund the preparation or submission of this brief.

Solutions (2018) (calling on lawyers to brief not only the meaning of the Federal Constitution but also state constitutions in litigation). ACLL believes this case involves questions of whether this Court's precedents concerning standing are historically correct. ACLL will address that question and argue that a historically accurate understanding of standing works in Appellants' favor.

SUMMARY OF THE ARGUMENT

The trial court's decision in this case rested on the notion that Appellants failed to prove that they had standing. More than anything, the trial court reasoned that Appellants failed to show that they had suffered an injury-in-fact. While ACLL expects that Appellants will contest that point under the government precedents, ACLL desires to submit another point for the Court's consideration: The injury-in-fact requirement of the standing doctrine does not comport with the Alabama Constitution. Justice Clarence Thomas of the U.S. Supreme Court and Judge Kevin Newsom of the Eleventh Circuit have issued thoughtful historical critiques of the injury-in-fact requirement from an originalist perspective over the last two years. Because ACLL believes that those some problems are present in Alabama jurisprudence and caused

Appellants to lose their lawsuit below, ACLL will argue that the injury-in-fact requirement of the standing doctrine is unconstitutional, ahistorical, and due to be reconsidered.

Alabama courts typically follow the U.S. Supreme Court's decision in *Lujan v. Defenders of Wildlife* to determine whether a party has standing to sue. One of *Lujan*'s requirements was that a party suffer an injury-in-fact that is concrete and particularized, as well as actual and imminent. While this rule from *Lujan* had a basis in precedents from the 1970's and was undoubtedly a noble attempt to protect the separation of powers, this rule has proven difficult to apply in practice. For instance, lower federal courts have held that receiving unsolicited phone calls constitute such injury while receiving unsolicited text messages are not. Some have held that receiving objectively misleading communications constitutes fraud, while others have held that the plaintiff must actually be misled in order to have standing to sue. And in the wake of COVID-19, state courts have upheld executive orders of highly doubtful constitutionality, which provided criminal penalties for their violation, on the basis that nobody actually threatened to enforce them. Such rules give tortfeasors, criminals, and tyrants permission to engage in the

childish game of "I'm not touching you" and to hold real harm over innocent people's heads while they are powerless to do anything about it. These unjust and inconsistent outcomes should warrant an investigation as to whether the injury-in-fact rule is sound or not.

Justice Thomas and Judge Newsom argue persuasively that it is not. At the time of the Founding, a matter was considered justiciable when a person had his or her legal rights violated and asserted their own rights. This gave rise to a legal cause of action, which was interchangeable with the word "case" that we find in Article III. It was not until the 1970's that injury-in-fact arrived as another way to establish standing. It was meant to supplement the injury-at-law requirement, but it did not take long for injury-in-fact to begin consuming the old rule. Finally, in *Lujan*, the U.S. Supreme Court replaced injury-at-law with injury-in-fact as the gateway into the courts.

For this reason, this Court should not follow the U.S. Supreme Court's ahistorical approach to justiciability. Instead, a historical analysis of the Alabama Constitution reveals that the original public meaning of the Judicial Power Clause aligned not with *Lujan* but with Justice Thomas and Judge Newsom's views. Applying that framework to

this case, Appellants have standing because they have individual rights to have their votes counted properly, which (taking the allegations in the complaint as true, which must be done at this stage) is not being done here because the voting machines have not been properly certified. Consequently, they have standing, and their case should be evaluated on the merits.

ARGUMENT

Standing is supposed to be a referee ensuring that there are not too many players on the field, not a punter that takes the football from the offense and kicks it away. Unfortunately, in modern times, the federal courts have become so harsh in interpreting the "actual injury requirement" that they have functioned more as a punter than a referee. Historical analysis from such prominent figures as Justice Clarence Thomas of the United States Supreme Court and Judge Kevin Newsom of the Eleventh Circuit has revealed that an injury *at law*, as opposed to an injury *in fact*, should be sufficient to confer standing on a plaintiff.[2]

[2] Many of the arguments in this brief are rooted in Justice Thomas's dissent in *Transunion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) and Judge Newsom's concurrence in *Sierra v. City of Hallandale Beach, Fla.*, 996 F. 3d 1110 (11th Cir. 2021).

ACLL contends that the same is true for Alabama courts, and that under such framework, this Court should find that Appellants have standing.

