IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Ohio A. Philip Randolph Institute, *et al*., Plaintiffs, vs. **Larry Householder**, Speaker of the Ohio House of Representatives, *et al.*, Defendants.	Case No.: 1:18-cv-00357-TSB Judge Timothy S. Black Judge Karen Nelson Moore Judge Michael H. Watson Magistrate Judge Karen L. Litkovitz

DEFENDANTS' AND INTERVENORS' JOINT PROPOSED CONCLUSIONS OF LAW AND POST-TRIAL BRIEF

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INTRODUCTION

The Democratic Party has every right to speak, associate, and compete for political power in Ohio. Rather than attempt to tailor a message to the districts the Ohio legislature enacted with overwhelming bi-partisan support, the Party's constituents ask this Court for a map more favorable to the Party's perceived interests. But Ohio has the right, at least within the equal-population requirement, to tell any and all political parties where they must win support if they wish to wield majority power. The Democratic Party's failure to craft a message competitive within that framework carries no constitutional significance. At one time, the Democratic Party had a message that resounded across the State, including with rural residents and blue-collar workers, and it then held a greater share of Ohio's congressional seats. But, as of 2011, its five incumbents held seats in under-populated regions, and its message more and more resonates only in a few concentrated areas. It is then no surprise that the Democratic Party now holds only four congressional seats. By comparison, it holds zero state-level, statewide offices.

The Democratic Party's constituents have no more a constitutional right to greater congressional representation than they have to judicial assistance in winning those statewide at-large seats. Nothing in the Constitution affords this right. How to construct the districts was a policy choice for the Ohio legislature, and it made a sound choice here. The 2011 plan was a bi-partisan compromise and finds dispositive support in *Gaffney v. Cummings*, 412 U.S. 735 (1973). The 12–4 goal Plaintiffs call unconstitutional was simply the goal of preserving incumbents, Democratic and Republican, to the extent possible given Ohio's loss of two seats in the reapportionment. Democratic incumbents benefited from that political goal since, without it, the partisan split could as easily be 13–3—especially given that their districts were under-populated and that Republican officials in Washington wanted a 13–3 plan to be obtained by splitting Franklin County four ways. Unsurprisingly, Democratic state legislators in 2011 understood that

the plan effectuated bi-partisan purposes—such as enhancing minority electoral opportunity—and voted for the plan overwhelmingly. Plaintiffs' belated claim, filed seven years after that vote, that the legislature was constitutionally obligated to impose the political costs of the reapportionment solely on Republican incumbents, pairing at least four Republican and no Democratic members, is factually and legally baseless.

If the Court believes otherwise, it still must uphold the 2011 plan because Plaintiffs' claims are non-justiciable. There is no constitutional rule providing what share of seats should be Republican or Democratic and no constitutional right to a district-specific percentage of party supporters to satisfy Plaintiffs' "just right" Goldilocks standard. For the Court to legislate these requirements would be untenable and, besides, bad policy: it is far better that the citizens who voted the current representatives into office have the power to vote them out. And there is no basis to afford Plaintiffs judicial help with their political goals. There is no violation of the Constitution to remedy, at least under "well developed and familiar" standards. *Baker v. Carr*, 369 U.S. 186, 227 (1962). There is no suspect classification, no burden on the right to vote, no restraint on speech or retaliation likely to deter expression, and no restriction on the parties' internal structures or freedoms.

And that only begins the defects with Plaintiffs' claims. Because they assert only "grievance[s] about government," *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam), they lack standing. And, because they sat on their claims for seven years, to the prejudice of the State in defending this case and its 11 million residents exercising their right to vote, Plaintiffs' claims are barred by laches. Plaintiffs' expectations of judicial help in winning elections are, in short, baseless and entirely unreasonable. Judgment should be entered against their claims.

ARGUMENT

I. The 2011 Plan Was a Bi-partisan Compromise To Preserve the Districts of Incumbents and Demonstrates Democracy in Action

"Politics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Indeed, a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." *Id.* at 753. The Supreme Court has therefore held that courts should assume "that those who redistrict and reapportion work with both political and census data" and that "they seek, through compromise or otherwise, to achieve the political or other ends of the State, its constituents, and its officeholders." *Id.* at 753–54.

As shown below (§ I.A), the political considerations worked both ways. Republican and Democratic leaders forged a compromise to protect existing incumbents in a difficult redistricting landscape. These political goals are not fundamentally different from those approved in *Gaffney*, a case Plaintiffs fail to cite even once in their 75-page post-trial brief. Pls. Trial Br., ECF No. 251. Ohio's 2011 congressional redistricting plan is a bi-partisan incumbency-protection plan that treated incumbents of both parties with an even hand. Faced with the loss of two seats due to the apportionment, the redistricting would necessarily produce a "political impact." *Gaffney*, 412 U.S. at 753. The Ohio legislature, under Speaker Batchelder's leadership and with the support of then-Speaker of the House of Representatives John Boehner, made the prudent choice to split that impact evenly, pairing one set of each major party's members. Incumbency was the overriding consideration for line drawing.

Like the plaintiffs in *Gaffney*, Plaintiffs here call the mere use of politics suspect. But whether or not "the shapes of districts would…have been so 'indecent' had the" legislature "not attempted to 'wiggle and joggle' boundary lines to ferret out pockets of each party's voting strength," *Gaffney*, 412 U.S. at 752 n.18, it is settled that partisan redistricting on a bi-partisan basis does not violate the Constitution. *Id.* at 754 ("[W]e have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States."); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1926–27 (2018) (reaffirming *Gaffney*). Plaintiffs' contrary position is indefensible. At base, they posit that the Ohio legislature was constitutionally obligated to place the entire political cost of the reapportionment on Republican incumbents. That is certainly not a constitutional demand, and Plaintiffs provide no authority for this remarkable position. *Gaffney* controls this case.

For the same reasons, Plaintiffs have not met the factors the Court's summary-judgment order identified as governing their claims: (1) "intent to discriminate against the state's preferred political party," (2) the "effect of entrenching partisan advantage against likely changes in voter preference," and (3) lack of justification. Order Denying Motion for Summary Judgment, ECF No. 222, at 9 (quotation marks and emphases omitted); *see also id.* at 13 (identifying same standard for right-to-vote claim); *id.* at 14–15 (same as to First Amendment claim); *id.* at 16–19 (same as to Article I claim). As discussed below (§ II), this standard is "both dubious and severely unmanageable," *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality opinion), and no different from tests five justices in *Vieth* rejected. But, in all events, the standard is not satisfied. Binding precedent bars Plaintiffs' claims.

A. The Intent Element Is Not Satisfied

Plaintiffs have not shown "a discriminatory partisan intent." Order Denying Motion for Summary Judgment at 10. Political classifications are "generally permissible." *Vieth*, 541 U.S. at

307 (opinion of Kennedy, J.). Plaintiffs failed to demonstrate any political intent except a bi-partisan compromise to protect incumbents of both parties. The unrebutted trial evidence shows that the line drawing followed legitimate criteria, including retention of district cores, Voting Rights Act compliance, perfect equality of district population, and other accepted redistricting principles. Further, the evidence shows that political data was used for a bi-partisan incumbency-protection purpose, a legitimate state interest applied equally as to each major party's incumbents. None of that is impermissible.

1. The Political Purpose Was a Legitimate, Bi-Partisan Incumbency-Protection Compromise

That incumbency protection is a legitimate state interest is beyond dispute. *See* Pls. Trial Br. 61 (conceding this point). From its earliest redistricting decisions, the Supreme Court has recognized that "[t]he fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966). The Supreme Court has also approved states' interest in "maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives." *White v. Weiser*, 412 U.S. 783, 791 (1973); *Vieth*, 541 U.S. at 358 (Breyer, J., dissenting) (conceding incumbency protection as legitimate purpose distinct from partisan entrenchment); *id.* at 351 n.6 (Souter, J., dissenting) ("*Gaffney* is settled law, and for today's purposes I would take as given its approval of bipartisan gerrymanders, with their associated goal of incumbency protection."); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (naming among legitimate state policies "preserving the cores of prior districts, and avoiding contests between incumbent Representatives").

The legitimate incumbency-protection goal includes both avoiding incumbent pairings and "maintaining existing relationships" between incumbents and "their constituents." *White*, 412 U.S. at 791; *see also In re Penn. Cong. Districts Reapportionment Cases*, 567 F. Supp. 1507, 1512 (M.D. Pa. 1982), *aff'd sub nom. Simon v. Davis*, 463 U.S. 1219 (1983); (6 Tr., ECF No. 246, 207:1–208:11 (Brunell)). One method of maintaining those relationships is by preserving existing district cores. *See, e.g.*, *League of Women Voters of Chicago v. City of Chicago*, 757 F.3d 722, 726–27 (7th Cir. 2014) (identifying "traditional redistricting criteria" as including "preserving the cores of prior districts, and avoiding contests between incumbent Representatives." (quotations omitted)); *Gonzalez v. Harris County, Tex.*, 601 F. App'x 255, 259 (5th Cir. 2015) (same); *Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1295 (D. Kan. 2002) (same); *Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 397 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 590 (N.D. Ill. 2011). Another is maintaining incumbents' voting bases to preserve "the seniority the members of the State's delegation have achieved in the United States House of Representatives." *White*, 412 U.S. at 791.

a. The Political Goals Were To Preserve the Districts of Incumbents

The purposes Plaintiffs call "partisan" were legitimate, even-handed incumbency-protection goals. The legislature chose to protect incumbents, and it did so on a bi-partisan basis. That is not materially different from *Gaffney*'s approved goal of aiding the representational strength "of the two major political parties." 412 U.S. at 738. The Ohio legislature, to be sure, focused on preserving the *status quo* incumbency-constituent relationships rather than on creating the "proportional representation" sought in *Gaffney*. *Id.* But *Gaffney* identified proportional representation as merely *one* legitimate political goal, holding expressly: "There is

no doubt that there may be other reapportionment plans for Connecticut that would have different political consequences and that would also be constitutional." *Id.* at 754. This case presents an equally fair, equally constitutional goal of bi-partisan incumbency protection. The Court therefore need not wade into the more complicated questions surrounding differential treatment of incumbents and voters. (*See infra* §§ II, III.)

Severe population shifts and the loss of two seats in the U.S. House presented the Ohio legislature with a difficult task. The reapportionment meant incumbents would be paired—and eliminated. (5 Tr., ECF No. 243, 154:22–25, 156:12–19, 155:1–5 (DiRossi).) What's more, the population became radically lopsided within the State, as northern Ohio lost, and the Columbus region gained, residents. (P090, Cooper Rep. at ¶ 15.) Incumbents had to go, and the first question was which ones to pair. *Gaffney* ratifies the legislature's choice to face that question head-on; it was not required to draw districts blind to this political reality. 412 U.S. at 752–54. After the 2010 elections, the Ohio delegation comprised 13 Republican and 5 Democratic members. (5 Tr. 156:3–11 (DiRossi).) Through the leadership of Speaker Batchelder, who negotiated with Democratic legislators, a compromise was reached: one Republican and one Democratic seat would be eliminated. (6 Tr. 42:8–22, 42:25–43:2, 47:12–13 (Batchelder); 5 Tr. 156:3–11 (DiRossi).) Then-Speaker of the U.S. House, John Boehner, supported this purpose. His goal was not to advance Republican gains but to protect existing incumbents of both parties. (Whatman Dep., ECF No. 230-52, 75:23–76:4, 76:18–23.) He, too, supported sharing evenly the burden of the two lost seats. (Whatman Dep. 76:25–77:10.) Given the uncertainty of even Republican support, the unknown views of a new governor, and the referendum possibility (and its eventual manifestation), Speaker Batchelder viewed Democratic legislative support as essential; he did not believe he was "in a position to just do any darn thing I wanted." (6 Tr.

55:15–56:1 (Batchelder); 6 Tr. 78:15–23 (Judy testifying to a similar understanding).) Because of the pre-reapportionment 13–5 partisan split, divvying up the lost seats fairly meant a 12–4 split. (Whatman Dep. 197:17–24.) There is nothing nefarious or unconstitutional about that goal.

From there, the question became which specific incumbents to pair. (Whatman Dep. 33:7–13.) And, on this issue also, Democratic officials had extensive input. Democratic leaders chose Representatives Kaptur and Kucinich as the Democratic pairing, and that choice is unremarkable when both members represented population-starved northern Ohio, which would lose seats. (8 Tr., ECF No. 249, 78:18–23, 79:4–11 (Kaptur).) Democratic members also expressed the preference that District 9, where they were paired, be drawn to favor Kaptur in the resulting contest. (5 Tr. 159:3–6, 159:10–13, 161:15–16, 162:19–163:13, 163:17–20 (DiRossi); 6 Tr. 77:24–78:3 (Judy); Szollosi Dep., ECF No. 230-47, 58:5–60:4, 63:18–25.) That latter goal differed from the goal of Tom Whatman, Speaker Boehner's redistricting staff member, who proposed a map to create a fair fight between the two. (Whatman Dep. 62:22–63:4.) HB319 also was drawn to set up an even match. (Szollosi Dep. 21:21–22:3.) But Democratic members voiced a different view, and they had their way. This choice was communicated to Republican leadership through Bob Bennett, the former chairman of the Ohio Republican Party, who had "incredible relationships with former Democratic chairs and also some of the county chairs and individual members" and worked out the logistics of this pairing. (5 Tr. 160:5–19 (DiRossi).) As a result, District 9 was reworked between HB319 and HB369 to incorporate new territory from Lucas County (more likely to favor Kaptur) and cut out wards from Cleveland (more likely to favor Kucinich). (5 Tr. 161:3–18, 166:7–13 (DiRossi).) This "teeter-totter" with more Toledo and less Cleveland (5 Tr. 166:14–19 (DiRossi)) resulted in a "more elongated" district (5 Tr. 166:20–23 (DiRossi)), but the political purpose was neither partisan nor one-sided. It was a

choice by Democratic officials to favor one incumbent over another in a musical-chairs end game. The resulting "snake-on-the-lake" district may not be aesthetically appealing, but "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement." *Gaffney*, 412 U.S. at 752 n.18; *see also Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798 (2017) ("The Equal Protection Clause does not prohibit misshapen districts.").

On the Republican side, Representatives Austria and Turner were the selected pairing. (Whatman Dep. 35:2–9, 37:21–38:2, 72:7–8.) But even in their district, District 10, Democratic leadership had input. To obtain Democratic support for HB369, DiRossi included the entirety of Montgomery County in District 10. (5 Tr. 166:25–167:17, 168:18–169:5 (DiRossi).) That necessitated transfers with District 15 and "ripple effects" throughout the map—all as a result of Democratic requests. (5 Tr. 167:18–25, 168:1–4 (DiRossi).) These maneuvers also made District 10 more favorable to Representative Turner, who won the ensuing contest. (5 Tr. 168:5–17 (DiRossi).)

The only departure from the incumbency-protection goal, understood in the strictest sense, occurred in Districts 16 and 3, but this was, once again, a bi-partisan compromise. It was, in fact, a policy priority for the Democratic Party. District 16 paired one Republican and one Democratic member, and the new seat, District 3, was favorable to a future Democratic candidate. Democratic members would keep at least one seat, and possibly gain one, since Democrats viewed District 16 as competitive. (Szollosi Dep. 91:10–15.) These new configurations advanced the overarching fairness purpose by giving the Democratic Party a new favorable seat to replace the one lost. The Constitution does not prohibit this trade.

This politically neutral trade was driven by population deficits in northeast Ohio around District 16 and population surplus in the Columbus suburbs. (*See* 6 Tr. 70:3–11 (Judy).) Northern Ohio's urban counties lost population, and the Columbus metropolitan region accounted for nearly all of Ohio's population gains. (P090, Cooper Rep. ¶ 15.) Delaware, Franklin, and Licking Counties saw population growth. (P090, Cooper Rep. at 9, Fig. 3.) Neutral districting goals, such as compactness, contiguity, and perfectly equal district populations, rendered it impossible to maintain the seats in northeast Ohio and in Franklin and Delaware Counties. Representation had to increase in the latter region and decrease in the former. (5 Tr. 176:5–9 (DiRossi).) Because Representatives Renacci and Sutton lived a mere 20 miles from each other and because of other goals in an already population-starved region—including, most importantly, preserving neighboring District 11 as a majority-minority district (5 Tr. 173:2–10 (DiRossi))—a third pairing was unavoidable. (5 Tr. 176:22–179:9 (DiRossi); Kincaid Dep. II, ECF No. 230-28, 576:18–25; *see also* 8 Tr. 79:4–11 (Kaptur).) And, again, a pairing burdening both parties was chosen, pitting Republican Member Renacci and Democratic Member Sutton in a competitive district that Renacci won in a close 2012 race. (J17 at Tab 4.)

