IN THE SUPREME COURT OF OHIO

THE OHIO ORGANIZING COLLABORATIVE, *et al.*, *Relators*, *v.* OHIO REDISTRICTING COMMISSION, *et al.*, *Respondents*.	:	Case No. 2021-1210 **APPORTIONMENT CASE** Filed pursuant to S.Ct.Prac.R. 14.03(A) and Section 9 of Article XI of the Ohio Constitution to challenge a plan of apportionment promulgated pursuant to Article XI.

REPLY BRIEF

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Citation	Description
DEPO_ [deponent]	Deposition transcripts and exhibits, submitted in volumes with the Stipulation of Evidence (Depositions transcripts and exhibits), by page number. The name of the deponent appears in brackets. For example: (DEPO_01583-01584 [Cupp])
HIST_	Historical records such as legislative history, submitted in one volume with the Affidavit of Derek Clinger, by page number.
Imai Aff. ¶ _	Affidavit of Dr. Kosuke Imai, submitted in one volume with the Affidavit of Danielle Stewart (Affidavits of Additional Expert Witnesses), by paragraph number.
OOC_	Affidavits of relators/witnesses and expert affidavit of Dr. Michael S. Latner, submitted in one volume with the Affidavit of Danielle Stewart, by page number.
Rodden Aff. ¶ _	Affidavit of Dr. Jonathan Rodden, submitted in one volume with the Affidavit of Danielle Stewart (Affidavits of Additional Expert Witnesses), by paragraph number.
STIP_	Hearing transcripts, minutes, and other items posted by the Ohio Redistricting Commission on its website, submitted in volumes with the Stipulation of Evidence filed on October 19, 2021, by page number.
__ Br. __	Merits Briefs are identified by the first party that appears on the brief, *e.g.*, DeWine Br., Huffman Br., etc.

INTRODUCTION

In their opening brief, The Ohio Organizing Collaborative relators showed that under the enacted General Assembly district plan, Republican votes have more value than Democratic votes. In any foreseeable electoral context, Republicans will win *more seats per vote* than Democrats. And this difference between the value of Republican and Democratic votes under the enacted plan is both substantial and statistically significant: if Democrats won 54 percent of the statewide vote, for example, they would likely win only 49 House seats, a minority. But if Republicans won 54 percent of the statewide vote, they would likely win 64 seats in the House, a supermajority. (OOC_0075 [Latner ¶ 50]) Respondents never rebut relators' showing that the enacted plan produces this staggering difference in voting power.

Respondents also fail to rebut relators' showing that the statewide proportion of districts favoring Republicans in the enacted plan differs dramatically from the statewide preferences of Ohio voters. Their own analysis found that 64.4 percent of House and Senate districts (85 out of 132) favor Republicans, as compared with only 54 percent of statewide votes. (STIP_0418) Respondents do not contend that 64.4 percent is close to 54 percent, and it is not. The record is clear that respondents could have enacted a fairer plan. Instead, they chose to crack and pack Democratic voters to entrench a Republican supermajority.

Rather than address relators' showings, respondents argue that Ohio law provides no judicial remedy for this type of injury. Their argument alternately ignores and mischaracterizes relators' claims under Section 3(B)(2) of Article XI, as well as their other arguments. Put simply, Ohio's Bill of Rights protects Ohioans' rights to vote on equal terms and to associate together to advance their political objectives, and these rights are violated by the partisan gerrymandering evidenced in the enacted plan. The plain text of Article XI, as amended in 2015, expressly

incorporates compliance with the Bill of Rights as one of Section 3's districting requirements. *See* Ohio Constitution, Article XI, Section 3(B)(2). If an enacted plan violates the Bill of Rights, Section 9 of Article XI establishes the remedy and provides, under specified circumstances applicable here, that this Court shall declare the plan invalid and order the Commission to draw a new one. *See* Ohio Constitution, Article XI, Section 9(D)(3)(b), (D)(3)(c). Rather than confront the Constitution's plain text, respondents inexplicably contend that relators never claimed the enacted map violated Section 3 of Article XI. This is patently untrue, and respondents' remaining arguments likewise lack merit.

Respondents also argue that other plans submitted to the Commission, such as the one submitted by Senator Sykes on August 31, or the plan submitted by a citizens group, the Ohio Citizens Redistricting Commission, had flaws, or suggest the real problem was a failure on the part of the Democratic commissioners to compromise. But this "whataboutism" is irrelevant. It is the enacted plan that is before this Court, not plans that the Commission never tried to introduce or improve. The Commission had ample opportunity to produce fair maps. Instead, it chose partisanship and brinksmanship. It cannot use that choice to insulate the enacted plan from judicial scrutiny.