I. Historically, Injury-at-Law, Not Injury-in-Fact, Was Sufficient to Confer Standing.

A. This Court's Adoption of *Lujan*

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the U.S. Supreme Court articulated three elements to satisfy Article III's standing requirements: (1) the plaintiffs must have suffered an injury *in fact*, which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and conduct complained of; i.e. it must be "fairly traceable" to defendants; and (3) it must be likely, not speculative, that a favorable decision will redress the injury. *Lujan*, 504 U.S. at 560-61.

This Court initially followed *Lujan* to determine whether an appellant had standing to bring a federal Commerce Clause claim. *Stiff v. Ala. Alcoholic Bev. Control Bd.*, 878 So. 2d 1138, 1142 (Ala. 2003). One could see why the Court would look to federal precedents when considering a federal claim.[3] But four months later, without any

[3] However, it does not follow that this Court had to follow Supreme Court precedent regarding *standing* when the only claim before it was a

independent assessment of *Lujan* or any analysis of whether the Alabama Constitution required a similar result, the Court applied *Lujan* to a breach-of-contract claim arising solely under Alabama law. *Avis Rent a Car Sys. v. Heilman*, 876 So. 2d 1111, 1120 (Ala. 2003). *Avis*'s sole reason for adopting *Lujan* to determine the Alabama judiciary's constitutional limits was that this Court had used *Lujan* in *Stiff*. *Id.* That's it.

The question then is whether it is good for this Court to adopt a rule verbatim from the U.S. Supreme Court, even though it involved an interpretation of a different constitution than Alabama's, solely because the U.S. Supreme Court did it. Undoubtedly, *Lujan* was an important decision that, ACLL believes, was generally shooting in the right direction. Recognizing constitutional limitations on who can sue is an essential limitation on judicial power. *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk L. Rev. 881 (1983) ("hereinafter *The Doctrine of Standing*"). On the other hand, *Lujan* itself did not engage in a careful originalist

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Commerce Clause claim. Standing rules in Alabama courts come from the Alabama Constitution, not the Federal Constitution. *See* Part III, *infra*.

analysis of Article III, but instead relied instead the Court's past precedents. *Lujan*, 504 U.S. at 560-61.[4] Precedent, of course, is entitled to a presumption of correctness. *See* 1 William Blackstone, *Commentaries* *68-74. But should a precedent err, it can cause problems for those who follow it, and lead to all kinds of unjust results solely because subsequent decisions followed the "crooked path of precedent." *See Lorence v. Hosp. Bd. of Morgan Cnty.*, 294 Ala. 614, 618-19, 320 So. 2d 631, 634-35 (1975).

B. The Practical Problems with *Lujan*'s Injury Rule

Prominent conservative jurists have begun criticizing *Lujan*'s injury rule after seeing how it works in practice. *See, e.g.*, *Transunion LLC v. Ramirez*, 141 S. Ct. 2190, 2216-21 (2021) (Thomas, J., dissenting); *Sierra v. City of Hallandale Beach, Fla.*, 996 F. 3d 1110, 1115-40 (11th Cir. 2021) (Newsom, J., concurring). For instance, as Judge Newsom has observed, the "concreteness" aspect of injury-in-fact has led to holding that receiving unwanted phone calls is a concrete injury but receiving unwanted text messages is not. *Sierra*, 996 F. 3d at 1116 (Newsom, J.,

[4] It is true that *Lujan* cited *The Federalist* No. 48 (James Madison) for background information. *Id.* at 559-60. Nevertheless, *The Federalist* No. 48 provided only general background information, not the level of detail needed to resolve the dispute. *See id.*

concurring) (citing *Cordoba v. DIRECTV, LLC*, 942 F. 3d 1259, 1270 (11th Cir. 2019) and *Salcedo v. Hanna*, 936 F. 3d 1162, 1169-70 (11th Cir. 2019)). Likewise, courts disagree on whether an injury is sufficiently "concrete" if a person receives an objectively misleading debt-collection letter or whether the plaintiff actually has to be misled. *Id.* (citing cases from the Second, Sixth, Eleventh, and D.C. Circuits on opposite sides).

Just as the referee is supposed to ensure that only the properly authorized football players are supposed to be on the field, so the courts are supposed to ensure that only actual cases get into the courts. But construing "injury" as strictly as some of the examples that Judge Newsom mentioned above is more like the referee taking the ball from the offense and punting it away. That is obviously not the role of the referee. Neither is it the role of the judiciary.