It was also unavoidable to create a new seat in the over-populated Columbus region, and that seat, District 3, was selected as a minority-opportunity seat to enable the minority community in that region to add another minority member to Ohio's delegation. That goal received overwhelming bi-partisan support. It was a priority for Speaker Batchelder (6 Tr. 70:3–11, 71:24–72:1 (Judy)) based on his discussions with African American leaders in Franklin County (6 Tr. 70:12–16, 71:5–11 (Judy)). A minority-opportunity seat in Franklin County was equally a "priority" of the Democratic caucus. (Szollosi Dep. 44:20–45:6; Routt Dep., ECF No. 230-41, 43:2–44:24, 55:5–59:4.) As of July 2011, Democratic members already were making the

"strong case for a Franklin County seat on the basis of having a self-contained district" that "also maximizes minority voting strength thereby increasing the opportunity of having an additional minority member of Congress outside of northeast Ohio." (I-087, 7/18/11 Email Chain; Routt Dep. 43:3–15.) They viewed this as furthering the "historical[] goal of the Senate Democratic Caucus, to have minority opportunities throughout the state...." (Routt Dep. 44:13–19; *see also* Routt Dep. 55:5–59:4); Szollosi Dep. 44:20–45:6 (calling this a "priority of our caucus").) In fact, when the Senate Democratic Caucus contacted representatives of a national Democratic Party group (the National Committee for an Effective Congress), it requested assistance with creating an "opportunity district" in Franklin County. (Routt Dep. 58:9–18.)

District 3's configuration had political components, but, yet again, personality not partisanship drove these purposes. Speaker Batchelder wanted District 3 drawn as a seat favorable to Joyce Beatty, a longtime Democratic state legislator who had ambitions to run for Congress (6 Tr. 72:4–8 (Judy)) and who had input in the creation of the district (5 Tr. 177:11–22, 177:23–178:6, 178:17–22, 178:25–179:4, 179:4–9, 288:3–289:1 (DiRossi)). Joyce Beatty ultimately ran for that district and won. Although she was not an incumbent, the goal to aid the candidacy of a public statesperson respected on both sides of the aisle is functionally equivalent to an incumbency-protection goal—and is not unconstitutional. There is no partisan unfairness in it; Representative Beatty was (and is) a member of the Democratic Party.

Plaintiffs are therefore wrong (Pls. Trial Br. 46–47) that partisanship rather than neutral factors explain this configuration. The only interested parties who objected were national Republicans in Washington; they wanted Franklin County split four ways. (5 Tr. 232:7–21 (DiRossi).) That idea was rejected in favor of the bi-partisan state-level goal of a minority-opportunity district. These maneuvers can hardly have been for a raw partisan purpose to

advantage Republican statewide prospects when they were actively promoted, and independently proposed, by the Democratic caucus.

Plaintiffs therefore have this case backwards. The so-called partisan goals *helped* Democratic incumbents, who may well have been worse off without them. More than any other factor, population disparities drive every redistricting, and the impact in this case cannot be overstated. Ohio's population growth between 2000 and 2010 stagnated as compared to growth in other states—hence, the loss of two congressional seats—and the State was severely malapportioned, as northern Ohio's urban counties lost population, including Cuyahoga County (-8.2%), Lucas County (-.9%), Summit County (-0.2%), Trumbull County (-6.6%), and Mahoning County (-8.3%). (P090, Cooper Rep. at 9, Fig. 3.) Meanwhile, the Columbus metropolitan region accounted for most of the State's growth. (P090, Cooper Rep. at 9, Fig. 3.) Those disparities put Democratic incumbents at a stark disadvantage: theirs were the underpopulated districts, and Republican-represented districts were over-populated. (5 Tr. 176:5–9 (DiRossi), 6 Tr. 70:3–11 (Judy).) And Democratic-leaning constituents are clustered in only a few areas of the state, giving them a further geographic disadvantage. (7 Tr., ECF No. 247, 155:4–11, 155:12–25, 168:1–8, 168:12–169:1 (Hood).) There was "no question" that Democratic incumbents' districts would have to change markedly—or be eliminated. (8 Tr. 79:4–11 (Kaptur).) Had a politically fair choice to protect incumbents of both parties not been made, the legislature could as easily have carved up more Democratic incumbents' seats for Republican gain. (*See infra* § I.A.1.b.) The choice at even-handed incumbency protection, and thus preservation of under-populated Democratic seats, required lines that "wiggle and joggle." *Gaffney*, 412 U.S. at 752 n.18. If Plaintiffs dislike politics in redistricting, they must accept the

incidental impact on a political party whose members are naturally packed in a few areas—and whose popularity is waning in the State. (7 Tr. 169:2–23, 170:10–21 (Hood).)

The incumbency-driven responses to the apportionment and lopsided population disparities marked the primary political preoccupations with the redistricting, and those preoccupations were *fair*. Otherwise, the preeminent goal was to maintain other incumbencies and meet idiosyncratic requests from congressmembers and legislators of both parties. (*See, e.g.*, 5 Tr. 182:11–19 (DiRossi testifying about adopting legislator's requests for the three districts in Mercer County), *id.* 182:20–25 (DiRossi testifying about proposal in District 16), *id.* 183:6–13, 183:17–24 (DiRossi testifying about request to include NASA Glenn Research Center in District 9 because of Representative Kaptur's involvement with the Armed Services Committee), *id.* 184:6–185:1 (DiRossi testifying about request to include the entire city of Loveland, Ohio within District 2 because Congresswoman Schmidt—the District 2 incumbent—lived in Loveland).) Democratic and Republican proposals alike were heard and incorporated, Democratic and Republican incumbents alike were protected, and Ray DiRossi testified that drawing "Republican districts" was not his directive and not his goal. (5 Tr. 158:7–18 (DiRossi).) As a result of these bi-partisan goals, Districts 1, 6, 10, 14, 15, and 16 became more competitive under HB369 than under HB319. (Szollosi Dep. 65:25–66:5, 89:18–90:9, 91:10–15.) The bi-partisan incumbency motives were legitimate, and this map must be upheld even under the Court's incorrect standard.

b. Plaintiffs Fail To Show That Bi-partisan Incumbency Protection Was Not the Goal

There is no record evidence rebutting these incumbency-protection and similar legitimate political purposes. That defeats Plaintiffs' claims because it is their *prima facie* burden to prove that legitimate motives did not in fact drive the line drawing. *Easley v. Cromartie (Cromartie II)*,

532 U.S. 234, 243 (2001). In racial-gerrymandering cases, the Supreme Court has held that partisan motive is lawful. *See, e.g.*, *Hunt v. Cromartie (Cromartie I)*, 526 U.S. 541, 551 (1999) ("[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering" (collecting cases)). (That, of course, is a highly inconvenient holding for Plaintiffs here.) The Supreme Court's racial-gerrymandering precedents therefore require challengers to prove that "race *rather* than politics *predominantly* explains" the challenged districts' boundaries. *Cromartie II*, 532 U.S. at 243 (emphasis in original). Similarly, in one-person, one-vote cases, where the Supreme Court has presumed without deciding that partisan motive does not justify deviations from perfect district population equality, it has required challengers to show that "[n]o legitimate purpose could explain" the deviations and the "plan's deviations and boundary shapes result from the predominance of…illegitimate factors." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016). The Supreme Court has observed that "we believe attacks…will succeed only rarely, in unusual cases." *Id.* at 1307. Plaintiffs have not shown this is the rare case where legitimate motives do not explain the map. If this case is rare, it is because of the bi-partisan cooperation.

Plaintiffs' evidentiary showing boils down to alleged harm from a plan currently electing twelve Republican and four Democratic members, which they contend would not occur but for partisan motive. Yet Plaintiffs concede that the result of a plan where "one Republican incumbent and one Democrat incumbent would lose their seats" would be "a 12–4 map." Pls. Trial Br. 33. There is no evidence for Plaintiffs' view that the current composition of the delegation was not the result of a bi-partisan incumbency-protection purpose.

Although some evidence suggests Republican legislators were unwilling to adopt a plan that protected fewer than twelve Republican incumbents (Glassburn Dep., ECF No. 230-14,

203:11–15), Plaintiffs identify no evidence from anyone involved in the redistricting attributing this to anything other than an incumbency-protection purpose. (*See* 5 Tr. 156:20–25 (DiRossi) (12–4 split meant pairing two Republican and two Democratic members).) After all, affording more than four Democratic-incumbent districts would have meant pairing two sets of Republican incumbents and no Democratic incumbents, placing the entire burden of the reapportionment on Republican incumbents. That Republican legislators opposed that course of action is wholly unremarkable, understandable, and lawful.

What is probative of intent, then, is not that the Republican-led legislature sought to protect twelve Republican and four Democratic incumbents, but that it did not target a partisan, Republican-friendly map. It is undisputed that the legislature "could have drawn this state with a maximum of 13 out of 16 districts Republican." (Glassburn Dep. 174:5–11; Szollosi Dep. 96:24–97:9; *see also* Kincaid Dep. II 573:22–574:8.) But the map enacted was not one "that maximizes Republican seats." (Kincaid Dep. II 574:10–15); *cf. Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d at 574–80 (rejecting partisan-gerrymandering challenge even though congressional map was drawn purposefully to help only Democratic incumbents and harm only Republican incumbents). That 13–3 possibility, though ostensibly advocated by national Republican Party leaders (5 Tr. 232:7–21 (DiRossi)), was rejected both by the Republican state leadership and John Boehner and the Republican congressional delegation. The incumbency purpose was fair.

Plaintiffs "point to nothing in the record to suggest the contrary." *Harris*, 136 S. Ct. at 1310. Their expert witnesses cannot carry their burden because, without exception, these witnesses did not control for or otherwise distinguish between incumbency-protection and partisan purposes. Dr. Warshaw agreed that a goal of protecting incumbents can result in "partisan bias that just happened to have occurred right before the redistricting." (3 Tr., ECF No.

241, 63:3–11.) His methods, however, fail to differentiate between partisanship and incumbency-protection purposes. (3 Tr. 92:24–93:4 (mean-median); 3 Tr. 98:6–7 (symmetry); 3 Tr. 64:7–11 (efficiency gap).) Dr. Warshaw's response to the incumbency-protection purpose is to disagree with it as a policy matter. (3 Tr. 63:15–21.) That ship has long since sailed. *See, e.g.*, *White*, 412 U.S. at 792.

Dr. Cho as well ignored incumbency protection in simulating her millions of maps, her simulation "makes no effort to protect incumbents" (5 Tr. 46:13–16), and she has no idea how many incumbents are paired in any of her maps (5 Tr. 34:2–4). But, unlike Dr. Warshaw, Dr. Cho agreed that incumbency protection is a legitimate redistricting goal. (5 Tr. 34:5–9.) She also agreed that incumbency protection includes that goal of preserving the incumbent's "core constituency." (5 Tr. 34:20–35:2.) The only reason she did not account for it in her simulations is that she believed it was not a legislative priority in 2011. (5 Tr. 35:3–8.) That error means her maps shed no light on whether a partisan-entrenchment or incumbency-protection purpose controlled the line drawing. (*See* 6 Tr. 197:25–198:4, 6 Tr. 205:2–4 (Brunell).)

Neither Dr. Niven nor Mr. Cooper assist Plaintiffs with their burden of distinguishing partisanship from incumbency protection. Dr. Niven provides extensive *ad hoc*, personal critiques of district lines but no basis to believe the motive behind those lines was anything other than an incumbency-protection motive (or, for that matter, a motive to accomplish other accepted redistricting goals), since an overriding fairness purpose can as much as anything else create lines that "wiggle and joggle." *Gaffney*, 412 U.S. at 752 n.18. Nothing in Dr. Niven's report or testimony meets Plaintiffs' burden of undermining a bi-partisan incumbency-protection purpose. Nor does anything in Mr. Cooper's testimony or report. His work was primarily for remedial purposes and did not attempt to match the incumbency pairings and core constituencies chosen

by the Ohio legislature in 2011. (3 Tr. 170:6–16 (Cooper discussing pairing in Cincinnati); *id.* 171:9–12 (discussing effort to pair "the same *number* of incumbents" (emphasis added)), *id.* 174:21-25 (discussing plan pairing Kucinich and Fudge), *id.* 176:14–16 (disagreeing with Democratic legislators' choice of which Democratic incumbents to pair).) It is irrelevant that Mr. Cooper "was able to draw multiple maps with the same number of incumbents paired," Pls. Trial Br. 57, when the evidence (as shown) indicates that specific pairings were selected by both Republican and Democratic leaders, as was the political balance of the resulting districts.[1] Mr. Cooper's disagreement with the political choice of which incumbents to pair does not establish a constitutional defect in the 2011 plan.

Plaintiffs' fact-witness testimony fares no better. Plaintiffs themselves, of course, have no personal knowledge about why any district looks as it does. *See* Fed. R. Evid. 602. The witnesses Plaintiffs offered with some involvement in the redistricting did not testify against the incumbency-protection purpose. Representative Fudge testified that she did not like the new configuration of District 11—directly against her 2011 statement that she was "not upset about how [her] district had been drawn" (1 Tr., ECF No. 239, 98:12–16)—but she agreed that John Boehner "would be sure that no one mistreated me" (1 Tr. 100:3–4). Whatever her personal views about her district (which shifted markedly between 2011 and 2019), she did not dispute the underlying point that she, as an incumbent, was protected.

Likewise, Representative Kaptur's various criticisms of her district—and her dissatisfaction is no surprise since she drew the short straw of running against a colleague (8 Tr. 78:5–6)—came qualified with the admission that she shared none of those criticisms at any

[1] This was, moreover, after Mr. Cooper proposed a plan that paired six sets of incumbents, including Speaker John Boehner. (7 Tr. 149:8–17 (Hood).)

hearings in 2011 (8 Tr. 80:22–25) or with anyone during the line-drawing process (8 Tr. 82:15–83:1), that concerns she did share were addressed in the final map (8 Tr. 84:6–7), and that, as Batchelder and Judy testified, her district favored her over Kucinich, as proven by her victory over him in 2012 (8 Tr. 89:7–14). When raised, the concerns that could be resolved were resolved, and the ones that were not resolved simply could not be—because of stark population loss in northern Ohio and the Democratic Party's choice of incumbents to pair. Representative Kaptur's disappointment with the inherently political process does not make out a constitutional violation—or suggest that the incumbency-protection purpose was not sincere or predominant. Plaintiffs also cite testimony of Representative Huffman for the proposition "that protection of incumbents was 'subservient' to other criteria." Pls. Trial Br. 58. But the criteria he referenced were traditional districting principles. (Trial Ex. J01.) The Court need not decide which of these equally legitimate goals in fact predominated.

Plaintiffs also focus on statements by national Republicans about the plan, but this looks to the wrong people. Political leaders in Washington may well have had opinions about the proposed plan, but the Ohio General Assembly maintained authority in both law and fact over the plan. (5 Tr. 155:21–156:2, 185:2–11, 234:2–16 (DiRossi).) National Republicans had a very different idea for the map, including a four-way split of Franklin County. (5 Tr. 232:7–21 (DiRossi).) The Ohio legislature rejected that idea out of hand—listening to their Democratic colleagues over national Republicans—and national Republicans had no recourse to disagree. Even Speaker Boehner and his team understood that they lacked authority over the maps they proposed. (Whatman Dep. 225:6–10.) Whatever national Republicans may or may not have said—or meant—is irrelevant; the question here is *legislative* intent, not *Republican* intent.