Finally, respondents attempt to justify the map based on Democratic voters' purported "natural disadvantage" in redistricting. But as the expert evidence shows, there was nothing "natural" about the way the Commission cracked and packed Democratic voters to entrench a Republican supermajority. Nor did Ohio's political geography necessitate the level of partisan bias and disproportionality that appears in the enacted plan. Therefore, the Commission's proffered justification fails. Respondents' suggestion that the plan is justified by the need to achieve regional proportionality is similarly unavailing. Section 6 of Article XI sets a statewide

proportionality standard, and for good reason: the General Assembly is a statewide, not a regional, body, so it is the statewide allocation of seats that's relevant. For these reasons, and the reasons stated in relators' opening brief, this Court should declare the enacted plan invalid and order the Commission to draw a new plan that meets the requirements of the Ohio Constitution.

REPLY

I. Section 3(B)(2) of Article XI, Which Incorporates the Ohio Bill of Rights, Is Enforceable Against the Enacted Plan

Respondents' principal argument is that the Ohio Constitution affords no remedies for relators' claims. First, they deny that relators have asserted a claim under Article XI, Section 3. *See* Huffman Br. 1, 29; DeWine Br. 16. Second, they contend that nothing in Ohio's Bill of Rights could address partisan gerrymandering because voters addressed that subject more specifically in Article XI and that, in any event, partisan gerrymandering claims are not justiciable under the Ohio Constitution. *See* Huffman Br. 29 n.5; DeWine Br. 24-26. Their first argument is easily dispatched. *See* OOC Compl., at pp. 30-33 (first and second causes of action asserting claims under Section 3 of Article XI); OOC Merits Br. 22-40 (proposition of law no. 2 supporting claims raised under Section 3 of Article XI). We turn to respondents' second argument below.[1]

A. Respondents Ignore the Plain Text of Section 3(B)(2) and Misapply Canons of Statutory Construction to Reach Their Preferred Interpretation

Because respondents pretend that The Ohio Organizing Collaborative relators have not asserted a claim under Section 3, they fail to analyze the plain text of that Section. It provides in relevant part that "[a]ny general assembly district plan adopted by the commission shall comply

[1] Respondents failed to rebut any of relators' claims. Because space is limited and the other relator groups filing replies in case nos. 2021-1193 and 2021-1198 will focus on arguments supporting claims under Article XI, Section 6, The Ohio Organizing Collaborative relators focus in this section on the enforceability of their claims under Article XI, Section 3.

with all applicable provisions of the constitutions of Ohio and the United States * * *." Ohio Constitution, Article XI, Section 3(B)(2). Because Article XI specifically incorporates and requires compliance with the Ohio Constitution, Article XI and Article I (one of the incorporated articles) must be read in *pari materia* to effectuate the meaning of the entire Constitution and the intent of the voters in amending Article XI. *See State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 78, 765 N.E.2d 854 (2002). Although "enacted at different times," they are "intimately connected," such that "one may serve as a key to the true interpretation of the other." *Shepler v. Dewey*, 1 Ohio St. 331, 338 (1853).

Notably, the DeWine respondents concede that the Ohio Bill of Rights, incorporated into Article XI through Section 3(B)(2), forbids certain "map-drawing actions," such as racial gerrymandering. DeWine Br. 36. Nevertheless, respondents contend that *partisan* gerrymandering falls outside the Constitution's ambit. They argue that because the 2015 amendment specifically "address[es] map drawing," there is "no need to turn to language written in 1802 or 1851 and pretend that it somehow addresses the same topic." DeWine Br. 25; *see also* Huffman Br. 29 n.5. They argue that "a claim cannot rest on a general part of the Constitution when a specific part of the Constitution addresses the precise question." *See* DeWine Br. 24, 36.

Their argument misapprehends both what voters did in 2015 as well as how Section 3(B)(2) relates to the rest of Article XI. In 2015, Ohioans voted to root out partisan gerrymandering by passing an amendment that attacked the problem in multiple ways. The amendment created new procedural rules designed to promote transparency and bipartisanship. *See* Ohio Constitution, Article XI, Sections 1, 8. It directed the Commission to attempt to adopt fair and proportional maps. *See* Ohio Constitution, Article XI, Section 6. And as relevant to relators' Section 3(B)(2) claims, it expressly incorporated the Ohio Bill of Rights into Article XI,

see Ohio Constitution, Article XI, Section 3(B)(2), enabling Ohioans for the first time to assert violations of the Bill of Rights directly *as violations of Article XI* under this Court's original apportionment-case jurisdiction. At the same time, it also provided this Court with clear and manageable standards to determine when such a violation warrants a new plan. *See* Ohio Constitution, Article XI, Section 9(D)(3).