Respectfully, it is not only the federal courts that have turned the standing doctrine from a gatekeeper into a bludgeon, but the state courts, including this Court, have sometimes followed suit. For instance, in *Munza v. Ivey*, 334 So. 3d 211, 219 (Ala. 2021), this Court held that the appellants lacked standing to challenge Governor Ivey's mask mandate on constitutional grounds because there was no credible threat of

prosecution for violating the mandate. The practical result of *Munza* was that the Governor, who appeared to be usurping the role of the Legislature, could get away with promulgating an unconstitutional order that had criminal penalties attached to it, leaving the People without a way to challenge it before they got thrown in jail.

For every sibling that loved to torment their younger brother or sister through a game of "I'm not touching you," this was music to their ears. But it was certainly not to the People of Alabama. Instead of merely having to put up with an annoying sibling who had a finger hanging in front of their face, they had to put up with a government that had a sword hanging over their head. Law-abiding citizens in a free society should not have to put up with patently unconstitutional threats of incarceration. To that end, the Alabama Constitution guarantees that "all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Art. I, § 13, Ala. Const. 1901.

To be fair, it appears that *Munza* was simply following precedent. And in fairness to the courts in general, it appears that this is what often

happens. But when following those rules yields results like those mentioned above, the question becomes whether the rules are an accurate reflection of the law. If they are not, then it is time to take another look at the precedents and question whether they are correct.

C. The Textual and Historical Approach to Injury

Starting with the text of the Federal Constitution, if one opens his copy to Article III, he will find that "'the Constitution contains no Standing Clause.'" *Sierra*, 996 F. 3d at 1121 (Newsom, J., concurring) (quoting Richard H. Fallon Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 101 (7th ed. 2015)). Instead, one would find that "[t]he judicial power shall extend to all *cases*, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," as well as other classes of "cases" and "controversies." U.S. Const., art. III, § 2 (emphasis added). Thus, in order to be valid, the rules of standing must be deduced from this text. *Lujan* held that the standing rules hinge on the words "cases" and "controversies" in Article III. *Lujan*, 504 U.S. at 560.

The word "case" during the Founding era meant a "cause or suit in court; as, the case was tried at the last term." *Sierra*, 996 F. 3d at 1122-23 (Newsom, J., concurring) (quoting *Case,* Webster's American Dictionary of the English Language (1828)). The same dictionary continued, "In this sense, case is nearly synonymous with cause, whose primary sense is nearly the same." *Id.* (quoting *Cause*, Webster's, *supra*). These terms have basically the same meaning that they do today, as the Supreme Court has recognized from the Marshall Court until now. *Id.* at 1122-23 (quoting *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1871) ("The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action.") and *Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("A 'case' was defined by Mr. Chief Justice Marshall as early as ... *Marbury v. Madison* to be a suit instituted according to the regular course of judicial procedure.")).Thus, Judge Newsom concludes that "a plaintiff who has a legally cognizable cause of action has a 'Case' within the meaning of Article III." *Id.*

The historical evidence recounted by Justice Thomas in his *Transunion* dissent strengthens this conclusion. Beginning in 1821, the

Supreme Court recognized that Article III's judicial power extends to "'"a case in law or equity," in which a *right*, under such law, is asserted."' *Transunion*, 141 S. Ct. at 2217 (Thomas, J., dissenting) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 405 (1821)) (emphasis in original). Thus, while the "mere filing of a complaint in federal court … does not a case (or controversy) make," the key "to the scope of judicial power … is whether an individual asserts his or her own rights." *Id.* at 2216-17. Thus, wherever a violation of a party's rights was shown, injury was presumed and was not required to be proved. *See Transunion*, 141 S. Ct. at 2217-18 (Thomas, J., dissenting) (citing *Robert Marys's Case*, 9 Co. Rep. 111b, 112b, 77 Eng. Rep. 895, 898–899 (K. B. 1613); *Entick v. Carrington*, 2 Wils. K. B. 275, 291, 95 Eng. Rep. 807, 817 (K. B. 1765); 3 William Blackstone, *Commentaries* *2 (discussing private wrongs and redress by the mere operation of law); 4 *id.*, at *5. (analyzing public wrongs and remedies for offenses against the law of nations); *Whittemore v. Cutter*, 29 F. Cas. 1120, 1121 (No. 17,600) (CC Mass. 1813) (Story, J.) ("[W]here the law gives an action for a particular act, the doing of that act imports of itself a damage to the party" because "[e]very violation of a right imports some damage."); *see also Sierra*, 996 F. 3d 1123-26) (Newsom, J.,

concurring) (citing *Marzetti v. Williams*, 109 Eng. Rep. 842, 846 (K.B. 1830) (Parke, J.) ("At common law, courts regularly awarded nominal damages when a plaintiff suffered a legal injury but either didn't seek or couldn't prove compensatory damages.")).