In all material respects, then, the evidence presented by all sides is consistent and calls for judgment in the 2011 plan's favor. Plaintiffs have no evidence that incumbency protection did not motivate the line drawing. A goal to maintain incumbents' seniority and protect their constituencies as far as possible under difficult circumstances, especially when implemented with an even hand, is valid under *Gaffney* and other binding precedents.

That goal also distinguishes this case from the two cases under review now in the Supreme Court. Plaintiffs' position does not follow from *Benisek v. Lamone*, 348 F. Supp. 3d 493, 517 (D. Md. 2018), and, in fact, is directly contrary to its core holding. The three-judge panel's decision in *Benisek* enjoined Maryland's congressional redistricting plan because the Democratic legislature "protected [only] Democratic incumbents" and intentionally "flipped the Sixth District from Republican to Democratic control." *Id.* at 517. Under the district-specific analysis called for in *Whitford*, the three-judge panel concluded that this one-sided approach and specific intent to dismantle a performing Republican district that allowed residents to elect their preferred candidates of choice violated the Constitution. *Id.* at 517–24. The evidence here, by contrast, shows a bi-partisan intent to assist incumbents of both parties and to "flip" no seats. The one seat "flipped" was replaced by a new seat allowing Democratic constituents to elect their preferred candidates of choice. If anything, *Benisek* is contrary to Plaintiffs' position because they assert that the Ohio legislature had a constitutional obligation to assist only Democratic incumbents and to "flip" one or more seats to Democratic control—in other words, to do exactly what the Maryland legislature did.[2] Plaintiffs' demand for one-sided constitutional standards and express judicial partisanship should give the Court pause.

[2] All of this, of course, proves why these claims are non-justiciable. Plaintiffs claim injury only because of the happenstance of their having the last word. The political choices embedded in their alternative scheme, had they been the legislative choices in 2011, would be equally

Plaintiffs' position also finds no support in *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018). There was no evidence there of a bi-partisan compromise on much of anything, much less on an agreed goal to protect incumbents of both parties, and the votes were mostly along party lines. Nor did *Rucho* involve substantial negotiating between the parties in which, as here, many minority-party demands were met. The process leading to the adoption of the 2011 plan is the polar opposite of the processes in *Rucho* and *Benisek*, and those cases are unavailing. Moreover, Plaintiffs' reliance on two cases that were argued just this week in the Supreme Court, much like their reliance on a Supreme Court concurrence that the majority expressly stated is not the law, is simply an invitation to a judicial kamikaze, not a sound decision.

2. The 2011 Plan Also Resulted from a Bona Fide Intent To Preserve and Advance Minority Representation

Intertwined with the Ohio legislature's incumbency protection goals was a principal goal to preserve and advance minority electoral prospects both in northeast Ohio and in Franklin County. That goal obtained bi-partisan support in 2011 and Plaintiffs presented no evidence undermining the validity or the impetus for these goals. As such, Plaintiffs' claim is no better than, and in fact is markedly worse than, the claim unanimously rejected by the Supreme Court in *Harris*, 136 S. Ct. at 1310.

a. Plaintiffs' Goal of Democratic-Party Advantage Does Not Trump the Legislature's Legitimate Minority-Protection Goals

The Voting Rights Act prevents racial discrimination in voting and, to that end, provides that members of every racial group must not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

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unconstitutional under their own legal test of intent, harm, and lack of justification at the district-specific level. These choices are inherently political. (*See infra* § II.)

Voting Rights Act § 2(b), 52 U.S.C. 10301(b). In some circumstances, the Voting Rights Act requires states or localities to draw districts of certain racial percentages—normally 50% minority citizen voting-age population or higher—to preserve that equal electoral opportunity. *See Bartlett v. Strickland*, 556 U.S. 1, 11–12 (2009) (discussing *Thornburg v. Gingles*, 478 U.S. 30 (1986)). But, aside from the Voting Rights Act, states may also choose to preserve or enhance minority electoral opportunity "as a matter of legislative choice or discretion." *Id.* at 23; *see also Voinovich v. Quilter*, 507 U.S. 146, 152 (1993); *Vieth*, 541 U.S. at 292–93 (plurality opinion) ("[W]e do not say that race-conscious decisionmaking is always unlawful. Race can be used, for example, as an indicator to achieve the purpose of neighborhood cohesiveness in districting.").

Given the inherent conflict between competing constituencies in redistricting, goals of Voting Rights Act compliance or enhancing minority representation can conflict with partisan goals. In this case, it is common ground that two districts drawn as minority-opportunity districts, Districts 3 and 11, have a statewide impact on the Democratic Party's electoral fortunes. (*See* Glassburn Dep. 191:14–19 (citing Districts 3 and 11 as two of the three cornerstone districts enabling "a 12–4 or 13–3 map"); 5 Tr. 176:2–14 (DiRossi testifying to the "ripple effect" from District 11).) And Plaintiffs' position here, that the Democratic Party's fortunes should override the rights and opportunities of racial minorities, is untenable. The Constitution does not privilege the Democratic Party as a special group, and Plaintiffs' position fails as a matter of law, common sense, and fairness.

b. The Legislature's Minority-Protection Goals Were in Good Faith and Received Broad, Bipartisan Support

It is undisputed that the legislature's goals in Districts 3 and 11 reflected a bona fide effort to preserve and enhance minority electoral opportunity. Plaintiffs' challenge to the objective merits of these goals misses the point of intent. Even if those goals were mistaken or

are subject to good-faith disagreement, a goal to aid minority electoral opportunity does not amount to "intent to discriminate" on a partisan basis. Order Denying Motion for Summary Judgment at 9.

Indeed, the Sixth Circuit recognizes this rule in other contexts where allegedly unlawful discrimination or retaliation is claimed. "'[A]s long as an employer has an honest belief in its proffered non-discriminatory reason,' the employee cannot establish pretext simply because the reason is ultimately shown to be incorrect." *Tillman v. Oh. Bell Tel. Co.*, 545 Fed. App'x 340, 349 (6th Cir. 2013) (per curiam) (citing *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001)); *see also Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998) ("[S]o long as the employer honestly believed in the proffered reason given for its employment action, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless."). "In determining whether Defendants had an 'honest belief' in the proffered basis for discharge," courts "examine whether [Defendant] established a 'reasonable reliance' on the particularized facts" that were before it at the time the decision was made. *Abdulnour v. Campbell Soup Supply Co.*, 502 F.3d 496, 502-03 (6th Cir. 2007). "Yet, in determining whether an employer reasonably relied on the particularized facts before it," courts "do not require that the decisional process used by the employer 'be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision….'" *Tillman*, 545 Fed. App'x at 349 (quoting *Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 285 (6th Cir. 2012)). Under this standard or any other, Plaintiffs cannot demonstrate any intent other than bi-partisan motivation to enhance minority electoral opportunity.

There can be no serious dispute that legislative leaders in both parties wanted a majority-minority district in northeast Ohio and a minority-opportunity district in Franklin County. Speaker Batchelder had long-standing, positive relationships with the legislative black caucus (6 Tr. 56:15–22, 57:20–25 (Batchelder)), and he consulted with leaders in the African American community about both Districts 3 and 11 (6 Tr. 70:12–16, 71:5–11, 72:4–8 (Judy).) District 11 received unique "care" (5 Tr. 170:17–25 (DiRossi)) because it (and its predecessor district) had existed as a majority-minority district since 1969 (1 Tr. 79:21–25, 89:1–4 (Fudge)). Its 2011 configuration was supported by former Congressman Stokes, who represented District 11's predecessor (1 Tr. 88:9–88:13, 89:16–18; 98:2–7 (Fudge)); George Forbes, president of the Cleveland City Council (1 Tr. 90:21–25, 91:1–3, 91:8–12, 91:20–94:14 (Fudge)); Democratic Ohio Senator Vernon Sykes (1 Tr. 94:20–24, 94:25–95:2, 95:3–4, 95:8–10, 95:16–97:25 (Fudge)); and other members of the black caucus (1 Tr. 98:8–11 (Fudge)). In fact, Representative Fudge herself reviewed and approved the configuration (5 Tr. 170:17–171:8, 171:19–172:17, 173:2–10 (DiRossi); 6 Tr. 76:5–15 (Judy); Szollosi Dep. 60:5–9; 61:24–62:15), and this was communicated with the map-drawers and legislative leadership through Ohio Republican Party Chairman Bob Bennett (6 Tr. 74:3–7, 76:1–4) (Judy)). Democratic officials had a voice in the process, and they too proposed majority-minority districts in northeast Ohio, including configurations not materially different from the one selected. (6 Tr. 75:10–13 (Judy), 2 Tr., ECF No. 240, 24:22–24 (Turner).) Although Democratic Senator Turner testified that she believed in 2011 that drawing District 11 above 50% black voting-age population was a "mockery of the Voting Rights Act," she conveniently neglected in 2011 to inform her Democratic colleagues who also proposed drawing District 11 above 50% black voting-age population that they were mocking the Voting Rights Act. (2 Tr. 33:1–4 (Turner).)

District 3 also received bi-partisan support as a minority-opportunity district (Routt Dep. 43:2–44:24, 55:5–59:4) and was drawn with extensive input from Joyce Beatty, its intended representative (5 Tr. 177:11–22, 177:23–178:6, 178:17–22, 178:25–179:4, 179:4–9, 288:3–289:1 (DiRossi)). However Republicans in Washington may have felt, no one involved in District 3's creation saw it as a "sinkhole." (5 Tr. 180:6–17 (DiRossi), 6 Tr. 26:11–25 (Batchelder); *see also* Kincaid Dep. II 363:7–24, 365:7–366:15 (testifying that he did not hear the term "sinkhole" in 2011).) Were it otherwise, Democratic leaders would not have supported the district as "maximiz[ing] minority voting strength" and "thereby increasing the opportunity of having an additional minority member of Congress outside of northeast Ohio." (Routt Dep. 43:9–15.)

"[N]othing in the record to suggest[s] the contrary." *Harris*, 136 S. Ct. at 1310. Representative Fudge did not disagree now or in 2011 that the district should be majority-minority. (1 Tr. 101:4–8, 102:21–24, 102:25–103:8 (Fudge).) This is no surprise; she was quoted in 2011 as supporting (or at least not opposing) District 11's proposed configuration; she admitted at trial that she said those words (1 Tr. 98:12–16); her statement that she was "misquoted" is inexplicable in light of that admission (1 Tr. 99:2–12) and in light of her testimony that "the *only* complaint I had was that I knew that taking Summit County or that portion of Akron away from Betty Sutton would make it seem…almost impossible for her to win her district," (1 Tr. 85:20–23 (emphasis added)); and she, in all events, made no effort to correct the record when it mattered, in 2011 (1 Tr. 99:2–12). Moreover, Representative Fudge did not address the most important fact for assessing the motives behind District 11—the fact that both Republican and Democratic legislators have testified that it enjoyed widespread support as a majority-minority district. Representative Fudge did not dispute the honest belief of legislators

like Speaker Batchelder and others that African American leaders and others wanted District 11 to be majority-minority. (Szollosi 44:20–45:11.)

Similarly, there is no factual dispute that District 3 received support as a minority-opportunity district. (Routt Dep. 43:9–15.) The disagreement with this goal came from national Republican leaders in Washington, who wanted to split Franklin County four ways to advantage Republican interests—a view soundly rejected. (5 Tr. 232:7–21 (DiRossi).) Plaintiffs' view that District 3 was created for a partisan purpose is revisionist.

Plaintiffs' reliance on Dr. Handley (to prove partisanship in District 11 but not District 3) is unfounded because she did not opine on intent of any kind. (2 Tr. 169:8–13, 2 Tr. 156:1–4, 2 Tr. 156:5–7, 2 Tr. 171:24–172:12, 2 Tr. 172:25–173:6, 2 Tr. 172:12–15.) Even if Plaintiffs could have shown that the legislature was mistakenly over-cautious in its Voting Rights Act-compliance strategy, a mistake would disprove an assertion of unlawful intent. *Majewski*, 274 F.3d at 1117. Plaintiffs' position again conflicts with *Harris*, which observed that some of the districting decisions were not strictly necessary under the Voting Rights Act but found that irrelevant to motive. *See* 136 S. Ct. at 1309 (finding that, although "the Commission ultimately concluded that District 8 was not a true ability-to-elect district," "counsel and consultants argued for District 8 for the sake of Voting Rights Act preclearance" and it was adopted "[o]n that basis"). Even if, as Dr. Handley posits, the Voting Rights Act would have been satisfied with a 45% black voting-age population district and 50% BVAP was unnecessary, that does not change the undisputed fact that District 11 was adopted "[o]n that basis." *Id.*

Plaintiffs argue otherwise only by challenging these decisions *after* their proposed burden shift, and the Court's summary-judgment opinion appears to capitulate on this. Order Denying Motion for Summary Judgment at 31–32. With respect, that is an error. The case cited for this

shift, *Cooper v. Harris*, 137 S. Ct. 1455 (2017), involved allegations and evidence of *racial*, not partisan, gerrymandering, *id.* at 1463, and under that theory, the burden shifts only after a showing "that the legislature 'subordinated' other factors…to 'racial considerations,'" *id.* at 1463-64. That burden cannot be assumed satisfied; a challenger must establish it after a searching inquiry into "the legislature's predominant motive for the design of the district as a whole" through a "holistic analysis" of "all of the lines of the district at issue." *Bethune-Hill*, 137 S. Ct. at 800. Plaintiffs did not plead this cause of action, the record is not developed to address it, no trial evidence was presented on it, and Defendants and Intervenors object to any adjudication on this basis. The argument that *race* predominated in this political-gerrymandering case has been forfeited and waived many times over.

There is, then, no basis to shift the burden. Redistricting challengers cannot skip ahead to second-guess the objective validity of legislature's Voting Rights Act-compliance goals simply by disagreeing with them. The Supreme Court unanimously rejected that view in *Voinovich*, 507 U.S. at 152. The plaintiffs in that case asserted that eight majority-minority districts in Ohio's 1991 state legislative plans were "packed" because they contained "disproportionately large majorities." *Id.* at 149. The Court made quick work of that argument, holding that the legal definition of "packing" requires a showing that, but for the high percentage of minority voters in some districts, at least one additional majority-minority district of over 50% BVAP could be drawn. *Id.* at 149–55. That was not shown in *Voinovich*, and it is not shown here. Plaintiffs complain only that Democrats, not African Americans, could do better under a different map, but the Voting Rights Act is not the Democratic Protection Act. Next, the Court in *Voinovich* held that there is no independent requirement that states assess any Voting Rights Act criteria before choosing to draw a majority-minority district; this is, rather, a state policy judgment, and "the

federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Id.* at 156. Accordingly, Ohio—both in 1991 and 2011—had no independent obligation to do any analysis or to draw districts with a bare minimum minority percentage under any given methodology. Even if a majority-minority district was not strictly required, the legislature had discretion to create it. *Voinovich* controls.

The same result obtains under the Court's summary-judgment standard. As the Court explained, the *prima facia* burden falls on Plaintiffs to establish discriminatory intent, and only after that showing is a justification burden triggered. Plaintiffs cannot shift the burden by pretending that a motive to preserve and enhance minority representation was, in fact, a motive of partisanship. Plaintiffs must first *prove* this by showing that partisanship "*rather than*" minority-opportunity enhancement was the actual motive. *Cromartie II*, 532 U.S. at 243 (emphasis in original). Plaintiffs cannot skip ahead to step 3 when they failed at step 1.[3]

3. Legitimate Goals Drove the Line Drawing in Each District

Protecting incumbents and enhancing minority representation were two legitimate goals with an overwhelming impact on district lines. And there were still other legitimate goals and constraints—most notably, a target of perfectly equal population by district down to the person. (*See, e.g.*, 5 Tr. 203:17–204:8 (DiRossi).) These goals together dominated the drawing of the entire map and each district individually.