Critically, enforcing the Bill of Rights against partisan gerrymandering does not conflict with anything else in Article XI, such that a more specific provision in the latter might control. *See West v. Bode*, 162 Ohio St.3d 293, 2020-Ohio-5473, 165 N.E.3d 298, ¶ 13 ("A specific statutory provision will prevail over a general one only when the provisions irreconcilably conflict."). Nor is it the case that reliance on the Bill of Rights' "general" provisions would render any specific provision of Article XI "superfluous." *State ex rel. Maxcy v. Saferin*, 155 Ohio St.3d 496, 2018-Ohio-4035, 122 N.E.3d 1165, ¶ 10 (cited at Huffman Br. 29 n.5). Hence to the extent that respondents are suggesting that relators' Section 3(B)(2) claims conflict with or render Section 6 superfluous, they are incorrect.

As relators argued in their opening brief, Article I establishes affirmative and positive *individual* rights to vote on equal terms, assemble, and associate, which are injured when a map is drawn as a partisan gerrymander. *See* OOC Merits Br. at 24-28. In contrast, Section 6 imposes specific districting standards on the Commission to apply during map-drawing, including requiring proportionality and that the plan not primarily favor one political party.[2] Section 6 is

[2] Respondents repeatedly cite a statement from Representative Kathleen Clyde in support of their argument that the Section 6 criteria directed to the Commission are unenforceable. Huffman Br. 1, 6, 28. It is well established that "[w]here the meaning of a provision is clear on its face" this Court "will not look beyond the provision in an attempt to divine what the drafters intended it to mean." *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ. of Ohio*, 123 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16 (citation omitted). But, even if the Court finds the

not a partisan gerrymandering-specific version of Ohio's Bill of Rights. It establishes standards for the Commission, not individual rights for voters, and enforcing standards that regulate the Commission is different from asserting the violation of an individual right. This is not unusual: agency regulations often draw complaints that the agency exceeded or failed to comply with its statutory (or constitutional) mandate *and* violated the plaintiff's individual rights. *See, e.g.*, *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 3 (noting the plaintiff had alleged both that a county board of health exceeded its authority and that an anti-smoking regulation was an unconstitutional taking); *Queensgate Inv. Co. v. Liquor Control Com.*, 69 Ohio St.2d 361, 365, 433 N.E.2d 138, 141 (1982) (adjudicating claims that liquor control commission's regulation exceeded its authority and violated the First Amendment). The Ohio Redistricting Commission *is* unusual insofar as it has an affirmative obligation to enact a district plan in accordance with specified criteria by a date certain, but these criteria are distinct from the Ohio Constitution's protection of fundamental individual rights.

Moreover, as Dr. Latner made clear, a Section 6 violation may involve different showings than those at issue in a Bill of Rights claim. A plan could, for example, give votes equal value and still produce a disproportionate map. (OOC_0073 [Latner ¶ 44]) Consider a plan that awards 65 percent of districts to Republicans when they receive 52 percent of the statewide vote and,

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meaning of the provision to lack clarity, "a single legislator does not speak for the entire Ohio General Assembly," *Nichols v. Villarreal*, 113 Ohio App.3d 343, 349, 680 N.E.2d 1259 (4th Dist.1996), much less does she speak for all the voters who passed the 2015 amendments. To determine the intent of the voters, a better guide is the ballot language and official descriptions of Ballot Issue 1. *See* OOC Merits Br. 6; *see also* Jane S. Schachter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L.J. 107, 117 (1995) ("In the vast majority of the decisions collected here, the courts declare that their task is to locate the controlling popular intent behind the provision at issue"). Further, even if Representative Clyde's comments concerning Section 6 reflected the intent of the People (they do not), they do not and could not diminish the protections of the Ohio Bill of Rights, which Section 3(B)(2) incorporates and makes enforceable.

likewise, awards 65 percent of districts to Democrats when they receive 52 percent of the statewide vote. Such a plan has partisan symmetry, *i.e.*, gives votes equal value, and based on these assumptions, would not violate the right to vote on equal terms under Section 3(B)(2). But such a map is highly disproportional in terms of seats to statewide vote share and therefore *would* violate the proportionality standard set forth in Section 6(B). As relators noted in their opening brief, because Section 3(B)(2) and Section 6 create distinct claims and can require different showings, enforcing Section 3(B)(2) does not render Section 6 or any other part of Article XI superfluous.

Once the differences between Section 3(B)(2) and Section 6 are made clear, many of respondents' other arguments unravel. For example, the DeWine respondents bizarrely suggest that if the Ohio Bill of Rights imposed a so-called "maximum-proportionality standard," then it would require the Commission to achieve that proportionality even at the expense of other constitutional requirements, like the contiguity requirement found in Section 3(B)(3). *See* DeWine Br. 26. But, as discussed, it is Section 6, not the Bill of Rights, that imposes a proportionality standard, and the Commission may not violate Section 3 in order to comply with Section 6. Moreover, under either of the two well-established tests that courts use to determine whether a partisan gerrymander violates equal protection or associational rights (*see* OOC Merits Br. 28-29), courts will excuse prima facie violations where the map drawer can point to a legitimate justification to explain why the map looks the way it does.