It was not until 1970 that "injury in fact" first appeared in Supreme Court decisions regarding standing. *Sierra*, 996 F. 3d at 1117 (Newsom, J., concurring) (citing *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970)). This, of course, was "180 years after the ratification of Article III[.]" *Id.* Initially, the injury-in-fact rule supplemented rather than repudiated the legal-injury rule. *Id.* at 1118. However, from 1975 onward, the injury-in-fact rule chipped away at the legal-injury rule until it completely consumed it in *Lujan*. *Id.* (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38-39 (1976); *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). But until that time, if a party's legal rights were violated, he or she had standing to sue.

The only difference was where a party sought to assert a right that the community as a whole held rather than a private right of an individual; in such a case, the President (or the executive branch of the state) would have to bring an action, especially when it came to the

prosecution of criminals. *Transunion*, 141 S. Ct. at 2217 (Thomas, J. dissenting) (citing 4 William Blackstone, *Commentaries* *5); *Sierra*, 996 F. 3d at 1131-32 (Newsom, J., concurring) (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329-30 (1816) (Story, J.)). However, as Blackstone recognized, there were many cases where a wrong could be both a private and public offense. *Sierra*, 996 F. 3d at 1134 (Newsom, J., concurring) (quoting 4 William Blackstone, *Commentaries* *5-7). In such cases, however, the fact that the people who created the government gave up the right to enforce public rights did not mean that they also gave up the right to enforce their privately held rights. *Id.* at 1135. In other words, in cases of overlap, individuals could still sue instead of simply hoping that their attorney general would sue for them.

So it is in this case. Appellants are not asking this Court to enforce a right that belongs exclusively to the public, such as the prosecution of criminals. Instead, they are asking the Court to enforce a right that both the public and the plaintiffs hold jointly. Without a doubt, the public has an interest in ensuring that the voting machines are properly vetted. However, even if public officials are convinced that there are no security problems, an individual voter still has a right to ensure that his or her

vote counts. "It has been repeatedly recognized that *all qualified voters* have a constitutionally protected right to vote … and to have their votes counted." *Waltman v. Rowell*, 913 So. 2d 1083, 1089 (Ala. 2005) (emphasis added, alteration in original, quotation marks and citations omitted). Thus, the right to have the votes properly counted by a properly vetted system is not one held only by the public but also by each individual voter, including Appellants and their members. Thus, under the historical view of standing as articulated by Justice Thomas and Judge Newsom, Appellants have standing to sue.

II. Under the Alabama Constitution as Interpreted According to Its Original Meaning, Appellants Have Standing

Earlier, ACLL noted that this Court adopted *Lujan* without much thought in *Avis* without much independent analysis of whether *Lujan* comported with the Alabama Constitution. *See* Part I.A., *supra*. However, it would be hypocritical of ACLL to argue that Justice Thomas and Judge Newsom's approach, although a more historically accurate understanding of standing under Article III, automatically fits this case better than *Lujan* without any analysis of the Alabama Constitution itself. The sources on which Justice Thomas and Judge Newsom rely are relevant to determining the original public meaning of the Alabama

Constitution inasmuch as they draw from the same traditions. But if there are any material textual differences, then history and tradition must be subservient to the text, not the other way around.

Article VI, § 139(a), Ala. Const. 1901 provides:

> Except as otherwise provided by this Constitution, the judicial power of the state shall be vested exclusively in a unified judicial system which shall consist of a supreme court, a court of criminal appeals, a court of civil appeals, a trial court of general jurisdiction known as the circuit court, a trial court of limited jurisdiction known as the district court, a probate court and such municipal courts as may be provided by law.

Unlike the Federal Constitution, the Alabama Constitution does not limit the judicial power of this State to "cases and controversies" arising under the Alabama Constitution. *Cf.* U.S. Const. art. III, § 2 ("The judicial power shall extend to all cases … arising under this Constitution … to controversies to which the United States shall be a party ….''). The absence of such a limitation in state constitutions in general is a key reason state courts have broader powers than federal courts (at least as interpreted by *Lujan*). For instance, state supreme courts have jurisdiction to render advisory opinions while federal courts do not. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (noting that the case-or-controversy requirement of Article III prohibits the federal courts from

issuing advisory opinions). Because *Lujan*'s requirement of actual injury hinged completely on the words "case or controversy,"[5] and since the Alabama Constitution does not contain such a limitation, this is all the more reason why reading *Lujan* into the Alabama Constitution is not a sound approach to constitutional interpretation.