As discussed above, the population and geographic pressures were acute in northern Ohio and had ripple effects across the State. In northeast Ohio, District 11 was heavily underpopulated, so significant changes were needed simply to comply with the one-person, one-

[3] As discussed below (*infra* § I.C), the 2011 plan is justified under the Voting Rights Act.

vote principle. That explains the southward pull: there was no excess population to the east or west, and crossing Lake Erie would drag the district into Canada. The district was drawn to maintain its incumbent (Fudge) and preserve minority opportunity. The configuration of District 11 constrained districts to its immediate east, Districts 13 and 14, which were bordered by Pennsylvania to the east, Lake Erie to the north, and District 16 to the west. Democratic members made no requests regarding these districts in 2011, so there was no reason to believe they were the subject of objections on partisan grounds. (5 Tr. 195:6–14, 196:19–197:1, 197:2–10 (DiRossi).)

North central Ohio was also population starved, necessitating the elimination of two seats. District 9 was carefully worked at the request of Democratic legislators to favor Kaptur over Kucinich in the ensuing and inevitable race between incumbents. (5 Tr. 166:14–19 (DiRossi).) These changes created waves that controlled the configurations of District 4 (5 Tr. 190:10–22), District 5[4] (5 Tr. 190:24–191:11), District 7 (5 Tr. 191:24–192:13), and District 16 (5 Tr. 197:23–198:10). Democratic legislators asked for these changes, and Plaintiffs cannot credibly claim—having no evidence—the districts were drawn with an unlawful purpose.

Central Ohio saw population increases, and with that came a new seat, District 3. In spite of the request of Republicans in Washington that Franklin County be split four ways to advantage Republicans, the legislature listened to Democratic members and chose the bi-partisan route: a minority-opportunity district wholly within Franklin County to be represented by a well-respected former state legislator, Representative Beatty. (5 Tr. 177:17–178:22 (DiRossi).) These goals, however, affected surrounding districts, particularly Districts 12 and 15. (5 Tr. 195:12–

[4] District 5 was also constrained to the north and west by state lines.

196:18 (DiRossi).) Celebrated at the time—and only in 2018 criticized as partisan—District 3 achieved a bi-partisan consensus.

Southwest Ohio was also heavily influenced by Democratic input, the principal concern being to include Montgomery County whole within District 10 and a second being to intentionally pair two Republican incumbents. These goals drove District 10 westward, necessitating substantial changes and dropping of population from its eastern end. (5 Tr. 194:17–195:5, 194:25–195:1 (DiRossi).) Those major changes sent shockwaves into surrounding districts, controlling the configurations of District 2[5] (5 Tr. 187:2–188:9), District 8 (5 Tr. 192:16–23, 192:24–193:2, 246:1–23), and District 15 (5 Tr. 197:11–22). These are legitimate decisions.

District 1, in turn, was located in Hamilton County in the benchmark plan and also included four townships in the southwestern part of Butler County. (5 Tr. 186:8–14 (DiRossi).) The initial goal was to draw one whole county into the district—a traditional, non-partisan goal—but the population numbers did not pan out to include all of Hamilton County within the district. (5 Tr. 186:15–22 (DiRossi).) The numbers worked, however, to place all of Warren County in the district, thereby achieving the goal of a whole county in District 1 and then to zero out population in Hamilton County, the prior locus of District 1. (5 Tr. 186:15–22 (DiRossi).) That achieved three traditional goals, maintaining the footprint in Hamilton County, maintaining one whole county in the district (Warren), and obtaining population perfection. This impacted the shape of the other district in Hamilton County, but was not politically motivated. (5 Tr. 186:23–187:6 (DiRossi).)

[5] District 2 was also constrained on its west side by the state line.

Southeast Ohio is dominated by District 6, which tracks the Ohio River along the West Virginia border. Inhabited by union members (e.g., mine and steel workers), this is a Democratic Party stronghold—or, actually, *used to be* a Democratic Party stronghold even a decade ago. (Kincaid Dep. II 296:3–19.) The Democratic Party platform, however, has left these regions of the country behind, but that is not the Ohio legislature's fault. Now represented by a Republican (Johnson), the district is open for overtures from Democratic candidates should they choose a platform appealing to its constituents. Until that occurs, the Democratic Party can hardly blame the legislature for its own political choices. In any event, Democratic legislatures had no recommendations for this district in 2011 (5 Tr. 191:16–20 (DiRossi)), and Plaintiffs have practically nothing to offer by way of evidence on it.

Plaintiffs offer no meaningful district-specific evidence to support their claims. Nothing in their arguments about "[t]he sequence of events" (Pls. Trial Br. 32–38), "[c]ontemporaneous statements" (*id.* at 38–40), or "demographic data" (*id.* at 40–43) explains *which* districts and *which* lines are gerrymandered. But the Supreme Court just last term held that the analysis proceeds district by district. *Gill*, 138 S. Ct. at 1929. This evidence is unavailing and, besides, incorrect. The evidence overwhelmingly shows that Democratic and Republican concerns were heard and implemented. As noted, Democratic leadership had extensive input in Districts 9 and 10, which in turn impacted districts across the map. Meanwhile, Plaintiffs' efforts to show that Republicans in Washington had control over the process—aside from being incorrect, since the legislature had no trouble spurning their suggestions—ignores the evidence that even Washington Republicans listened to Democratic leaders. Adam Kincaid, the redistricting coordinator at the National Republican Congressional Committee, could hardly recall a conversation with Ray DiRossi regarding HB369 (Kincaid Dep. I, ECF No. 230-27, 20:8–21:7),

but he met between 15 and 30 times with Representative La Tourette who was negotiating with Democratic members (Kincaid Dep. I 96:16–97:8, 97:11–14, 97:16–98:2, 98:8–12). "Democrats would give Mr. La Tourette information on precincts or communities that they would like to be in their districts," and those requests were heard and implemented. (Kincaid Dep. I 99:8–100:10.) The Court need not decide whether Washington Republicans had a significant role in the process because Democratic concerns were heard and implemented both in Washington and in Columbus.

Plaintiffs' experts offer them no help in proving that any specific district was not drawn with legitimate purposes. Dr. Niven's testimony was the only source of district-specific information (for only some districts), but he offered only aesthetic criticisms with no grounding in an objective method. As an initial matter, the Court has no cause to credit Dr. Niven in any respect. He has never served as an expert witness (4 Tr., ECF No. 242, 5:10–11), does not teach any courses on redistricting (4 Tr. 5:17–20, 23–25), was a political speech writer for several prominent Ohio Democrats (4 Tr. 69:23–70:5) and personally sought to run for a Democratic nomination (4 Tr. 72:2–4), has never provided speech writing or political consulting services to Republican clients in the political context (4 Tr. 70:11–16), had no involvement with redistricting matters prior to this case (4 Tr. 70:17–19), has never advised a legislature or redistricting authority on redistricting (4 Tr. 70:20–22), has never published any academic articles on redistricting or gerrymandering (4 Tr. 72:5–7), has never worked with geographic information software like Maptitude (4 Tr. 72:10–13), has never studied communities of interest before being engaged to work on this case (4 Tr. 72:14–16), had never tried to identify boundaries for communities of interest in any districting plan before this case (4 Tr. 72:18–21), had never used census tracts before writing his reports in this case (4 Tr. 72:22–24), had never

before performed an analysis like he used in this case (4 Tr. 73:2–5), and had never published any articles on the provision of constituent services by members of Congress (4 Tr. 73:6–8).

From the starting point of total ignorance, Dr. Niven adds no light to any case issues. First and foremost, Dr. Niven repeatedly criticizes the splitting of census tracts, but it is undisputed that the map-drawer, Mr. DiRossi, did not use census tracts in creating the districts. (5 Tr. 202:15–16 (DiRossi), *see also* 7 Tr. 54:19–55:13 (Brunell).) Moreover, Dr. Niven's criticisms of split boundaries fails to tie any split to anything meaningful. Dr. Niven admitted that he did not know the "influences" on the legislature or have anything to say on legislative motive. (4 Tr. 107:19–108:7.) "[B]oundaries have to go somewhere," and criticizing splits for their existence is nonsensical. (7 Tr. 48:18–49:1 (Brunell); *see also* 4 Tr. 83:23–84:2 (Dr. Niven admitting this).) Without knowing *why* any boundaries were split, the analysis only shows that people have different ideas about what makes a good redistricting plan.

Dr. Niven's analyses are therefore irrelevant. His complaint that lines may have been drawn "down to the individual household level" is interesting, but, because political data is not available at that level, the purpose (if there was a purpose at all) was not political. (7 Tr. 50:1–8.) Nor does it matter if a Ford truck plant was split between districts because there is no partisan advantage to splitting a Ford truck plant where no one lives. (7 Tr. 51:4–52:12 (Brunell).) Nor is it relevant if Dr. Niven thinks some districts have funny shapes; district shapes are not constitutionally required. *Bethune-Hill*, 137 S. Ct. at 798. "Sometimes cities and municipalities take on funny shapes of their own," and there are innumerable reasons aside from partisanship for drawing funny-shaped districts. (7 Tr. 60:10–62:10 (Brunell).) For example, district oddities in Franklin and Hamilton County resulted from efforts to "keep municipal and county and natural political boundaries whole to the extent that they possibly can." (7 Tr. 61:25–62:7

(Brunell).) All of this is unremarkable and irrelevant to proving that any specific district was drawn for partisan reasons.

Plaintiffs' other experts conceded that they have no district-specific information at all. None of Dr. Warshaw's methods can indicate whether "a specific congressional district was drawn with discriminatory partisan intent." (3 Tr., ECF No. 241, 45:1–6 (Warshaw on efficiency gap), 3 Tr. 93:20–25 (same for mean-median measurement), 3 Tr. 95:13–17 (same for declination), 2 Tr. 195:22–25 (same for partisan bias), 2 Tr. 201:14–22 (same for responsiveness).) The Court "need not doubt the plaintiffs' math," but "these calculations are an average measure" and measure only "the fortunes of political parties," not the impact the plan "has on the votes of particular citizens." *Gill*, 128 S. Ct. at 1933. The Supreme Court was not prepared to be an adjunct of either major party, and this Court should follow its lead. But beyond describing "the fortunes of political parties," Dr. Warshaw's analysis does nothing. Not only can he not identify *which* districts are and are not gerrymandered, he also cannot identify whether the alleged partisan effect resulted from partisan motive. Partisan bias can result from non-partisan goals, and Dr. Warshaw made no effort to control for those goals. (3 Tr. 61:9–13, 3 Tr. 62:11–19, 3 Tr. 63:3–11, 3 Tr. 68:21–25, 3 Tr. 92:24–93:4, 3 Tr. 98:3–5, 3 Tr. 98:6–7, 3 Tr. 104:1–11.) The Court therefore cannot conclude from Dr. Warshaw that a goal of partisanship in any amount created the bias he purports to identify.

Dr. Cho's analysis says even less. The 2011 map is only an "outlier" as compared to Dr. Cho's millions of simulated maps only in the sense that any particular person's IQ is an "outlier" when compared to chickens. (6 Tr. 196:11–15 (Brunell).) Dr. Cho's sample maps have nothing to do with the legislature's goals but simply reflect an effort to rewrite them. She invented criteria that were not the legislature's criteria and ran three million maps with no logical

connection to this case. In fact, all three million maps are illegal because not one complies with the one-person, one vote rule.[6] *Evenwel v. Abbott*, 136 S.Ct. 1120, 1124 (2016) (explaining that "[s]tates must draw congressional districts with populations as close to perfect equality as possible"). Congressional districts have been invalidated for even tiny departures from perfection. *See Karcher*, 462 U.S. at 732, 736, 744 (rejecting a "one percent benchmark" and invalidating a plan with .7% total deviation); *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675 (M.D. Pa. 2002) (striking down plan off from perfection by 19 persons). Dr. Cho also did not factor in incumbency protection or the legislature's minority-opportunity or majority-minority goals. She set different goals. But different does not mean unconstitutional. Because redistricting "is primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), Dr. Cho's preferences do not matter.

B. The Effect Element Is Not Satisfied

Just as there is no discriminatory intent, there is no discriminatory effect. That twelve Republican and four Democratic members have won seats since 2011 is the natural, probable, and constitutional result of a legitimate incumbency-protection goal. Moreover, the current 12–4 split is, if nothing else, attributable to the Democratic Party's gradual loss of popularity in Ohio.

To begin, the incumbency-protection purpose effectuated in the 2011 map may have succeeded, but, if so, it does not follow that there is an impermissible "discriminatory partisan effect on those allegedly gerrymandered districts' voters." Order Denying Motion for Summary

[6] Although Dr. Cho argues that deviations below 1% are immaterial, since the legislature could split a single precinct to achieve perfection and would lack partisan data to assess that split from a partisan perspective, this argument contradicts the point of the exercise: mimicking the non-partisan goals to measure the extent and impact of partisan goals. Precincts can be, and are, selected for non-partisan reasons, so Dr. Cho's failure to include precinct splits in her map fails to implement the legislature's non-partisan goals. And Dr. Cho cannot ensure that split precincts would conflict with her other criteria, such as those against divided political subdivisions. Her analysis does not provide a meaningful comparison.

Judgment at 10. Plaintiffs identify no partisan effect other than the 12–4 split. *See* Pls. Trial Br. 50–56. But with no basis to distinguish the partisan effect from an incumbency-protection effect, they cannot claim a constitutional injury, since *Gaffney* approves the incumbency-protection effect equally with the incumbency-protection purpose. *See* 412 U.S. at 738 (allowing legislatures to impact the "consequences" of the map). The 12–4 split has continued precisely because, from 2012 through 2018, all incumbents (other than those paired) won reelection. (7 Tr. 161:5–10 (Hood).) That effect is permissible and proves the legislature's bi-partisan incumbency-protection motive.

Next, even if that were not so, Plaintiffs would still have to prove a district-specific partisan effect, and they have not. As described above, Dr. Cho and Dr. Warshaw provide statewide measurements of party fortune and do not measure the harm to the voters of any specific districts. And Dr. Niven's aesthetic critique of district lines does not establish discriminatory effect, or an effect of any kind.

But setting all those independently dispositive points aside, Plaintiffs' evidence fails to show the type of enduring partisan outcomes of (alleged) constitutional significance. There are many reasons for election outcomes. Here, for example, potential challengers to the incumbents—who by virtue of incumbency, enjoyed a built-in advantage—were political novices with no prior office-holding experience. (7 Tr. 162:8–12, 162:25–163:12 176:18–177:13 (Hood).) Dr. Warshaw used congressional-election data, which does not control for the "great variation" of candidate quality between and within districts over time. (7 Tr. 39:23–40:15 (Brunell).) Moreover, Dr. Warshaw's measures are highly volatile. (3 Tr. 69:1–4 (Warshaw).) The 2011 plan is only a so-called outlier under the first two elections, but not under the 2016 and 2018 elections. (3 Tr. 54:5–7, 109:15–110:11 (Warshaw).) The efficiency gap measure "jumps

around a fair bit." (3 Tr. 69:22–24 (Warshaw).) Furthermore, Dr. Warshaw's methods do not measure actual election results, but rather impute results to uncontested races (3 Tr. 82:6–16 (Warshaw)), and they do not control for turnout variations between districts (3 Tr. 95:23–25 (Warshaw)). This is not a reliable measure of partisan effect, and, besides, is not a measure at all: Dr. Warshaw is unable to say how many seats Republican incumbents won due to partisan redistricting versus other factors. (3 Tr. 68:19–20, 98:24–99:3 (Warshaw).) Similarly, Dr. Cho excluded from her partisan index of 2012 and 2014 data all statewide races which Republican candidates won handily, and she did not look at 2016 data. (5 Tr. 106:18–107:5 (Cho); 6 Tr. 109:20–25 (Thornton).) The method cannot shed light on partisan impact when the index makes Dr. Cho's maps appear more Democratic than Ohio's electorate. That, in turn, biases her partisan calculations of each simulated map and her conclusion that the 2011 plan is an outlier. That is no basis to find partisan effect.