In sum, as applied to relators' Section 3(B)(2) claims in this case, the Ohio Constitution and Article XI combine to provide an enforceable right and a judicial remedy. Specifically, the Court should determine whether the enacted plan values Republican votes over Democratic votes or infringes upon associational rights under either the balancing test set forth in relators' opening

brief (OOC Merits Br. 29-30) or the alternative intent, effect, justification test that was used by some courts in prior partisan gerrymandering cases (OOC Merits Br. 36-37). And, once the Court finds these Section 3 violations, it should order the Commission to enact a new plan, as laid out in Section 9(D)(3).

B. Relators' Section 3(B)(2) Claims Are Justiciable

Having argued that Article XI provides no remedy for violations of the Bill of Rights, respondents offer only cursory responses to the substance of relators' Section 3(B)(2) claims. Their argument appears to be that relators' claims under Section 3(B)(2) are not justiciable because (1) "some" of relators' claims are "coextensive with federal law" and (2) federal claims are not justiciable. *See* Huffman Br. 29 n.5; DeWine Br. 35. This reasoning fails at each step.

As relators explained in their opening brief, Ohio's Constitution has independent force and affords greater rights to Ohioans than does the federal constitution. This is especially true in relation to the unique language of Ohio's self-governance and equal protection provisions under Article I, Section 2, which provides Ohio citizens with the affirmative and equal "right" to alter, reform, or abolish their government. *See* OOC Merits Br. 22-26. The Ohio Constitution also grants positive speech and assembly rights not found in the First Amendment, which affords only negative rights against state action. Relators did acknowledge that in other contexts this Court has construed the scope of the Ohio Constitution's *free speech* provision to be coextensive with the First Amendment, which has in turn been interpreted by federal courts to protect associational rights. *See id.* at 26-27. But relators never argued that this Court was limited by federal law in determining how partisan gerrymandering infringes upon such associational rights under the Ohio Constitution, as the DeWine respondents contend. DeWine Br. 35.

More importantly, even if the provisions at issue had the same language and history as their federal counterparts (they do not), there are additional reasons why this Court should hold that partisan gerrymandering claims are justiciable under the Ohio Constitution:

First, this Court, not a 5-4 majority of the U.S. Supreme Court, is "the ultimate arbiter of the meaning of the Ohio Constitution." *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21. Although the U.S. Supreme Court held in *Rucho v. Common Cause* that partisan gerrymandering claims under the federal constitution are not justiciable, *Rucho* itself contemplates that state courts would pick up where it left off. *See* 139 S. Ct. 2484, 2507, 204 L.Ed.2d 931 (2019). And in recent years, state courts have done just that, holding that partisan gerrymandering violates longstanding provisions of their respective state constitutions. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 111-112, 178 A.3d 737 (2018); *Common Cause v. Lewis*, N.C.Super. No. 18 CVS 014001, 2019 WL 4569584, at *122 (Sept. 3, 2019).

Second, the Ohio Constitution vests Article XI jurisdiction in this Court to review a General Assembly district plan, declare that it is invalid, and order the Commission to adopt a new one. Ohio Constitution, Article XI, Section 9(A), (B), (D)(3). In fact, Section 9(D)(3) provides this Court exactly the sort of manageable standard that the U.S. Supreme Court found lacking in *Rucho*. It lays out two situations where Section 3 violations warrant a new map: where remedying those violations would require amending at least six House districts or two Senate districts, *see* Ohio Constitution, Article XI, Section 9(D)(3)(b), or where those violations—however many—are significant and materially affect the plan's ability to comply with the proportionality standard set forth in Section 6(B) of Article XI and the plan does not comply with that standard, *see* Ohio Constitution, Article XI, Section 9(D)(3)(c) (applying when a plan is

passed via Article XI's impasse procedure). This text specifying remedies—which is absent from the federal constitution—requires and structures judicial review of claims under Section 3(B)(2).