The Constitution of 1901, with its 1973 judicial amendment, does not differ in any material respect from past Alabama Constitutions. Each of the previous Alabama Constitutions had similar language regarding judicial power but not an explicit "case or controversy" requirement like Article III. *See* Art V., § 1, Ala. Const. 1819; Art. V, § 1, Ala. Const. 1861; Art. VI, § 1, Ala. Const. 1865; Art. VI, § 1, Ala. Const. 1868; Art. VI, § 1, Ala. Const. 1875. Neither is there any material difference between the Alabama Constitution of 1901 and the newly approved Alabama Constitution of 2022. *See* Art. VI, § 139, Ala. Const. 2022.[6]

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[5] *Lujan*, 504 U.S. at 590.

[6] *Available at* https://alison-file.legislature.state.al.us/pdfdocs/lsa/proposed-constitution/2022-constitution-statewide.pdf (last visited Nov. 10, 2022). The Alabama Constitution of 2022, which was approved by the voters on November 8, will go into effect on January 1, 2023. Art. XVIII, § 286.01, Ala. Const. 1901. Furthermore, the People authorized the Alabama Constitution of 2022 to make only five categories of changes to the Constitution of 1901,

Of course, this does not mean that the judicial power of the Alabama courts is limitless. Around the time of the 1901 Constitution, "judicial power" was understood as "'the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.'" *Muskrat v. United States*, 219 U.S. 346, 356 (1911) (quoting Samuel Freeman Miller, *The Constitution and the Supreme Court of the United States* 314 (1889)).[7] This appears to fit the Founding Era understanding of the judiciary, which was defined as "[t]hat branch of government which is concerned in the trial and determination of *controversies between parties*, and of

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and revision of the judicial article was not among them. Art. XVIII, § 286.02, Ala. Const. 1901. If the Court finds, at the time that it considers this case, that the Alabama Constitution of 2022 is the governing law instead of the Alabama Constitution of 1901, then the analysis of the Alabama Constitution of 1901 is still relevant because the Alabama Constitution of 2022 did not change anything pertaining to the judiciary.

[7] Unfortunately, the 1901 version of *Webster's International Dictionary* is not helpful in this case. That dictionary defines "judicial" as "[p]ertaining or appropriate to courts of justice, or to a judge." *Webster's International Dictionary* 804 (1901). While this clarifies that courts exercise judicial power, it sheds no light on what the judicial power is. Thus, other sources must be consulted for determining the original public meaning of "judicial power" in 1901. *Muskrat* and Justice Miller's treatise are helpful sources.

criminal prosecutions." *Webster's American 1828 Dictionary of the English Language* 468 (Walking Lion Press 2010) (1828) (emphasis added). When the Judicial Article was adopted in 1973,[8] "judicial" still meant "of or relating to a judgment." *Webster's Seventh New Collegiate Dictionary* 460 (1972). From the Founding era until then, it was said that the courts, vested with judicial power, had "neither Force nor Will, but merely judgment." *The Federalist* No. 78 at 523 (Alexander Hamilton) (J. Cooke ed. 1961). Thus, judicial power is the power to exercise judgment in the cases brought before the court. Consequently, the courts are, in fact, the "least dangerous" branch. *Id.*

But since the presence of a "case" is key to understanding what judicial power is, one may ask, "How is this different than the federal 'case or controversy' requirement as established in *Lujan*?" The answer, as discussed in Part I.C., *supra*, is that "case" at the time of the Founding, and at the times of the 1901 Constitution and 1973 Judicial Article, was interchangeable with "cause," which meant "cause of action." That, in turn, meant that when someone violated their rights, they had a cause of action, and therefore a "case" for the courts to consider.

[8] Amend. 328, Ala. Const. 1901.

Nothing in the dictionaries from 1901 or 1973 concerning the definitions of "case" or "cause" compel a different result. In 1901, a "case" was "[t]he matters of fact or conditions involved in a suit, as distinguished from the questions of law; a suit or action at law; *a cause*." *Webster's International Dictionary* 222 (1901) (emphasis added). "Cause," in turn, meant a "suit or action in court; any legal process by which a party endeavors to obtain his claim, or what he regards as his right; case; ground of action." *Id.* at 229. Thus, the focus of a "cause," and therefore a "case," was on whether one's *legal rights* were violated, not whether they suffered a concrete injury in fact. *Accord Transunion*, 141 S. Ct. at 2216-18 (Thomas, J., dissenting); *Sierra*, 996 F. 3d at 22-23 (Newsom, J., concurring).