The fact is that the seats Plaintiffs call unwinnable for Democratic candidates are competitive. Republicans would have failed to garner a majority of the vote in eight of sixteen HB369 districts in the 2006 Ohio attorney-general race and seven in the 2010 attorney-general race. (Kincaid Dep. II 565:14–567:10.) The scoring values indicate that eleven of the twelve so-called Republican seats can be put in play and at least five afford Republican candidates only a 5% or smaller cushion of past Republican voters. (Kincaid Dep. II 506:14–16, P499.) There is, moreover, no reliable measure of partisan voting behavior, and the stakeholders involved in the 2011 redistricting, Democratic and Republican alike, disputed which indexes were reliable. (*See, e.g.*, 5 Tr. 273:11–274:1, 229:7–18 (DiRossi); Blessing Dep., ECF No. 230-5, 46:15–24; Glassburn Dep. 79:16–22, 79:23–80:5, 80:15–81:14; 3 Tr. 39:25–40:3 (Dr. Warshaw conceding no universally accepted way to measure partisanship).)

Thus, where the Court required Plaintiffs' to prove a partisan effect of "entrenchment," the record shows a muddle. There is no rigging of election outcomes (were that even possible), and citizens of Ohio already have the right to choose their representatives, not the other way around. That the Democratic Party (or at least its constituents in this case) wants to be "immune from the obligation to pull, haul, and trade to find common political ground" within this lawful framework, *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), is neither Ohio's nor this Court's problem. This element is not met.

C. The Absence-of-Justification Element Is Not Satisfied

The third element, absence of justification, is also not satisfied. As discussed above, the partisan bias, even understood as such, resulted from numerous legitimate state policies, not from any unlawful purpose.

As a threshold matter, Defendants and Intervenors respectfully disagree that the burden falls on the defense to prove justification. Supreme Court precedent bars this shift. The only reason this case has not long ago been dismissed is that Justice Kennedy held out the possibility that a challenger might someday meet the burden of showing that "how an otherwise permissible classification, as applied, burdens representational rights." *Vieth*, 541 U.S. at 314 (opinion of Kennedy, J.); *see also id.* at 316 (rejecting claim because the challengers "have failed to prove…that these legislative classifications reflect no policy, but simply arbitrary and capricious action" (quotation and edit marks omitted)). It is beyond strange that Plaintiffs here advise the Court that *they* can meet *their* burden by shifting it to the defense. If that option were available, courts should have been striking down plans in droves for decades.

Regardless, Plaintiffs fail under this element because legitimate state policies plainly justify the deviations from perfect proportional representation—which is not, in any event, constitutionally required. *Vieth*, 541 U.S. at 308 ("The fairness principle appellants propose is

that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept.").

First, as described above, incumbency protection is a legitimate goal, particularly where it is effected through bi-partisan supermajorities, and there was no way for the Ohio legislature to adopt a policy of even-handed incumbency protection without preserving twelve Republican incumbents and four Democratic incumbents. To create an 11–5 plan or anything more favorable to the Democratic Party, the legislature would have had to adopt the expressly one-sided policy of pairing only Republican incumbents or carving up other performing Republican districts to unseat Republican members. Its choice against that justifies the 2011 plan.

Second, the alleged bias is justified by the Voting Rights Act and minority-protection goals, which are both rational state policies that justify burdens on even well-recognized representational rights. *See Harris*, 136 S. Ct. at 1309–10 (holding that Voting Rights Act Section 5 goals were rational policy justifying departures from the one-person, one-vote principle, even after Section 5 was disabled under *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)). The legislature had good reasons to fear Voting Rights Act liability in northeast Ohio because the City of Euclid was the subject of successful Section 2 claims immediately prior to the redistricting, due to polarized voting in the city and its history of racial discrimination and animus. Memorandum & Order, *United States v. Euclid City School Board*, No. 1:08-CV-2832 (N.D. Ohio Oct. 28, 2011), ECF. No. 61 (Page ID 1242); *see also United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio Apr. 16, 2008). Euclid is encompassed entirely within District 11, and the legislature concluded that the demographics, culture, communities of interest, or voting patterns in other areas of the district do not differ from those in Euclid. Speaker Batchelder and other leaders met with representatives of the African American community in

northeast Ohio and met with legislators representing the area to discuss this district, and they conducted a functional analysis of the district to conclude that a 50% target was appropriate. Although Dr. Handley did not agree with the result, this type of analysis has been approved by the Supreme Court, even in racial-gerrymandering cases where the state bears the burden under strict scrutiny. *Bethune-Hill*, 137 S. Ct. at 801 (finding the functional analysis standard satisfied where map-drawer met with incumbent and other legislators regarding the district). The 2011 plan easily satisfies whatever burden the Court may choose to apply.

Indeed, the majority-minority goal finds its support squarely within Supreme Court precedent, which adopted a "*majority-minority requirement*" for Section 2 districts. *Bartlett*, 556 U.S. at 17 (emphasis added). It did so precisely to ensure that states would not have to conduct the very type of analysis Plaintiffs say is required:

> Determining whether a § 2 claim would lie—i.e., determining whether potential districts could function as crossover districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions. The Judiciary would be directed to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term. For example, courts would be required to pursue these inquiries: What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same? Those questions are speculative, and the answers (if they could be supposed) would prove elusive.

Id. Those are precisely the considerations Dr. Handley claims the legislature had to engage in and that this Court should engage in for the purpose of vetting the needed 50% district in northeast Ohio. Yet the Supreme Court expressly held that those requirements are *not* necessary, and instead adopted "an objective, numerical test: Do minorities make up more than 50 percent

of the voting-age population in the relevant geographic area?" *Id.* at 18. The Ohio legislature was justified in applying that test, not the test expressly derided in *Bartlett*, and that is all the more obvious when the Wisconsin legislature in 2011 drew a 47% minority VAP district and promptly lost a Section 2 case. *See Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 856 (E.D. Wis. 2012).

Third, the goal of a minority-opportunity district in Franklin County is also justified. Although that district is not a majority-minority district, the Supreme Court has expressly recognized that, "in the exercise of lawful discretion," states may "draw crossover districts as they deem[] appropriate." *Bartlett*, 556 U.S. at 24. Unlike the majority-minority goal in northeast Ohio, Plaintiffs do not quarrel with the crossover goal in Franklin County as such. And, if they did, that would only support drawing the district as a 50% majority-minority district, thereby placing more Democratic voters in District 3. (This presumably explains why Plaintiffs, as avowed partisans, do not dispute this goal.) This purpose, then, justifies what Plaintiffs call a "sinkhole." The only dispute here is whether this was a sincere goal or a pretext; Plaintiffs bore the burden at the intent stage, and their argument fare no better at this stage. The witness testimony was credible, there was zero testimony for Plaintiffs view, and there was no pretext. The goal was to create another minority-opportunity district, and this goal was realized.

Fourth, the legislature's traditional goals also justify the deviation, as discussed above. (*See supra* § I.A.3.)

D. The Totality of Circumstances Demonstrates That the 2011 Plan Is Not a Partisan Gerrymander

The Court should not be content with Plaintiffs' test. Just as a court in a Voting Rights Act redistricting case must conduct "a searching practical evaluation of the past and present reality" of a jurisdiction and not apply legal standards in a "mechanical" fashion, *Gingles*, 478

U.S. at 45, 57, the Court here should not mindlessly run through factors. It instead should look past the labels and into the reality of what occurred in 2011. Multiple salient facts demonstrate that, even if courts may be justified in striking down some plans as unconstitutional partisan gerrymanders, Plaintiffs picked the wrong case.

For one thing, a majority of Democratic legislators voted for the plan. Although Plaintiffs may be correct in the abstract that support by a minority party does not immunize a plan from challenge, this fact certainly cannot be deemed *irrelevant*. This is not a case where a few scattershot minority members may have "idiosyncratic reasons" for supporting a gerrymander against their own party. (2 Tr. 194:19–24 (Warshaw).) Here, a majority of Democratic legislators supported the plan challenged as a gerrymander against the Democratic Party. Even if this does not immunize the plan—and the Court could as easily hold it does—Plaintiffs should bear the burden of proving why the Democratic Party needs judicial assistance to be free from a districting plan its own elected representatives supported with a majority vote. Having failed to explain with particularity how this support is consistent with their partisan-gerrymandering allegations, Plaintiffs cannot be heard to complain that it discriminates against the Democratic Party or its constituents.

Moreover, Ohio's referendum process placed meaningful bargaining chips in the Democratic Party's hands, and those chips did not go to waste. The Court's summary-judgment opinion relied on, more than any other Supreme Court precedent, *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652 (2015), but that case approved democratic, not judicial, means "to control election regulations." *Id.* at 2677. By the same token, it should be relevant in assessing whether judicial power is necessary to preserve democratic structures whether democratic structures are capable of correcting potential abuse. Here, Ohio's

referendum process created a check of "direct democracy," *id.*, over and against possible legislative abuse, and that process was used. Republicans in the legislature not only had the votes to pass HB319, they in fact exercised those votes and turned HB319 into the positive law of Ohio. (5 Tr. 174:3–4 (DiRossi).) But the threat of a referendum sent legislators back to work seeking further compromises. The record is teeming with evidence that, at least at that stage, Democratic leaders had input in the plan, their voices were heard, and they obtained concessions. Even if this does not immunize the plan—and, again, it probably should—Plaintiffs must at a minimum explain why democracy is not good enough for their purposes.

Additionally, the Court should consider that "entrenchment" in this case is one degree of separation from a case where representatives choose their voters. *Cf. Ariz. State Legislature*, 135 S. Ct. at 2677. The districts here are not drawn by the very legislators who run in them. The state legislature configured the separate congressional seats; its own seats are not challenged. Moreover, the entrenchment concern of Justice Breyer's *Vieth* opinion was "the *unjustified* use of political factors to entrench a minority in power." *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting). But Republicans here are the majority and Democrats the minority. The Democratic Party's demand for assistance here is more concerning than the Republican line drawing.

Next, the Court should weigh the personalities involved in the redistricting. Many legislatures over the decades have behaved badly in the redistricting process. *See, e.g.*, *Baldus*, 849 F. Supp. 2d at 843 (describing how, notwithstanding Wisconsin's "courtesy and its tradition of good government," the state has not been "exempted . . . from the contentious side of the redistricting process," and "the last time the Wisconsin legislature successfully passed a redistricting plan was in 1972"). The 2011 redistricting was spearheaded by Speaker Batchelder, among the most respected figures in Ohio politics since the 1970s, and he testified credibly that

his deep personal relationships with Democratic and African American statespersons informed the process. The process was also aided significantly by John Boehner, then-Speaker of the U.S. House, a moderate respected on all sides as a pragmatic, non-ideological problem-solver. It is extremely unlikely that these figures would have created the first partisan gerrymander in history so severe as to be invalidated in an opinion withstanding Supreme Court scrutiny. A far more likely explanation, consistent with the totality of the evidence, is that the Democratic Party received a fair shake. At a minimum, it is undisputed that the Democratic legislators got the deal they wanted, even if the Plaintiffs now disagree with it. It should go without saying that this Court's role is not to remedy Plaintiffs' buyer's remorse.

Along similar lines, the Court should carefully review the facts of past partisan-gerrymandering cases and compare them with this one. The partisanship in *Davis v. Bandemer*, 478 U.S. 109 (1986), far exceeded the partisanship alleged here, but the Supreme Court rejected that partisan-gerrymandering claim. Likewise, in *League of United Latin American Citizens v. Perry, ("LULAC")*, 548 U.S. 412–13 (2006), the Democratic members of the Texas legislature physically left the state in an effort to thwart the redistricting. *Id.* at 412. Yet that plan also was found not to be a partisan gerrymander. If those plans passed scrutiny under those circumstances, is it even plausible that Ohio's bi-partisan plan could fail?

Indeed, if the Court strikes down the 2011 plan, this will only prove that these claims are non-justiciable. Unimpeachable precedent holds that "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds*, 377 U.S. at 586, and that the judiciary should review redistricting only "with extraordinary caution," *Miller v. Johnson*, 515 U.S. 900, 916 (1995). If there is to be a partisan-gerrymandering cause of action, it must rest on "some limited and precise rationale" to "correct an established violation of the Constitution"

without committing "federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (opinion of Kennedy, J.). Not every plan can be the most "extreme" ever. *See, e.g.*, Br. for Appellants 41, *Vieth*, No. 021580 (U.S. Aug. 29, 2003). To be manageable, a standard must distinguish cases like this from those like *LULAC* and *Benisek*. If it cannot, that would be dispositive evidence that there can be no justiciable claim. Accordingly, an injunction against a bi-partisan plan like Ohio's may go further than anything to date to facilitate an eventual Supreme Court ruling barring these claims once and for all. A victory for Plaintiffs is sure to by pyrrhic.

II. Claims of "Gerrymandering" Are Non-Justiciable

Plaintiffs raise "an unsettled kind of claim this Court has not agreed upon, the contours and *justiciability* of which are unresolved." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (emphasis added). If the Court concludes (erroneously) that this case is not controlled by *Gaffney v. Cummings*, 412 U.S. 735 (1973), it will have no choice but to address justiciability. Relying on *Davis v. Bandemer*'s justiciability holding (but not its standard) is untenable when the Supreme Court has expressly called justiciability into question. *Gill*, 138 S. Ct. at. 1934; *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (plurality opinion) (four Justices voting to overrule *Bandemer*), *id.* at 308 (opinion Kennedy, J.) (agreeing that the plurality's views "may prevail in the long run").

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court identified six factors relevant to determining whether a claim is nonjusticiable. More recent cases have focused on the first two of those factors—textual commitment to a coordinate branch and lack of judicially manageable standards—as the most salient. *See, e.g.*, *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012); *Nixon*, 506 U.S. at 228. In *Zivotofsky*, for example, the Court limited its analysis to these two factors, and the plurality in *Vieth* observed that the Baker factors "are probably listed in descending order of both importance and certainty." 541 U.S. at 278. Here, all factors indicate

that claims that congressional districting maps constitute unconstitutional partisan gerrymanders are not justiciable.

First, the Constitution contains "a textually demonstrable constitutional commitment" of political discretion over election regulations "to a coordinate political department"—in fact, two departments per state, the legislature and Congress. *Baker*, 369 U.S. at 217. Article I, § 4, cl. 1 commits power to regulate elections to "the Legislature" of each state and to "Congress." The term "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution."' *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The word necessarily differentiates between that body and the "state" of which it is but a subpart. And just as the term is "a limitation upon the state in respect of any attempt to circumscribe the legislative power" over federal elections, *McPherson v. Blacker*, 146 U.S. 1, 25 (1892), the term "Congress" limits the power the other federal branches may exert over the same. An Article I delegation to "Congress" is not a delegation to the "judicial power of the United States" under Article III. And, the judiciary possessing (like the other federal branches) only limited powers, the absence of a delegation is an express denial of power. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Although the principal recipient of the delegation is the state legislature, that does not extenuate the separation-of-powers harm of judicial review. When it enacts congressional districts, the legislature "is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under…the United States Constitution." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). Moreover, to seize supervisory authority over elections is to seize congressional power, an invasion of authority allocated to "a coordinate political department." Plaintiffs do "not offer evidence of a single

word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review" as the remedy for abuse of legislative authority in this arena, *Nixon v. United States*, 506 U.S. 224, 233 (1993), and the textual commitment of supervisory power with Congress is powerful evidence that no review over political determinations is contemplated. This factor weighs in favor of non-justiciability.

Second, there are no "judicially discoverable and manageable standards for resolving" these claims. *Baker*, 369 U.S. at 217. Plaintiffs' standard "shares many features with other proposed standards" that were rejected by five votes in *Vieth* and do not resolve the fundamental problems *Vieth* identified with them. 541 U.S. at 285 (plurality opinion); *id.* at 308 ("The plurality demonstrates the shortcomings of the other standards that have been considered to date."). The words "intent" and "effect" have been around for decades, *Vieth* dealt with them, and it they do not provide the clarity the Supreme Court has demanded.[7] *Vieth* rejected both a "predominant" intent standard as too "indeterminate" and a standard "of mere intent to disadvantage the plaintiff's group" as too easy "to meet." *Id.* at 284, *see also id.* at 281–82. The effect prong too was known and dealt with in *Vieth*. Intent to "pack" and "crack" flunked in *Vieth*, and it flunks again here as both indeterminate—since "a person's politics is rarely as readily discernible…as a person's race—and "this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation." *Vieth*, 541 U.S. at 286–88 (plurality opinion). Plaintiffs offer both tests again here, but the differences between the test and the various tests (especially Justice Breyer's rejected test) are cosmetic at best.