This enforcement regime is new. While respondents express incredulity that voters would amend Article XI if Article I already offered protection against partisan gerrymandering, *see* DeWine Br. 24, 36-37, the 2015 amendments significantly changed how Ohioans could raise such claims and established new standards for when and how this Court must provide remedies for Bill of Rights violations. And even if partisan gerrymandering claims could have been, but were not, asserted in the past, that is not a reason to let those harms stand today. As the court observed in *Lewis*, "long standing, and even widespread, historical practices do not immunize governmental action from constitutional scrutiny." *Lewis*, 2019 WL 4569584, at *3 (citing *Citizens United v. FEC*, 558 U.S. 310, 365, 130 S.Ct. 876 (2010); *Reynolds v. Sims*, 377 U.S. 533, 582, 84 S. Ct. 1362 (1964)).[3]

Ultimately, respondents ask this Court to throw up its hands because, as respondents see things, this case might require the Court to make hard judgments. *See* DeWine Br. 28. That a case is "hard" or controversial does not, however, make it non-justiciable. To the contrary, hard cases make it all the more important that this Court not "dodge [its] responsibility by asserting that this case involves a nonjusticiable political question." *DeRolph v. State*, 78 Ohio St.3d 193, 198, 677 N.E.2d 733 (1997).

[3] The law and science of partisan gerrymandering is evolving rapidly, as is modern understanding of its harms, such that the absence of comparable cases in the distant past is far from definitive. In addition, in many areas of the law, including apportionment cases, courts may not recognize a constitutional right for many decades or even hundreds of years, and then, after having recognized it, living without that right quickly becomes unthinkable. Similarly, the above-discussed state courts recently held partisan gerrymandering to be incompatible with long-extant provisions of their state constitutions. This Court should do the same.

Luckily, *this* case is straightforward. None of the respondents engages relators' Bill of Rights arguments on the merit, let alone rebuts relators' substantial evidence. No one questions whether constitutional rights are implicated when a plan values Republican votes over Democratic votes or impairs Democratic voters' associational rights. The Huffman respondents appear to concede such an injury exists. *See* Huffman Br. 41 ("[T]here can be no dispute that the way a district is drawn can injure a particular voter's right to receive equal treatment."). Nor do they dispute the magnitude of the enacted plan's bias. They never rebut Dr. Latner's showing, for example, that Republicans would likely win 15 more House seats than Democrats would win with the *same share* of the statewide vote. (OOC_0075 [Latner ¶ 50]) Nor do they rebut Dr. Imai's showing that the enacted plan is more biased than any of his 5,000 simulated plans. (Imai Aff. ¶¶ 3, 31-39) And they don't dispute that Governor DeWine declined to say whether the plan was constitutional (STIP_0398 ("That's up for, up to a court to do.")), or that Secretary LaRose called it a "map [with] many shortcomings" in public and "asinine" in private (STIP_0398; DEPO_00158 [LaRose Ex. 2]). In fact, notwithstanding the legal arguments they have made through counsel, a majority of the Commission doesn't think much of the enacted plan. And the justifications that some of them belatedly offer in litigation are meritless and certainly cannot justify the constitutional injuries imposed on relators. We turn to those justifications next.

II. Respondents' Proffered Justifications for the Enacted Plan Are Meritless and Do Not Justify the Plan's Infringement of Relators' Rights

While respondents mainly argue that relators' claims are not legally cognizable, they do offer several arguments that might be deemed a belated effort to justify the Commission's noncompliance with Section 3(B)(2) and Section 6. In particular and without factual basis, respondents argue that Ohio's natural political geography (the clustering of Democratic voters in cities and suburbs) is responsible for maps that heavily favor Republicans. They also argue that,

because of an uneven distribution of voters, drawing districts to meet a proportionality standard at the statewide level is unfair to Republicans or discriminatory because it creates localized disproportionality in Ohio's most populous counties. The DeWine respondents argue that this is a reason to avoid judicial review (DeWine Br. 27-28), while the Huffman respondents go so far as to suggest that the statewide proportionality standard under Section 6(B) "may" violate the Fourteenth Amendment (Huffman Br. 38). All of these arguments are meritless.[4]

A. Ohio's Political Geography Does Not Justify the Commission's Plan

Article XI provides instructions as to how Ohio's political geography should be incorporated into district plans: it lays out detailed rules limiting the splitting of counties, townships, and municipalities. For example, districts in populous counties are, for the most part, contained wholly within each county's borders. This is the relevant political geography constraint on the Commission under the Ohio Constitution, and respondents do not show that any of these rules necessitated the partisan bias and disproportionality that appears in the enacted plan. The record is clear they did not: the expert submissions include a demonstrative map and thousands of simulated maps that were at least as compliant with these rules as the enacted plan, but far less biased and disproportional. *See* OOC Merits Br. 32 (citing Imai Aff. ¶¶ 3, 20, 27-39); Rodden Aff. ¶ 4, 108. Put simply, the Commission had plenty of room within the confines of

