

IN THE SUPREME COURT OF OHIO

LEAGUE OF WOMEN VOTERS,)	SUPREME COURT
<i>et al</i> ,)	CASE NO. 2021-1193
)	
Relators,)	Original Action Pursuant to
)	Ohio Const., Art. XI
vs.)	
)	
OHIO REDISTRICTING)	
COMMISSION, <i>et al</i> ,)	
)	
Respondents,)	

**BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF
RELATORS LEAGUE OF WOMEN VOTERS, ET AL**

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INTRODUCTION

It is a “core principle of republican government . . . that the voters should choose their representatives, not the other way around.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824, 135 S. Ct. 2652, 192 L.Ed.2d 704 (2015), quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005). Partisan gerrymandering is anathema to that foundational principle of democratic governance and dramatically distorts the political process.

Ohio voters recognize those harms. In 2015, they approved—across party lines and with 71 percent of the vote—a constitutional amendment to end partisan gerrymandering in the state. The new amendment could not be clearer. Districts cannot be drawn to favor or disfavor a political party, and each district must correspond to the statewide preferences of Ohio voters. Yet, in open defiance of the will of nearly three-quarters of Ohioans, the Ohio Redistricting Commission refused to adopt a bipartisan general assembly district plan that met this standard. It instead forced a blatantly gerrymandered map through the Ohio Constitution’s emergency impasse procedure. This failure is a microcosm of a broader trend. Partisan gerrymandering has ushered in a political era in which the people’s representatives are less and less responsive to the people themselves. Ohioans rejected such arrogance. They now look to this Court to enforce the law they adopted.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Campaign Legal Center (“CLC”) is a nonpartisan, nonprofit organization dedicated to ensuring that the democratic process is open and fair for all voters. CLC has litigated or been involved in approximately 100 cases regarding voting rights and gerrymandering. CLC has participated in numerous cases addressing gerrymandering, including *Gill v. Whitford*, 138 S. Ct. 1916, 201 L.Ed.2d 313 (2018), and *Rucho v. Common Cause*, 139 S. Ct. 2484, 204 L.Ed.2d

931 (2019). CLC respectfully submits this amicus brief in accordance with Rule 16.06 of the Ohio Supreme Court Rules of Practice.

STATEMENT OF THE CASE AND THE FACTS

Amicus adopt the Relators' statement of the case and the facts, as described in their Complaint, and all other Relators' dispositive briefing.

LAW AND ARGUMENT

I. The Ohio Constitution bars partisan gerrymandering.

Article XI of the Ohio Constitution prohibits partisan gerrymandering. The provision is explicit: "No general assembly district plan shall be drawn primarily to favor or disfavor a political party," and "[t]he statewide proportion of districts whose voters . . . favor each political party shall correspond closely to the statewide preferences of [Ohio's] voters." Ohio Const. art. XI, § 6(A)-(B). The official ballot language informed Ohioans that the amendment to Article XI would "[e]nd the partisan process for drawing Ohio House and Senate districts, and replace it with a bipartisan process" intended to generate "politically competitive" maps.¹ The Ohio electorate, in other words, voted to end partisan gerrymandering.

This constitutional mandate is consistent with—and essential to—the equal protection and free expression guarantees of both the Ohio and federal Constitutions. This Court has a "duty to give a construction to the Constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions." *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 59, quoting *State ex rel. Taylor v. French*, 96 Ohio St. 172, 189, 117 N.E. 173 (1917). Moreover, this Court strives to employ interpretations that "avoid constitutional

¹ See *Issue 1*, Ohio Sec'y of State (Nov. 2015), <https://www.ohiosos.gov/globalassets/ballotboard/2015/1-language.pdf> (accessed Oct. 28, 2021).

infirmities.” *State ex rel. Thompson v. Spon*, 83 Ohio St.3d 551, 555, 700 N.E.2d 1281 (1998). Only by applying Article XI to mean what it says, and bar partisan gerrymandering, can the Court give full effect to the constitutional guarantees of equal protection and free expression.

First, partisan gerrymandering violates the Equal Protection Clauses of the U.S. and Ohio Constitutions. Those provisions “guarantee[] the opportunity for equal participation by all voters in the election of state legislators.” *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964); see *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶¶ 14, 21 (explaining that Ohio Constitution’s Equal Protection Clause provides at least as much protection as federal equivalent). All nine justices of the U.S. Supreme Court agreed in *Vieth v. Jubelirer* that “excessive injection of politics” in redistricting “is unlawful,” regardless of whether *federal courts* have Article III jurisdiction to adjudicate such a claim. 541 U.S. 267, 293, 124 S. Ct. 1769, 158 L.Ed.2d 546 (2004) (Scalia, J., plurality) (emphasis omitted). Moreover, as the U.S. Supreme Court recognized in *Reynolds*, “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” 377 U.S. at 555. Partisan gerrymandering is a “debasement.” It deliberately deprives voters of the disfavored party of “an equally effective voice in the election of members of [their] state legislature.” *Id.* at 565. Only by enforcing the anti-gerrymandering provision can the court vindicate this constitutional right.

Second, partisan gerrymandering contravenes state and federal constitutional guarantees of free expression and association. The Bill of Rights of both the U.S. and Ohio Constitutions prohibit government from burdening political “belief and association.” *Elrod v. Burns*, 427 U.S. 347, 357, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion); see *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 528, 709 N.E.2d 1148 (1999) (recognizing that the First Amendment “is the proper

basis” for interpreting Ohio Constitution’s free speech provision). The Constitutions protect “the ability of citizens to band together in promoting . . . candidates who espouse their political views,” without which “[r]epresentative democracy . . . is unimaginable.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S. Ct. 2402, 147 L.Ed.2d 502 (2000).