The matter was no different in 1973. "Case" meant "a suit or action in law or equity." *Webster's Seventh New Collegiate Dictionary* 129 (1972). "Cause" was likewise interchangeable with "case." *Id.* at 133. Again, this fits well with Justice Thomas and Judge Newsom's descriptions, which focus on legal violations of a person's rights rather than injuries in fact.

Thus, the positions of Justice Thomas and Judge Newsom fit better with the Alabama Constitution than *Lujan* does. As Judge Newsom

observes, perhaps Justice Scalia, the author of *Lujan*, found injury-in-fact in the case-or-controversy language "'for want of a better vehicle.'" *Sierra*, 996 F. 3d at 1122 (Newsom, J., concurring) (quoting *The Doctrine of Standing*, *supra*, at 882). But with respect, "judges shouldn't be surveying the constitutional landscape in search of 'vehicle[s]' through which to implement rules that the document's provisions, plainly read, don't establish." *Id.* (alteration in original).

As much of an originalist Titan as Justice Scalia was, not all his judicial opinions were created equal. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1894-95 (2021) (Alito, J., concurring in judgment) (comparing Justice Scalia's remarkably careful analysis of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008) with his analysis of the Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990)). But as Judge Sutton has observed, if Justice Scalia could have been proven wrong according to his own methodology of originalism, "[he would not have minded" but "would have taken it for the compliment that it is—that he left us with a theory of judging to measure his rulings against." Jeffrey S. Sutton, *Introduction* xxvii, *in*

Antonin Scalia, *The Essential Scalia* (Jeffrey S. Sutton & Edward Whelan, eds. 2020).

Consequently, under the historically accurate understanding of judicial power under the Alabama Constitution, Appellants have standing to challenge this suit. Both the people as a whole and the individual plaintiffs have rights to have their votes properly counted. *See Waltman*, 913 So. 2d at 1089. Appellants here have alleged a violation of their rights to have their votes properly counted, and therefore their case should be considered on the merits.

III. Returning to a Historical Understanding of Standing in Alabama Jurisprudence Would Not Defy the U.S. Supreme Court Because This Court, Not the U.S. Supreme Court, Is the Final Arbiter of the Meaning of the State Constitution

If there is any confusion, ACLL is not asking this Court to defy the U.S. Supreme Court by adopting the historical understanding of standing and rejecting part of *Lujan*. As the U.S. Supreme Court itself has held, "The state courts are the final arbiters of [state laws'] meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on [federal] constitutional grounds." *Beal v. Mo. P. R. Corp.*, 312 U.S. 45, 50 (1941). Article III of the Federal Constitution does not address standing in

Alabama state-court proceedings. On the contrary, the governing law is found in the Alabama Constitution itself. Thus, this Court is free to recognize *Lujan*'s error and reject it. Doing so would not defy the precedents of the United States Supreme Court. There simply are no U.S. Supreme Court precedents about standing in state courts; therefore there is nothing to defy.

CONCLUSION

Because Appellants have shown that they have standing under the historically accurate interpretation of that doctrine, this Court should not affirm the trial court's judgment for lack of standing. Instead, the Court should hold that Appellants have established standing and consider Appellants' claims on the merits.

Respectfully submitted November 10, 2022,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28(a)(12) and 29(c), Ala. R. App. P., I hereby certify that this brief complies with the font and word limits as required by Rule 32(d), Ala. R. App. P. This brief was written in 14-point Century Schoolbook font, and the text is fully justified. Not counting the portions exempted by Rules 28(j)(1) and Rule 29(c), this brief contains 6,094 words.

/s/ Matthew J. Clark
Matthew J. Clark

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, I emailed the foregoing to Appellants' counsel at the following email address:

Melissa Isaak:	Isaaklaw@gmail.com
Jay Hinton:	jay@ghhclaw.com
Phillip Jauregui:	pljaureguillc.com

I also hereby certify that on November 10, 2022, I emailed the foregoing to Appellees' counsel at the following email addresses:

Steve Marshall:	Steve.Marshall@alabamaag.gov
James Davis:	Jim.Davis@alabamaag.gov
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