[7] As discussed below (§ III), the test is further off base because it has nothing to do with any constitutional right.

The "intent" and "effect" elements do not tell courts how to discern how much intent and effect is too much or, as this case shows, how to distinguish between and among the various intents and effects that go into the map. Nor does it tell courts which persons' intent matters: Plaintiffs' intent allegations here turn almost entirely on alleged intent of persons not responsible for enacting the 2011 plan. Similarly, Plaintiffs' choice of the word "entrenchment" and its derivatives adds no clarity because there is no way to know when a "partisan advantage" is cemented "against likely changes in voter preference." Order Denying Motion for Summary Judgment at 9 (quotations omitted). How does anyone know what voter preferences will be in the future? Who predicted Donald Trump in 2011? Dr. Warshaw conceded that a 55% vote share would give Democratic candidates a delegation majority; how can the Court or anyone else know whether 55% is tolerable or intolerable? Would 53% be different? Plaintiffs have no idea. None of this is manageable, none of it guides the courts through this political thicket, and none of it ensures the public that judges in these cases will apply neutral standards rather than their own partisan preferences.

The underlying error is that Plaintiffs have done precisely nothing to satisfy Justice Kennedy's *Vieth* opinion, the only opening for their claim. In *Vieth*, Justice Kennedy held out hope for a justiciable legal standard precisely because the social sciences might eventually provide the basis for the standard. *Vieth*, 541 U.S. at 312–13 (opinion of Kennedy, J.). Justice Kennedy reiterated this point in *League of United Latin American Citizens v. Perry ("LULAC")*, 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.), by rejecting a social-science metric that failed to establish "a standard for deciding how much partisan dominance is too much." Plaintiffs, however, have long since admitted that their social-science methods do not provide a workable standard, so the resort back to indeterminate "intent" and "effect" lingo does nothing to

answer the all-important question of "how much partisan dominance is too much." *Id.* The absence of manageable standards alone is sufficient to find the claim non-justiciable.

Third, the Constitution points to "the impossibility of deciding" a partisan-gerrymandering case "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. The framers understood that the power delegated under the Elections Clause is "*discretionary*." The Federalist No. 59, at 398 (Hamilton) (Jacob Cooke ed., 1961) (emphasis added). To evaluate whether discretion is exercised fairly or unfairly is to evaluate whether it is exercised wisely or unwisely, an inquiry unfit for judicial resolution. *See, e.g.*, *Polish Nat'l All. of the U.S. of N. Am. v. N.L.R.B.*, 322 U.S. 643, 650 (1944).

To be precise, the initial policy determination a partisan-gerrymandering claim presents is what does and does not qualify as "fairness in districting." *Vieth*, 541 U.S. at 307 (opinion of Kennedy, J.). Electing one's preferred candidates is not like expressing one's beliefs: speech can be countered by more speech, so courts can enforce free-speech rights simply by enjoining a speech restraint; they need not limit other persons' ability to communicate an opposing message. By contrast, for one constituency—defined in its preferred way—to elect its preferred candidates, it must outvote competing constituencies, frustrating their ability to do the same. And, for one constituency to obtain more favorable districts, others must lose favorable districts. Identifying whether a redistricting map unfairly burdens a given constituency requires (1) classifying the constituency in one way over another, (2) deciding how much representation it deserves, and (3) deciding from what other constituency to take that representation.

These questions are political, not legal. Ohio can be divided into an infinite number of equally populated districts, and an infinite number of alternative maps can therefore be identified—each with its own set of political winners and losers. Constituencies also can be

defined and redefined in any number of ways: "farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats," and so on. *Vieth*, 541 U.S. at 288 (plurality opinion). Democratic and Republican voters do not exist either as facts of nature or as members of constitutionally defined castes; the parties can be broken down into sub-constituencies, and many constituencies have a home in neither party. A legal right to elect preferred candidates can only be administered for favored groups (here, the Democratic and Republican Parties), or else administering it would pit the rights of all Americans against each other.

And then there are the innumerable competing principles of fairness. Even if an expert witness like Dr. Cho creates an algorithm to produce millions of alternative maps by which to measure the alleged gerrymander, the expert necessarily plugs policy judgments into those maps by creating one algorithm, not another. (Dr. Cho, for example, ignored the Ohio legislature's policy judgments and made up her own.) As the Court has seen, fairness can be defined geographically, such as under so-called traditional districting principles like compactness, contiguity, and political-subdivision integrity. It can, alternatively, be defined under votes-to-seats ratios by comparing how many votes a party obtains against how many seats its candidates win. These measures may be subdivided and reworked under their own internal logic, and they set up competing definitions of fairness as against other methods. In all these respects, "[t]he wide range of possibilities makes the choice inherently standardless." *Holder v. Hall*, 512 U.S. 874, 881 (1994). That is why the Constitution delegates these questions to political bodies, not courts. To decide whether a legislature acted fairly, a court must usurp the predicate question of what that even means, a political question. This factor weighs for non-justiciability.

Fourth, the Constitution renders it impossible for "a court's undertaking independent resolution" of a partisan-gerrymandering case "without expressing lack of the respect due

coordinate branches of government." *Baker*, 369 U.S. at 217. A court cannot rule that a legislature engaged in improper "partisan gerrymandering" without concluding that the court knows better than the legislature which competing constituencies deserve electoral representation, in what way, and to what degree. What's more, invalidating the legislature's redistricting legislation often necessitates replacing it with a court-drawn scheme. That, in turn, means replacing core legislative policy with judicial policy.

Entertaining these questions disrespects both state legislatures and Congress. When it was proposed, the Elections Clause sparked controversy because many convention delegates were appalled that it authorized Congress to override state legislatures' election laws, universally viewed as a matter for local control. *See* 2 Joseph Story, Commentaries on the Constitution of the United States § 813 (1st ed. 1833). The Federalists retorted, not that election procedure should be viewed primarily as a national matter, but that the power "will be so desirable a boon in [the legislatures'] possession" that Congress would not likely interfere "unless from an extreme necessity, or a very urgent exigency." *Id.* § 820. But a decision by the courts that a legislature acted unfairly—from a political standpoint—would insult both the legislature, by removing this "desirable" "boon" from its "possession," and Congress, by ruling on what is and is not "an extreme" or "very urgent exigency" meriting federal intervention. This factor weighs in favor of non-justiciability.

Fifth, the Constitution codifies "an unusual need for unquestioning adherence to a political decision already made," and it points to "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. Partisan-gerrymandering claims set courts up as superior branches, capable of second-guessing and even making political choices, when they have no competency to do so. These cases are

unlike those alleging criminal misconduct or discrimination based on an immutable characteristic, where courts can tailor their proceedings, inquiries, decisions, and remedies to finite questions distinct from those properly left to other branches—and touch on political questions only incidentally. Courts in partisan-gerrymandering cases have no choice but to place the entire deliberative process at issue, because the entire deliberative process is political, and base their determinations squarely on political choices.

This case vividly illustrates this problem. Legislators and congressmembers have been ordered to appear in court and produce documents, and Plaintiffs ask the Court to pass judgment on the entirety of the legislative record, politics and all. Ohio residents have complained about the congressmembers, expecting this Court to make a judicial determination regarding whether those members are adequately representing constituents. The impropriety of this can hardly be over-emphasized. These representatives have equal dignity in the constitutional scheme with members of this Court, and the Constitution does not render them answerable to this Court insofar as their political judgments are concerned. Any citizen can complain about democratically elected representatives in any number of forums—including at the ballot box—but the Constitution does not set up the federal courts as among those forums. There is no right to judicial assistance for individual voters who would like different representatives.

The Constitution vests the very political choices of redistricting with the legislature, so placing the judge over and against the legislature and its constituent members to review those very choices, precisely for their being political, creates the public misimpression that courts—viewed as non-political and fair arbiters of law—are competent to condemn legislators' political choices and views.

In addition, an enjoined redistricting plan must be replaced, often by a court-ordered plan. Because political consequences are unavoidable, these plans of necessity reflect policy choices. Under this Court's precedents, district courts must narrowly tailor their remedies, touching only discrete legal violations. They must "honor state policies," not "unnecessarily put aside" legislative decisions, and choose a remedy "which most clearly approximate[s] the reapportionment plan of the state legislature, while satisfying constitutional requirements." *White v. Weiser*, 412 U.S. 783, 795–96 (1973); *see also Upham v. Seamon*, 456 U.S. 37, 42–44 (1982); *Perry v. Perez*, 565 U.S. 388, 394 (2012). But a partisan-gerrymandering claim encompasses the very foundations of the legislative policy decisions, politics and all. remedying these would-be violations will eventuate wholesale judicial reinvention of redistricting priorities from scratch. The "state policies" themselves being condemned, district courts will surely implement their own criteria. That means directly "prescrib[ing]" the "Times, Places and Manner" of congressional elections and cutting out "the Legislature" altogether. Redistricting is "political" because of what it is, not because of who does it. This final factor, like all others, weighs in favor of non-justiciability.

III. Claims of Gerrymandering Are Not Predicated on Constitutional Rights

It is not enough that a proposed standard be "judicially manageable"; it must also (and most importantly) be "judicially discernible in the sense of being relevant to some constitutional violation." *Vieth*, 541 U.S. at 287–88 (plurality opinion). Likewise, it is not enough that Plaintiffs' partisan-gerrymandering claims be held justiciable; they must also be held to identify violations of some constitutional provision. Plaintiffs' three-part test fails not only insofar as it is indeterminate and, hence, unmanageable, but also insofar as it is not grounded in "well developed and familiar" equal-protection and free-speech standards. *Baker*, 369 U.S. at 227. Justiciability concerns aside, no equal-protection, free-speech, or free-association standards are

violated here, and they may never be violated in cases between major political parties in a healthy two-party system. Gerrymandering burdens, at most, "the fortunes of political parties," not individual rights. *Gill*, 138 S. Ct. at 1933.

A. No Equal-Protection Standard Is Violated

Plaintiffs' first claim, an equal-protection claim, starts from the premise that political intent is no different from invidious racial discrimination. Five Justices in *Vieth* disagreed. *See Vieth*, 541 U.S. at 293 (plurality opinion), *id.* at 307 (opinion of Kennedy, J.). That subjects Plaintiffs' claim to rational-basis review—and dooms it. Every redistricting plan, including Ohio's, is rationally related to a legitimate government interest. Plaintiffs cannot prove otherwise.

If the Court is to apply in "well developed and familiar" equal-protection and free-speech standards, *Baker*, 369 U.S. at 227, it must begin with the predicate question of whether the state used a classification bearing no "reasonable and just relation to the act in respect to which the classification is proposed." *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 155 (1897). If the state's classification is not suspect, there is no heightened scrutiny, and federal-court oversight is limited to rational-basis review. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Five Justices in *Vieth* agreed that politics is "permissible." *Vieth*, 541 U.S. at 314 (opinion of Kennedy, J.). A unanimous Court in *Gaffney* held the same. *Gaffney*, 412 U.S. at 753. That only stands to reason: members of a major political party do not bear an immutable characteristic, they are not a discrete and insular minority, they do not have a history of unequal treatment, and they are well-represented in the political processes. Members or supporters of a major political party cannot seriously expect, as a class, to receive enhanced scrutiny where discrimination claims by the mentally disabled and elderly fall under rational-basis review. *Mass.*

Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976); *City of Cleburne*, 473 U.S. at 440. Plaintiffs have presented no evidence indicating that they have been subject to a suspect classification.

The rational basis standard is satisfied "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "Perfection in making the necessary classifications is neither possible nor necessary." *Mass. Bd. of Ret.*, 427 U.S. at 314. The 2011 plan passes that test with flying colors. The mere fact that the plan was drawn to perfectly equal population alone establishes a rational basis sufficient for it satisfy equal-protection scrutiny. That is because, if *any* rational basis can be found, the presence of some allegedly impermissible basis does not override the legitimate basis. *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 315. That purpose—and all the others, incumbency protection, compactness, contiguity, and so on—confirms the validity of the plan under rational-basis review.

The only basis Plaintiffs identify for invalidating the plan is an allegation of supposedly improper motive. But "the motives of legislators are irrelevant to rational basis scrutiny." *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1302 (7th Cir. 1990); *see also Fox v. Standard Oil Co. of N.J.*, 294 U.S. 87, 100–01 (1935) (rejecting inquiry into motive in Fourteenth Amendment challenge to state taxing scheme); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F.3d 237, 241 (8th Cir. 1994). Moreover, because rational-basis review assumes the state's criteria are legitimate until proven otherwise, the Court must assume even the political classifications were legitimate. And they are. *See Gaffney*, 412 U.S. at 753. There is no conceivable equal-protection violation here.

B. No Fundamental-Right or Liberty-Interest Standards Is Violated

There is no burden on the right to vote and no vote dilution that resembles what the Supreme Court recognizes as actionable under "well developed and familiar" standards. *Baker*,

369 U.S. at 227. While Plaintiffs rely on cases addressing partisan intent in the one-person, one-vote context, *see, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016)), and in the context of the *Anderson/Burdick* framework for adjudicating alleged burdens on voting rights, *see Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992), these doctrines do not proceed by an intent/effect framework. Rather, they identify a burden on the right to vote and address possible justifications for that burden. But Plaintiffs have identified no burden on the right to vote analogous to the burdens cognizable under these doctrines and rely instead on allegations of partisan motive, which are not relevant.

In addressing the right-to-vote doctrines, Plaintiffs ignore *Crawford v. Marion County Election Board*, 553 U.S. 181, 203–04 (2008), which held that, if a voting restriction or qualification is otherwise justified or non-burdensome on the right to vote, partisan intent does not invalidate the state's "valid neutral justifications" for the voting requirement. Accordingly, *Crawford* upheld a photo identification voting law even though it assumed that it was enacted with partisan intent to discouraging voting by members of the Democratic Party who were more likely not to have photo identification. *Id.* Because the law did not burden the right to vote, the *Anderson/Burdick* framework was not triggered, and the partisan intent was irrelevant.[8] *Id.*

That is also the rule under the one-person, one-vote framework. Although the Supreme Court in *Harris* and its summary affirmance of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *see Cox v. Larios*, 542 U.S. 947 (2004), has assumed that partisan considerations cannot justify deviations from perfect equality of district population, this doctrine requires a triggering

[8] To be sure, *Crawford* stated that partisan intent cannot justify a voting requirement if that requirement places an otherwise unjustified burden on the right to vote. *Id.* But this means only that partisanship is a nullity: it neither saves an otherwise impermissible burden on the right to vote nor establishes an independent basis for striking down a law.

event of inequality, a burden on the right to vote. These cases do not hold that partisan favoritism amounts to a basis *independent* of that burden to invalidate a redistricting scheme. In fact, the Court in *Harris* went so far as to warn potential challengers that "we believe attacks on deviations under 10%," the presumptive threshold for when deviations from equality become *de minimis*, "will succeed only rarely, in unusual cases." 136 S. Ct. at 1307. That is hardly a compelling basis to justify the enormous expansion of judicial oversight of redistricting that Plaintiffs demand.

Nothing in these doctrines implies the intent/effect/justification test Plaintiffs propose. Under both related doctrines, crux of any claim is not an alleged partisan intent, but rather the degree of burden, if any, on the right to vote. *See Vieth*, 541 U.S. at 314 (opinion of Kennedy, J.) (observing that a plaintiff must show a plan "burdens representational rights"); *LULAC*, 548 U.S. at 418 (opinion of Kennedy, J.) (same). Here, there is no burden on the right to vote and no vote dilution that resembles what the Supreme Court has previously recognized as actionable. The purported burden Plaintiffs identify the district court identified is that it would take 55% of the vote for candidates of the Democratic Party to win 50% of the seats due to "cracking" and "packing."

That is not similar to the burdens on the right to vote at issue under the *Anderson/Burdick* line of cases, which involve barriers to participation in the voting process, such as restrictions on ballot access for political parties and candidates, *Anderson*, 460 U.S. at 787, bars on write-in voting, *Burdick*, 504 U.S. at 434–35, and voter qualifications that may limit access to the polls, *Crawford*, 553 U.S. at 211–18. Unlike in those cases, the 2011 plan places no obstacle between a voter and a polling place or a political party or candidate and a ballot. Here, there is no burden on the right to vote, much less a "severe" one requiring state justification. *Burdick*, 504 U.S. at 434.