[4] Respondents also seek to justify the plan by blaming Democratic commissioners for failing to compromise, and by pointing to supposed technical flaws in the maps submitted by Senator Sykes and the Ohio Citizens Redistricting Commission. These arguments are beside the point: it is the fairness of the enacted plan that is before this Court. Moreover, Democratic commissioners in fact demonstrated a willingness to negotiate. (DEPO_ 00071-00073, 00100-00101, 00104 [LaRose]; DEPO_01018-01021 [Faber]; DEPO_00879, 00889-00890 [V. Sykes]) And the Commission had ample opportunity to produce a fair map. It could have hired a non-partisan mapmaker in the first instance, rather than relying on a mapmaker for the Republican caucus with a history of producing partisan gerrymanders. Or it could have sought to address any technical issues with the "Sykes" or the "Citizens" plans before September 15 and produced a constitutional plan. Indeed, the Republican caucus map introduced on September 9 itself had technical flaws that the Commission fixed in advance of passage. (DEPO_0649-653 [DiRossi])

Ohio's political geography and Article XI to enact an unbiased and proportional plan. Instead, it chose to draw districts that give asymmetrical and disproportional voting power to Republican voters.

The Commission achieved this outcome through a series of choices as to how to draw districts. Pursuant to Section 3(B)(2) and Section 6, however, the Commission had an affirmative duty to draw districts in a way that minimized partisan bias and promoted proportionality. But the Commission not only defaulted on that duty, it actively sought out the opposite.

For instance, Dr. Imai compared the enacted plan to an ensemble of 5,000 simulated comparison plans that are at least as compliant with Article XI.[5] (Imai Aff. ¶¶ 12-13 & Appendix) The comparison is apples-to-apples: he evaluated the simulated maps under the same political geography and data as the enacted plan. Dr. Imai found that the degree of disproportionality and partisan bias is much greater under the enacted plan than under any of his 5,000 simulated plans. (Imai Aff. ¶ 3) In other words, the enacted plan is a clear outlier.

The record also shows that these statewide deficiencies are themselves the product of deliberate manipulation at the regional and county level. For example, Dr. Latner showed, with county-level examples, how the mapmakers made choices within those counties to create additional Republican-leaning House districts. (OOC_0084-93 [Latner ¶¶ 64-72]) And he explained how they combined House districts to form Senate districts in a manner that created additional Republican-leaning Senate seats, *i.e.*, another round of packing and cracking. (OOC_0095-97 [Latner ¶¶ 76-77]) For instance, the enacted plan has three Senate districts with

[5] Dr. Imai did not instruct the simulations to pursue proportionality, which further weakens respondents' argument that the plan's lack of proportionality was a product of Ohio's political geography. (Imai Aff. ¶¶ 14-18)

75 percent or more Democratic voters, whereas the Senate map submitted by the Ohio Citizens group has only one such district. (OOC_0096 [Latner ¶ 77])

Dr. Imai likewise demonstrated that "[p]artisan bias in the enacted plan is apparent not just * * * statewide * * * but also at the local level." (Imai Aff. ¶ 56) For example, Dr. Imai determined that the House map is an outlier for northeastern Ohio, which includes Cuyahoga, Summit, and Geauga Counties. Whereas the enacted plan yields, on average, 6.3 Republican House seats across these three counties, the simulated plans all yield fewer Republican seats with an average of 5.4. (*Id.* ¶ 70) Dr. Imai further found that the enacted plan "concentrate[ed] Democrats and dr[ew] district borders along partisan boundaries" in order to increase the number of Republican-favoring districts. (*Id.* ¶ 68) It "pack[ed] Democratic voters in Cleveland districts, shoring up Republican vote shares in districts 17 and 31." (*Id.* Fig. 17; *see also* OOC_0086-0087 [Latner ¶ 67 & Fig. 9a (noting that "the [e]nacted [p]lan's Cleveland and adjacent districts, specifically 18, 20, and 21, are packed with more Democratic voters, and that difference, however subtle, creates an opportunity to draw two highly competitive seats, 15 and 23, that lean Republican")]; Rodden Aff. ¶¶ 94, 96 & Fig. 9 (observing that "district 17 was drawn so as to pull together Republican-leaning communities in the outer suburbs" and that "the difference between the Commission's plan and * * * alternative plans in Cuyahoga County is that the Commission produces 6 districts with Democratic majorities higher than 70 percent, while each of the alternative plans produces only 4 such highly packed districts")) District 31 would lean slightly Democratic were it not for the mapmakers' decision to place Akron proper in a separate district from the towns of Norton and Barberton in the southwest. (Imai Aff. ¶ 69) Under Dr. Imai's "simulated plans, Norton and Barberton are more likely to be included with at least part of Akron * * *." (*Id.*)

As for the Senate map, the Cuyahoga, Summit, and Geauga County cluster allows for 27 Senate district combinations. (*Id.* ¶ 71) Dr. Imai found that the enacted plan adopts the most pro-Republican possible combination from this set. (*Id.*) More precisely, "it chooses one safe district and one competitive district." (*Id.*)

In sum, although respondents point to Ohio's political geography, they never explain how it necessitated the specific decisions reflected in the plan and do not rebut Dr. Imai's showing that the enacted map is a "clear outlier" even within that geography. (Imai Aff. ¶¶ 32-39) Even under respondents' own reasoning, maps that dilute the power of one set of voters beyond what is required by political geography reflect a partisan gerrymander. As shown, the enacted plan includes such maps. Accordingly, Ohio's political geography does not justify the enacted plan and, in fact, further reveals why the enacted plan is unconstitutional.