Likewise, the "discriminatory effect" identified here is not analogous to the vote dilution present in the Court's one-person, one-vote cases. Those decisions prohibit "[w]eighting the votes of citizens differently." *Reynolds v. Sims*, 377 U.S. 533, 563 (1964). But, in this case, all districts have exactly equal population, and residents have exactly equal representation in Ohio's congressional delegation.

The difference between this case and both the voting-restriction and vote-dilution cases is not merely technical, but rather goes to fundamental differences as to the theories' respective "model[s] of fair and effective representation." *Vieth*, 541 U.S. at 307 (opinion of Kennedy, J.). This Court's familiar and well-established standards vindicate the right to participation in the electoral process, through fair and congruent voting requirements and relative equality of representation, as measured by the number of representatives assigned to a given number of residents. Plaintiffs' theory is altogether different. The only burden Plaintiffs identify is one allegedly on the right of the two major political parties to elect their preferred candidates. But the right to vote does hinges on their "fortunes." *Gill*, 138 S.Ct. at 1933. This theory ignores the usual assumption that a representative for whom the individual voter did not vote nevertheless will represent that voter's interest. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986); *Whitcomb v. Chavis*, 403 U.S. 124, 149–153 (1971). Whatever burden may or may not fall on the fortunes of the Democratic Party are irrelevant to the rights of individual voters in Ohio, and those rights are in no way burdened.[9]

[9] Notably, the only legal guarantee of a right to elect preferred candidates is a creature of statute, the Voting Rights Act. That a statute is necessary to create the rights for racial and language minority groups that Plaintiffs say the Constitution confers on the Democratic and Republican Parties is overwhelming, if not dispositive, evidence that no such constitutional right exists.

Plaintiffs' right-to-vote and free-speech claims have these concepts exactly backwards. Ohioans exercised their right to vote by electing members to the legislature, and, since the right to vote entails the right to have the vote counted, the right surely entails the right for the elected representative to make the political choices constitutionally delegated to them (under both the Ohio and U.S. Constitutions). It is Plaintiffs, not the State, that seek to frustrate the right to vote because they want this Court itself to implement a plan, and they want it to look like the one drawn by their expert Mr. Cooper. But neither federal judges nor Mr. Cooper are elected, so according them the right to exercise political discretion in rejecting the political choices of political actors frustrates, if not violates, the very provisions Plaintiffs purport to vindicate. Whatever burden Plaintiffs think they discern from the 2011 plan pales in comparison to removing political redistricting choices from the political process. Plaintiffs, not the State, should be required to satisfy the *Anderson/Burdick* test.

C. No First Amendment Standard Is Violated

Plaintiffs' First Amendment claim fares no better. Plaintiffs ignore the requirement that they establish a restraint (or its functional equivalent) on speech. The 2011 plan does not restrain any Ohio voter's speech.

First Amendment standards condemn classification on grounds of expression or association only to "the extent [they] compel[] or restrain[] belief and association…." *Elrod v. Burns*, 427 U.S. 347, 357 (1976); *see also Vieth*, 541 U.S. at 314–15 (opinion of Kennedy, J.) ("The [First Amendment] inquiry…is whether political classifications were used to burden a group's representational rights."). That is, the First Amendment condemns "restraints" on expressive and associational rights, *e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and more subversive forms of retaliation that "would deter a person of ordinary firmness from exercising his First Amendment rights," *see, e.g.*, *Bridges v. Gilbert*, 557 F.3d 541, 552 (7th Cir.

2009). For political parties, this involves a threshold showing of a burden on associational rights, such as compelled association, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 573 (2000), or non-association, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–17 (1986).

Nothing like that is present here. There is no serious contention that Ohio has placed any restraint on the speech of the Democratic Party or its members or supporters. No speech or association is even "arguably prohibited." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979); *see, e.g.*, *League of Women Voters v. Quinn*, 2011 WL 5143044, *12–13 (N.D. Ill. Oct. 28, 2011) ("The redistricting plan does not prevent any LWV member from engaging in any political speech, whether that be expressing a political view, endorsing and campaigning for a candidate, contributing to a candidate, or voting for a candidate."); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 575 (N.D. Ill. 2011); *Pope v. Blue*, 809 F. Supp. 392, 398–399 (W.D.N.C. 1992), *sum. aff'd*, 506 U.S. 801 (1992); *Badham v. March Fong Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988), *sum. aff'd*, 488 U.S. 1024 (1989). This is because free-speech doctrines do not "guarantee political success," i.e., a right to "translate" votes into a given number of Congressional seats. *Badham*, 694 F. Supp. at 675; *see also, e.g.*, *Quinn*, 2011 WL 5143044, at *4; *Comm. for a Fair and Balanced Map*, 835 F. Supp. 2d at 575; *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1101 (10th Cir. 2006).

Nor would a person of "ordinary firmness" be deterred from engaging in political speech or association out of fear that the Ohio legislature would retaliate by means of a political gerrymander. "Political gerrymanders are not new to the American scene," *Vieth*, 541 U.S. at 274 (plurality opinion), so if they had a deterrent effect on speech or association, someone would have noticed that by now. Political gerrymandering is not similar to a "prolonged and organized campaign of harassment" by law enforcement officers, *see, e.g.*, *Bennett v. Hendrix*, 423 F.3d

1247, 1254 (11th Cir. 2005), police "intimidation tactics," *see, e.g.*, *Keenan v. Tejeda*, 290 F.3d 252, 259 (5th Cir. 2002), criminal prosecution, *see Bruner v. Baker*, 506 F.3d 1021, 1030 (10th Cir. 2007), or adverse employment action, *see, e.g.*, *Hill v. City of Pine Bluff, Ark.*, 696 F.3d 709, 715 (8th Cir. 2012). The target of these deprivations knows when they occur and has good reason to fear them. The effect, if any, of political gerrymandering is *de minimis* and does not arise to the level of a First Amendment deprivation. *See Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 227 (2d Cir. 2006) (finding no deprivation of First Amendment rights where university professor was denied "emeritus" status because the "benefits of such status…carry little or no value and their deprivation therefore may be classified as *de minimis*"); *Mezibov v. Allen*, 411 F.3d 712, 721–23 (6th Cir. 2005) (finding no First Amendment deprivation where allegedly defamatory statements by prosecutor would not deter a "defense attorney of ordinary firmness" from continuing to defend his client).

Likewise, this case involves no burden on associational rights in the form of regulation on "parties' internal processes." *Jones*, 530 U.S. at 573. The 2011 plan has no effect on "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Id.* at 574. There is neither forced association of any party with individuals or candidates with whom the party would prefer not to associate, *id.* at 577, nor prevented association of any party with individuals or candidates with whom the party wishes to associate, *Tashjian*, 479 U.S. at 214. By comparison, the Supreme Court has denied relief in a challenge to a closed-caucus system where plaintiffs were not political parties, but potential candidates asserting the right to be endorsed by political parties; the Court observed "[n]one of our cases establishes an individual's constitutional right to have a 'fair shot' at winning the party's nomination." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205–06 (2008). Indeed,

"[w]hat constitutes a 'fair shot'" is "hardly a manageable constitutional question for judges," especially where "traditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a 'fair shot' at party nomination." *Id.* at 206; *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453 (2008).

That should sound familiar. Plaintiffs are claiming a right that does not exist, under standards that are not remotely manageable, for an alleged harm that does not in any way impact the internal affairs of any political party. The right they would vindicate is a right to a government-created forum, a districting scheme that enable of a group of persons—defined as the Democratic Party would prefer they be defined—to obtain an audience with the government through a representative of their choosing (i.e., a Democrat). The First Amendment confers no such right. *See, e.g.*, *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 286 (1984); *Smith v. Ark. State Highway Employees*, 441 U.S. 463 (1979) (per curiam).

D. No Article I Standard Is Violated

Plaintiffs' Article I arguments are meritless. As note above, Article I, § 4 cl. 1, delegates the power to draw congressional districts to "the Legislature" of each state. This provision, sometimes called the "Elections Clause," uses "comprehensive words" that "embrace authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Nothing in the text remotely implies "principles of fairness" that judges may impose against legislation that otherwise regulates elections procedure. *Vieth*, 541 U.S. at 307 (opinion of Kennedy, J.). To the contrary, the Clause's plain language and its location in Article I both signal that those choices are vested in non-judicial bodies.

In the debates over this hotly contested provision, the idea that courts might play a role in regulating federal elections appears to have occurred to no one. Alexander Hamilton, for example, found it axiomatic that "there were only three ways, in which this power could have

been reasonably modified and disposed": in the state legislatures, in Congress, or divided between the two. The Federalist No. 59, *supra*, at 398–99. That is hardly surprising, since the framers drew a bright line between judicial and legislative power. Redistricting is not an act of legal judgment; it is "primarily a political and legislative process." *Gaffney*, 412 U.S. at 749. It was not intuitive then, and is not now, that the Elections Clause might delegate power to judges to wield political authority over redistricting.

Plaintiffs' effort to find manageable standards from this provision falls flat. The only judicial role in enforcing the Elections Clause is to assess whether challenged legislation properly falls within the Elections Clause's express delegation of election-procedure authority. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995). This role is no different from the courts' role in policing any positive grant of authority, such as Congress's Commerce Clause power, its spending power, and its power to enforce the Civil War Amendments. Because the scope of review is limited to assessing whether the exercise is "appropriate" to that grant, *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), judicial review of Elections Clause legislation is limited to whether it exceeds the "'broad power' to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Gralike*, 531 U.S. 510, 523 (2001). In particular, the Court has reviewed whether legislation falls within those "comprehensive words," "Times, Places, and Manner," *Smiley*, 285 U.S. at 366; *see Thornton*, 514 U.S. at 832–36, and whether legislative action was exercised by "the Legislature," *see Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

A redistricting plan—every redistricting plan—satisfies this test. Districting legislation "classifies tracts of land, precincts or census blocks," *Hunt v. Cromartie*, 526 U.S. 541, 547

(1999), and clearly sets the "Places" and "Manner" of elections. It assigns voters to districts and representatives and dictates where they vote. Under the correct inquiry, the 2011 plan plainly qualifies. Plaintiffs, again, only argue otherwise by reference to what they call unconstitutional motive. But motive is irrelevant to whether an exercise of authority falls within a positive grant of power. *See, e.g.*, *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (finding inquiry into "hidden motives" to be "beyond the competency of courts" in assessing whether tax legislation exceeded constitutional taxing authority); *McCray v. United States*, 195 U.S. 27, 56 (1904) (rejecting the notion "that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted"); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).[10]

Plaintiffs misread *Thornton* and *Gralike*, in support of their motive inquiry. Those cases do not condemn procedural election laws if accompanied by improper motive or effect; they rather condemn laws that do not regulate election procedure at all. *Thornton* concluded that the power to craft procedural laws does not encompass the power to establish qualifications to congressional office. 514 U.S. at 828. It then rejected a state constitutional provision establishing qualifications (term limits) on its face in the form of a ballot-access rule. *Id.* at 833–36. The provision expressly stated: "the people of Arkansas…herein limit the terms of elected officials." *Id.* at 784, 830. Likewise, *Gralike* invalidated a statute that, on its face, expressed government opposition to candidates who declined to support term limits; it viewed this mechanism as the

[10] The question whether legislation exceeds a positive delegation differs in this respect from the question whether legislation infringes on individual rights. Courts probe motive in individual-rights cases because "[a] statute, otherwise neutral on its face," violates individual rights if it is "applied so as invidiously to discriminate on the basis of race" (or another suspect classification). *Washington v. Davis*, 426 U.S. 229, 241 (1976). Review of whether legislative action exceeds the scope of authority is different and does not involve a review of motive.

functional equivalent of an impermissible qualification for office. *Gralike*, 531 U.S. at 514–15 Both cases judged the challenged provisions according to their plain text, and neither provision even purported to set time, place, or manner rules. The problem was that the law in no way regulated election procedure and in every way set qualifications. It does not follow from either holding that facially neutral state laws that directly and extensively regulate election procedure are invalid on a judicial finding of some type of motive or effect. A redistricting plan, even one enacted to advantage one group over another, is never a "sole…attempt to achieve a result that is forbidden by the Federal Constitution." *Thornton*, 514 U.S. at 829.

IV. Plaintiffs Lack Standing

To establish standing, a plaintiff first must demonstrate (a) injury in fact, (b) causation, and (c) redressibility. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and some internal quotation marks omitted). To establish prudential standing requirements: "(1) a plaintiff must assert [her] own legal rights and interests, without resting the claim on the rights or interests of third parties; (2) the claim must not be a 'generalized grievance' shared by a large class of citizens; and (3) in statutory cases, the plaintiff's claim must fall within the 'zone of interests' regulated by the statute in question." *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012). In *Gill*, the Supreme Court addressed this "threshold" question, asking: "what is necessary to show standing in a case" alleging political gerrymandering in the form of vote dilution? *Gill*, 138 S. Ct. at 1929. The Court focused on the "foremost" element: injury in fact. *Id.* Noting that it had "long recognized that a person's right to vote is 'individual and personal in nature,'" *id.* (quoting *Reynolds*, 377 U.S. at 561), it required plaintiffs to show "disadvantage to themselves as individuals" to meet this element. *Id.* (quoting *Baker*, 369 U.S. at 206).

As shown below, the undisputed evidence in this case demonstrates that Plaintiffs here have not presented any evidence of any individual, district-specific harm.

A. Plaintiffs Demonstrate Only Generalized Grievances About Legislative Decisions

Determining the shape, size, and composition of districts involves numerous policy decisions. At trial, Plaintiffs' own expert, William Cooper, acknowledged that some intent to gain political advantage is inescapable whenever political bodies devise a districting plan and that intent will at least have some effect on the map. (3 Tr. 184:13–18, 184:19–21 (Cooper).) He used political data to evaluate his own maps, which was available on his software—the same Maptitude program the 2011 map-drawers used. (3 Tr. 185:20–24, 204:25–205:11 (Cooper).)

In addition, in preparing his proposed remedial plans and "hypothetical" plans, Mr. Cooper had to make numerous discretionary decisions. (*See, e.g.*, 3 Tr. 188:21–189:6 (admitting his goal of a "better outcome for the Democratic candidates"); 3 Tr. 189:7–19 (admitting he used his own definition what makes a district "competitive"); 3 Tr. 189:20–190:3, 190:3–7 (admitting that, in trying to give Democratic voters a better opportunity to elect their candidates of choice, he sometimes shifted Democratic voters into Republican districts and that, in making some districts more competitive for Democrats, he made other districts less competitive); 3 Tr. 184:22–185:1, 185:6–9 (admitting that he chose to ignore input of legislators and public in drawing is proposed districts); 3 Tr. 200:9–201:8 (admitting that he chose to pair different incumbents that the enacted plan because pairing the same incumbents would have affected the way the map was drawn).) None of Mr. Cooper's discretionary policy decisions were compelled by the law. Ultimately, Plaintiffs only present evidence that they disagree with Ohio's current districting plan and with the General Assembly's discretionary policy decisions.

But policy disagreement is not a legal injury. For standing purposes, an injury cannot be a "generalized grievance" that "no more directly and tangibly" affects the plaintiff "than it does the public at large." *Lujan*, 504 U.S. at 574. Try as they might (and do) to dress them up as

individualized, Plaintiffs' grievances here are general complaints about legislative action and policy. Under that theory, nearly every voter would be injured by *any* districting plan.

One person's "packed" is another person's "cracked." Each district that "packs" Democratic voters also "cracks" Republican voters—and vice versa. Under Plaintiffs' theory, both Democratic and Republican voters in every one of Ohio's sixteen district would be equally injured, and every voter would equally have standing to challenge the districts. But a claim that assigns injury to the entire voting public (or even most of it) does not allege individualized harm. That is a generalized grievance and does not support standing. *McGlone*, 681 F.3d at 729 (no prudential standing for "a 'generalized grievance' shared by a large class of citizens").

No Plaintiff, individual or organizational, articulated any individual, district-specific harm. At most, Plaintiffs expressed generalized grievances with the statewide political results of the congressional plan. That fails to establish standing.

B. There Is No Evidence That Plaintiffs' Self-Described "Packed" or "Cracked" Districts Caused Them Legal Injury

Plaintiffs use the terms "packing" and "cracking" as a substitute for demonstrable legal injury. That does not cut it. The Supreme Court has never defined these terms in the context of a partisan-gerrymandering case. No definition exists in this context. Nor did *Gill* provide one. The majority opinion did not endorse any formulation of "packing" or "cracking" in the partisan-gerrymandering context and instead went out of its way to cast doubt on the future viability of any such claim. Plaintiffs find their refuge in the *Gill* concurrence, not in the majority opinion. But the majority made it clear that the *majority* opinion was the *only* opinion that expressed the opinion of the court on these issues. *Gill*, 138 S. Ct. at 1931 ("the reasoning of this Court with respect to the disposition of this case is set forth in this opinion and *none other*.") (emphasis added). Merely invoking these words does not demonstrate injury or confer standing which, as

made clear by *Gill*, is not "dispensed in gross." *Id*. at 1934.

The terms "packing" and "cracking" come from cases alleging unconstitutional racial discrimination or violations of Section 2 of the Voting Rights Act against a minority *group*, not an individual plaintiff. To prove racial "packing" or "cracking," the minority group must show that it constitutes a majority in a geographically compact area, that it is politically cohesive, and that it cannot elect its preferred candidate of choice in the challenged district because of racial bloc voting by the majority. *White v. Register*, 412 U.S. 755 (1973); *Thornburg v. Gingles*, 478 U.S. 30, 35, 50–51 (1986); *Bartlett v. Strickland*, 556 U.S. 1, 14–18 (2009). "Cracking" occurs when a geographically compact minority group is distributed in multiple districts so that it cannot constitute a majority in any district. "Packing" occurs when the minority group is packed into one district in such high numbers to prevent the creation of a second district in which the minority group could be the majority. *Gingles*, 478 U.S. and 46; *Quilter v. Voinovich*, 507 U.S. 146, 153–54 (1993).

"Cracking" and "packing" as defined in racial discrimination cases cannot be applied to so-called partisan gerrymandering. The rights protected in racial vote dilution cases belong to the minority group. Racial gerrymandering claims arise from plaintiffs' allegations that they have been "separate[d] ... into different districts on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 649 (1993). "Resolution of such claims will usually turn upon 'circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing' the lines of legislative districts." *North Carolina v. Covington*, 138 S. Ct. 2548, 2552–53 (2018) (quoting *Miller v. Johnson*, 515 U.S. 900 (1995)).

In contrast, after *Gill*, it is clear that a partisan-gerrymandering claim, assuming such claims are justiciable, must be brought by an individual—not a political group such as a party or

individuals making the same generic claim as a party. There is no cause of action for political groups whose members have been allegedly "packed" or "cracked." *Gill*, 138 S. Ct. at 1933 (the effect that an alleged gerrymander has "on the fortunes of political parties" is irrelevant).

Plaintiffs here have not shown that "Democratic voters" are "cohesive" for vote-dilution purposes, and nor could they. This is because "a person's politics is rarely discernable—and *never* permanently discerned—as a person's race." *Vieth*, 541 U.S. at 287. Moreover, "[p]olitical affiliation is not an immutable characteristic but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Id*. In short, Plaintiffs have not produced evidence of concrete or particularized legal injury. Moreover, as shown below, despite Plaintiffs' allegations of living in "packed" or "cracked" districts, Plaintiffs' proposed remedial plan would consign nearly all of them to similar districts. Plaintiffs' efforts fall woefully short of proving individual injury sufficient to demonstrate standing.

C. Plaintiffs Offer No Evidence of Individualized Injury

There is also no evidence that Plaintiffs' or Plaintiffs' members' votes have been "diluted" in violation of the First Amendment, Fourteenth Amendment, or Article I.

In the absence of any individual district-specific injuries-in-fact identified by the Plaintiffs themselves, Plaintiffs' apparently intend to rely on a theory of harm by vote dilution. The concept of vote "dilution" comes from the Supreme Court's malapportionment cases. In those cases, an individual's vote was deemed "diluted" if the district into which he was placed included a greater absolute number of voters in comparison to others district in his state. In *Wesberry v. Sanders*, 376 U.S. 1, 2 (1964), for example, one Georgia district had a population of 823,680, whereas the average population of the state's ten districts was 394,312, and one district had as few as 272,154 people. The Court concluded that "[s]ince there is only one Congressman for each district, this inequality of population means that the Fifth District's Congressman has to

represent from two to three times as many people as do Congressmen from some of the other Georgia districts."

Rhetoric aside, Plaintiffs here are not actually complaining about the "weight" of their votes—since the district populations are perfectly equal. No such complaint can be made based on longstanding Supreme Court precedent. Instead, some, but not all, of the plaintiffs here have been unable to vindicate their *partisan preference* in recent congressional elections. The Supreme Court has taken pains to explain that "the mere fact that a particular [redistricting] makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm." *Bandemer*, 478 U.S. at 131. The "power to influence the political process is not limited to winning elections" and this is "true even in a safe district where the losing group loses election after election." *Id*. at 132. Otherwise, every district that "packs" or "cracks" one party's supporters, regardless whether this allegedly occurs "naturally" or "intentionally," would be deemed to injure the other party's supporters.

Plaintiffs attempt to extend the notion of vote dilution from malapportionment cases to partisan-gerrymandering cases.[11] But living in a district that is "cracked" or "packed" based on partisanship does not give an individual less of a political voice under the rationale of *Wesberry* and similar malapportionment cases. In contrast to *Wesberry*, it is undisputed that each of Ohio's sixteen districts has roughly the same number of voters according to the 2010 census. As a result, Plaintiffs' votes, no matter what district they live in, are equally "weighted" to the votes of others.

[11] In *Gill*, the Supreme Court did not hold that "vote dilution" is a viable theory of harm in a partisan-gerrymandering case but reasoned only that, even if "vote dilution" were a cognizable injury in this context, "the plaintiffs failed to meaningfully pursue their allegations of individual harm." 138 S. Ct. at 1932.

Plaintiffs also fail to explain why "vote dilution" would be an actionable harm in districts that they alleged are intentionally "packed" or "cracked" but not in districts that are drawn according to "traditional redistricting principles" where one party's voters remain concentrated or dispersed. Even under Plaintiffs' proposed remedial plan, which they contend was drawn using "traditional redistricting principles," Democrats consistently receive a majority of the vote share in three districts—CDs 1, 3, and 13—under both the 2011 plan and Mr. Cooper's proposed remedial plan under all election cycles using the congressional election results relied upon by Mr. Cooper. (3 Tr. 193:1–6, 193:19–194:2 (Cooper).) And, in the 2014 election cycle, Democrats received a majority of the vote share in the same four districts in the proposed remedial plan as they did under the 2011 plan. (3 Tr. 191:19–192:1 (Cooper).) The fact that an allegedly "nonpartisan" plan drawn by their own expert results in a map that yields the same political "results" wholly undermines Plaintiffs' claimed injury.

Using a broader-based index, when compared to the 2011 plan, Plaintiffs' proposed remedial plan at best results in one less safe Republican district and one additional competitive Democratic-leaning district. (7 Tr. 159:24–160:4 (Hood).) And many Plaintiffs live in districts that were majority-Republican before the 2011 plan or would likely remain majority-Republican under Plaintiffs' proposed remedial plan. (*See, e.g.*, Goldenhar Dep., ECF No. 230-15, 11:7–9; Burks Dep., ECF No. 230-8, 31:8–11; Libster Dep., ECF No. 230-30, 10:21–11:25; Dagres Dep., ECF No. 230-10, 12:4–11; Deitsch Dep., ECF No. 230-11, 13:19–14:2, 35:8–9, 106:21–107:25; Hutton Dep., ECF No. 230-20, 25:12–20, 26:7–20; Rubin Dep., ECF NO. 230-42, 9:2–10:6.) A majority of Plaintiffs live in districts that were majority-Democratic before the 2011 plan and/or would likely remain majority-Democratic under Plaintiffs' proposed remedial plan. Some

Plaintiffs would be less likely to elect their preferred candidate in their districts under the proposed remedial plan.

For those Plaintiffs who live in districts where their votes would be "diluted" or "wasted" regardless of the districting plan, it is clear that the 2011 plan could not be deemed to cause any alleged district-specific injury and that Plaintiffs' proposed remedial plan would not remedy any alleged district-specific injury. Accordingly, Plaintiffs have failed to show a cognizable injury-in-fact that could be remedied and thus fail to establish standing under a vote dilution theory.

D. Plaintiffs Fail To Offer Any Evidence of Individualized Injury Under the First Amendment Under a Right-of-Association Theory

Plaintiffs argue that their First Amendment right of association is injured because Ohio's current districting plan "has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring).

As an initial matter, Justice Kagan's concurring opinion is not the law. *Gill*, 138 S. Ct. at 1931 (noting the unanimous opinion was the sole opinion of the Court "and none other"). But Plaintiffs cannot meet the hypothetical standing requirement suggested by Justice Kagan in any event. There is no evidence that Plaintiffs have suffered any concrete legal injury or that Ohio's current districting plan has impeded Plaintiffs' ability to associate with likeminded citizens.

None of the Plaintiffs offer any evidence that Ohio's current district have burdened their ability to affiliate with like-minded people or to carry out their preferred activities and objectives. To the contrary, multiple Plaintiffs admitted that they continue to engage in the political process, to coordinate with like-minded people, and to vote for and campaign for their preferred candidates. Plaintiffs have no evidence that the character of their association with like-minded people would be any different in different district configurations.

E. Plaintiffs Fail To Establish Redressability and Prudential Standing

Standing also requires each Plaintiff to demonstrate that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 at 561 (quoting *Simon*, 426 U.S. at 41–42). Moreover, under prudential standing principles, a "plaintiff must assert [her] own legal rights and interests, without resting the claim on the rights or interests of third parties." *McGlone*, 681 F.3d at 729. The testimony of Plaintiffs and their own expert witness, including his proposed remedial plan, forecloses standing.

Under Plaintiffs' proposed remedial plan, the partisan makeup of Ohio's congressional districts would have been very similar, and identical in one year, to the partisan makeup of the districts under the 2011 plan. The fact that Plaintiffs' proposed remedial plan might result in one or more districts that elect a Democratic candidate in some election cycles is not sufficient to show that Plaintiffs' alleged injury could be redressed by a favorable decision of this Court.

V. Laches Bars Plaintiffs' Claims

Plaintiffs' unjustified seven-year delay in bringing this action has prejudiced defendants by rendering important evidence and testimony unavailable and by threatening to inflict rushed and disruptive changes upon Ohio's electoral system. Their claims are barred by laches. A defendant can successfully invoke laches "if (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay." *Am. Civil Liberties Union of Ohio, Inc. v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004). Here, Plaintiffs lacked diligence in bringing claims that were ripe shortly after the 2011 plan was passed. *See, e.g.*, *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 865 (E.D. Wis. 2001) (holding that a redistricting case is ripe "when citizens need to start preparing for the primary elections" under the challenged map). Since the delay is self-evident, Plaintiffs bear the burden of justifying it. *See McClafferty v. Portage County Bd. of Elections*, 661 F. Supp. 2d 826, 839 (N.D. Ohio 2009). The Supreme Court's

denial of injunctive relief in *Benisek v. Lamone*, 138 S. Ct. 1942 (2018), is instructive. The plaintiffs there were far more diligent than Plaintiffs here, filing their case in 2013, but they amended their claims three years later and did not move for injunctive relief until six years after the plan was adopted—still beating these Plaintiffs by a year. All of that showed, the Court held, a lack of "reasonable diligence." *Id.* at 1944. It is irrelevant that the case involved a preliminary injunction and this one a permanent injunction. Diligence is diligence, and an injunction is an injunction. The first element is met.

So is the second. Plaintiffs' unreasonable delay resulted in prejudice to Defendants and Intervenors in two independent respects: (1) its adverse impact on the defense of the current map, and (2) its adverse impact on the State and its voters, who lose out in Plaintiffs demand for a rushed redistricting as forms are being printed for the 2020 census.

First, Plaintiffs' inexcusable delay hindered Defendants' and Intervenors' ability to marshal evidence in defense of the 2011 plan. Because of the delay, record retention periods passed, meaning that, in some cases, Defendants had to obtain copies of their own documents from Plaintiffs, because Defendants no longer had them. (*See* Lenzo Dep., ECF No. 230-29, 23:3–24:17, 23:20–24:10; Turcer Dep., ECF No. 130-49, 19:23–20:13, 23:2–23:14, 28:21–29:2.) Remarkably, a significant number of relevant documents in Plaintiffs' possession were shredded as late as the end of 2017—even though Plaintiffs had anticipated litigation as early as 2013. (*See* 1 Tr. 183:17–18; LWVO Dep., ECF No. 138-12, 109:15–110:10.) Moreover, witnesses' memories have faltered after seven years—hence, the glut of "I do not recall" responses—and would-be fact witnesses are now deceased, including Representative LaTourette, Tom Hofeller, Louis Stokes, Mike Wild, and Bob Bennett, the former Ohio Republican Party chairman who was instrumental in negotiations with Democratic leaders in the 2011 redistricting process. (*See*

6 Tr. 74:4–11, 75:19–25). And "[u]navailability of important witnesses, dulling of memories of witnesses, and loss or destruction of relevant evidence all constitute prejudice." *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002). On that ground alone, laches should bar Plaintiffs' claims.

Second, Plaintiffs' delay has forced the State to litigate on an accelerated basis near the end of a redistricting cycle. Well-established, related case law places a heavy presumption against last-minute changes to electoral systems. *See, e.g., Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012) ("As a general rule, last-minute injunctions changing election procedures are strongly disfavored"). And once again, the Supreme Court's decision in *Benisek* is instructive. *See* 138 S. Ct. at 1944.

An injunction against the 2011 plan and a redistricting solely for one election would inflict "confusion and disarray" upon the State and its voters. *Libertarian Party of Ohio v. Husted*, 2014 WL 12647018, at *3 (S.D. Ohio Sept. 24, 2014) (Watson, J.) (applying laches to bar injunctive relief). Voters are acclimated to the 2011 plan, and members of Congress have invested deeply in their districts. As Plaintiffs would have it, those relationships will be disrupted in 2019 for only one election and then disrupted again at the 2021 redistricting. Voters would spend the next two elections cycles in flux between districts. Some may end up voting in three different districts for the 2018, 2020, and 2022 elections. Voters floating from one district to another would experience confusion and delay in accessing constituent services. And the basic principle that members of Congress should be voted—not drawn—out of office would suffer immeasurable harm. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (explaining states' interests' in electoral "efficiency" and "stable" political systems).

At the Rule 12 stage, the Court declined to apply laches to bar Plaintiffs' claims, reasoning that Plaintiffs were seeking "injunctive relief." Order Denying Motion to Dismiss, ECF No. 61, at 17. But laches is a well-established equitable defense to claims for injunctive relief. *See*, *e.g.*, *Taft*, 385 F.3d at 647 (recognizing that laches can bar injunctive relief in an election law case where, as here, the defendant can point to evidence "specifically demonstrating" how prejudice has occurred); *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980). Unlike claims of "progressive encroachment" on a trademark, *Nartron*, 305 F.3d at 410, Plaintiffs' alleged injury is from one original sin, and each election under the plan presents the exact same injury. (*See* LWVO Dep. 107:16–19.) The prospect of future harm is no different from the harm supposedly incurred in 2012, 2014, 2016, and 2018. Thus, Plaintiffs' years-long delay is without excuse, prejudicial, and triggers laches.

CONCLUSION

For all these reasons, and those stated in Defendants' and Intervenors' prior briefing in this case, including their summary-judgment and motion-in-limine briefing, judgment should be entered in favor of Defendants and Intervenors, and Plaintiffs' claims should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 28, 2019, the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

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