B. The Proportion of Republican Voters in Certain Counties Does Not Justify the Commission's Plan

Respondents further argue, counterintuitively, that a map that is fair, symmetrical, and proportional at the statewide level would "disenfranchise" Republican voters who live in populous Ohio counties. DeWine Br. 28. In other words, respondents imagine a world in which Republicans have a solid majority of the General Assembly, but a Republican voter in Columbus is nevertheless disenfranchised because the proportion of House districts *in Franklin County* does not correspond closely with the county-wide preferences of Franklin County voters. Respondents' argument defies common sense and has no basis in the Ohio Constitution or accepted redistricting principles. Section 6(B) is the applicable proportionality standard under Article XI, and it applies to a "general assembly district plan" on a statewide basis.

Respondents' arguments have no basis in logic because candidates for the House and Senate are elected to the General Assembly, which enacts laws with statewide application. Ohio

citizens vote on equal terms when they have an equal opportunity to alter and reform their government—in this case, the General Assembly, a statewide body. And their ability to effectively associate together to pursue shared goals likewise depends on voters' statewide representation in the General Assembly. Relators suffer injury because their individual districts are gerrymandered in pursuit of a *statewide* district plan that systematically disfavors them and gives unequal weight to their vote.

In any event, respondents' argument runs headlong into the Ohio Constitution. Ohio voters chose a statewide proportionality standard in ratifying Section 6(B) of Article XI. So long as a plan enables citizens to vote on equal terms and otherwise respects their individual and associational rights, nothing in the Ohio Constitution requires districts that are perfectly proportional to immediate geography (*e.g.*, to create Democratic seats in proportion to Democratic vote share within a county).[6] And a plan certainly cannot violate Section 6(B)'s statewide proportionality standard in the name of proportionality at the local level, as respondents argue. In sum, respondents' focus on county-level proportionality is arbitrary and contrary to law.

C. The Huffman Respondents' Belated Suggestion that Section 6(B) Is Unconstitutional Does Not Justify the Commission's Plan

Perhaps recognizing that their localized disproportionality argument is incompatible with the plain text of the Ohio Constitution, the Huffman respondents ultimately argue that if this Court were inclined to declare the plan to be invalid under the Ohio Constitution for lack of

[6] Moreover, respondents do not explain why a county-level inquiry is relevant rather than a regional inquiry that considers multiple counties or a municipal inquiry that takes a finer look at proportionality. As explained by Dr. Latner, "[p]roportionality is a scientifically accepted concept that can be measured by the degree to which an electoral system or district scheme reflects the statewide preferences of voters." (OOC_0061 [Latner ¶ 17])

compliance with Section 6(B), then it should declare Section 6(B) itself unconstitutional under the Fourteenth Amendment to the United States Constitution. Huffman Br. 38.[7] The U.S. Supreme Court has long held that a district plan is not unconstitutional simply "because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Gaffney v. Cummings*, 412 U.S. 735, 754, 93 S.Ct. 2321, 37 L.Ed. 2d 298 (1973) (holding that the use of limited population deviation to achieve statewide proportionality does not violate the Fourteenth Amendment). In *Gaffney*, there was no Fourteenth Amendment violation even though "virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." *Id.* at 752.

Respondents seem to be claiming that enforcing the plain meaning of Section 6(B) would result in a localized partisan gerrymander in favor of Democrats in certain populous counties. Huffman Br. 38, 41; DeWine Br. 29. This argument is puzzling for various reasons. First, the ultimate inquiry in assessing a gerrymander in a statewide body is its statewide effect. Localized redistricting decisions are ultimately only relevant to the extent that they combine to create bias. Given the clear statewide disproportionality in the enacted plan, it does not follow that

[7] The precise wording of the Huffman respondents' request is this: "If this Court determines that strict statewide proportionality must be granted to Democratic voters through the systematic destruction of Republican leaning districts only in the counties where political discretion may be exercised to determine their political lean, this Court should exercise its authority to declare Section 6(B) unconstitutional under the Fourteenth Amendment * * *." Huffman Br. 38. This phrasing inserts a "strict" proportionality requirement and is premised upon "systematic destruction" of Republican-leaning districts that respondents assume should exist. Without accepting these word substitutions or premises, we assume that respondents are arguing that if the Court declares the plan invalid under Section 9(D)(3)(c), then such invalidation would violate the Fourteenth Amendment to the United States Constitution.

remedying this gerrymander, which necessarily must reduce the number of Republican leaning districts, is itself a gerrymander against Republican voters. Second, as respondents themselves have noted, the federal constitution affords no remedy for partisan gerrymanders under *Rucho*. Therefore, neither logic nor the Fourteenth Amendment can support respondents' argument.

III. Contrary to the Huffman Respondents' Argument, This Court Should Review the Enacted Plan Independently, Without Presuming Its Constitutionality

The Sykes respondents agree with relators' statement of the standard of review. Sykes Br. 15-16. Consistent with Governor DeWine's statement that judging the constitutionality of the enacted plan was "up to a court to do" (STIP_0398), the DeWine respondents do not address the applicable legal standard. Thus, five of seven commissioners either support relators' proposition of law No. 1 or do not address it. Only the Huffman respondents argue that the Court should presume that the enacted plan is constitutional and then decide whether relators have rebutted that presumption "beyond a reasonable doubt." Huffman Br. 24-25. They are incorrect.

While a presumption of regularity and constitutionality makes sense when the General Assembly is legislating in other areas that do not implicate their self-interest or burden the fundamental right to vote, it is not appropriate here. A hyper-deferential standard of review in the face of a showing of harm to fundamental rights would greatly diminish those rights, when Ohio should "afford greater rights to our citizens when [the Court believes] such an interpretation is both prudent and not inconsistent with the intent of the [Ohio] framers." *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21 (plurality opinion). And, as relators emphasized in their opening brief, such a deferential standard of review is especially inappropriate where, as here, commissioners who voted to pass the plan expressly disclaimed making any independent determination of its constitutionality. *See* OOC Merits Br. 21.

The Court had no occasion to consider these points in *Wilson v. Kasich* because relators there did not assert any claims based on infringement of fundamental rights, given that Article XI did not incorporate the Ohio Bill of Rights at the time. 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814. Nor did *Wilson* have occasion to consider the specific and mandatory language of Section 9(D)(3) of Article XI, which provides that the Court "shall" order a new plan when it "finds" (Section 9(D)(3)(b)) or "determines" (Section 9(D)(3)(c)) that the plan violates Section 3, among others. That language, too, did not exist at the time of *Wilson* and further shows that voters directed independent review. The Huffman respondents fail to address these points and rely on *Wilson* as though the 2015 amendments made no significant changes. Although relators should prevail here under any standard of review, this Court should reject the Huffman respondents' argument and review the plan independently, without presuming its constitutionality.

IV. The DeWine Respondents' Argument That the Commission Is the Only Proper Respondent Under Article XI Is Incorrect

The DeWine respondents contend that when voters amended Article XI in 2015, they made a "significant change," and that courts must presume that these amendments were made to change the effect and operation of the law. DeWine Br. 30. That much is true, but the specific conclusion the DeWine respondents draw—that they are not proper respondents—is incorrect.

The 2015 amendments to Article XI abrogated this Court's holding in *Wilson* that the apportionment board was not a necessary and indispensable party. 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 10. As the Court observed, Article XI previously provided that if a court determined that a district plan was invalid, then "'the persons responsible for apportionment by a majority of their number' shall determine a new, constitutionally compliant plan." *Id.* (quoting Ohio Constitution, Article XI, Section 13 (1967) (repealed 2015)). After the

2015 amendments, the Commission *is* a necessary party because it is "responsible" for drafting the plan, and this Court "shall order the commission" to adopt a new one if it finds significant violations. *See* Ohio Constitution, Article XI, Sections 1(A), 9(D)(3).

But the Commission is not the *only* necessary party. The Commission is a temporary body. Under Article XI, "[f]our weeks after the adoption of a general assembly district plan or a congressional district plan, whichever is later, the commission shall be automatically dissolved." Ohio Constitution, Article XI, Section 1(C). If a relator named only the Commission, the Commission might cease to exist in the middle of a case, leaving no respondent to defend the plan thereby potentially insulating the plan from judicial review. Moreover, because this Court has jurisdiction over the individually-named and served commissioners, it can order them to reconstitute the Commission, convene, and adopt a new General Assembly district plan that complies with Article XI. *See* Ohio Constitution, Article XI, Section 9(B). Thus, although the Commission—not Senate President Huffman or Senator Sykes—drafts the plan, naming the individual commissioners is necessary to ensure that the Court can order them to convene the Commission for that purpose.

CONCLUSION

For the reasons stated above, this Court should declare that the General Assembly district plan adopted by the Commission is invalid, enjoin respondents from using the plan adopted by the Commission, order respondents to adopt a new plan in accordance with the Ohio Constitution, and retain jurisdiction should further relief be necessary.

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