Partisan gerrymandering undermines that protection. By sorting voters by partisanship, government targets citizens of the disfavored party for exercising their right to free expression and association, punishing them for their beliefs and association by depriving them of any practical political influence. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment). Reading Article XI in this constitutional context further supports enforcing the provision’s ban on partisan gerrymandering.

This Court has emphasized that its role in enforcing the Ohio Constitution’s guarantees of individual rights is “particularly important . . . whenever the United States Supreme Court’s decisions dilute or underenforce important individual rights and protections.” *Mole*, at ¶ 22. Partisan gerrymandering both dilutes and underenforces individual rights and protections. Indeed, the U.S. Supreme Court has acknowledged that “gerrymandering is ‘incompatible with democratic principles.’” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07, 204 L.Ed.2d 931 (2019), quoting *Ariz. State Legislature*, 576 U.S. at 791. The U.S. Supreme Court also acknowledged that the solution was outside the province of the federal judiciary.² For Ohioans, the only remedy rests with

² The U.S. Supreme Court has never held that partisan gerrymandering is constitutional—only that it is not justiciable in federal court. *See Rucho*, 139 S. Ct. at 2506-07. Indeed, it unanimously held that it was “unlawful.” *Vieth*, 541 U.S. at 293. This Court does not have the option of declaring gerrymandering nonjusticiable, as the Ohio Constitution requires this Court to enforce the constitutional mandate. *Rucho* itself recognized this: “Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.” 139 S. Ct. at 2507.

this Court: enforcing Article XI's anti-gerrymandering mandate would secure their rights to equal protection and freedom of expression.

II. Partisan gerrymandering is a powerful tool used to tip the balance of power despite voter preferences.

Partisan gerrymandering is a stain on the ideals of republican government both in Ohio and around the country. Ohio has a great tradition of forging alliances among the state's diverse ideological perspectives. A General Assembly anointed by mapmakers rather than elected by voters is destined to be less responsive to the people. Indeed, it threatens the future of meritocratic legislating in the Buckeye state. The Ohio Constitution rightly precludes that result.

A. Partisan gerrymandering is antidemocratic.

Partisan gerrymandering is antidemocratic in two distinct ways. First, partisan gerrymandering creates a mismatch between the partisan composition of a state and the partisan makeup of the delegation that represents that state. Second, partisan gerrymandering reduces competition, allowing the election of fringe candidates who are not responsive to the issues facing their districts.

Partisan gerrymandering creates an asymmetry between the share of a state's voters who identify with a particular political party and the share of a state's representatives who are members of that party. Ohio is a classic example of this dynamic. The gerrymandering that occurred in Ohio a decade ago expanded the Republican Party's share of seats in the Ohio State House from a 59-40 majority in 2010 to a 64-35 margin in 2020.³ At the same time, the Republican share of seats in the Ohio State Senate increased from 23-10 to 25-8.⁴ This makeup is badly misaligned with the

³ Ballotpedia, *Ohio General Assembly*, https://ballotpedia.org/Ohio_General_Assembly (accessed Oct. 29, 2021).

⁴ *Id.*

preferences of Ohio voters: 65% of the State House and 75% of the State Senate are Republican, yet only 53% of Ohioans voted for the Republican presidential candidate in the 2020 election, and the Democratic candidate for the U.S. Senate won in the 2018 election with 53% of the vote.⁵ The Commission's proposed map would entrench this disparity, granting 69% of the seats in both the State House and State Senate to Republican candidates.⁶ The Ohio Constitution does not permit this antidemocratic result.

Partisan gerrymandering also shifts power to the more radical candidates within a party. This is another antidemocratic result that harms both the majority and minority parties. Partisan gerrymandering reduces competition by increasing the number of safe seats, which in turn results in the election of ideologically extreme candidates. So just as partisan gerrymandering produces an antidemocratic mismatch between the partisan makeup of a gerrymandered delegation and the electorate it represents, it also distorts the ideological alignment between elected representatives and the average member of their own party.

As partisan gerrymandering increased the number of safe-seat elections, the competition in those races has decreased. In the lead up to 2010, the Republican Party executed a strategy called "REDMAP,"⁷ successfully targeting control of twenty state legislatures in advance of the 2010 redistricting cycle, in part to draw extreme partisan gerrymanders that would help ensure partisan control of state legislatures and Congress for the decade.⁸ These newly elected officials then

⁵ Ohio Sec'y of State, *2020 Official Election Results*, <https://www.ohiosos.gov/elections/election-results-and-data/2020/> (accessed Oct. 28, 2021).

⁶ Complaint, *League of Women Voters of Ohio v. Ohio Redistricting Commission*, No. 2021-1193 (Oct. 22, 2021).

⁷ Redistricting Majority Project, 2012 REDMAP Summary Report, <http://www.redistrictingmajorityproject.com/> (accessed Oct. 28, 2021).

⁸ Elizabeth Kolbert, *Drawing the Line*, *The New Yorker* (June 27, 2016), <https://www.newyorker.com/magazine/2016/06/27/ratfcked-the-influence-of-redistricting> (accessed Oct. 28, 2021).

enacted precise, computer-assisted partisan gerrymanders based on voting behavior and political affiliation reflecting the most granular level of census data—the block level.

Ohio has witnessed increasingly uncompetitive elections. Elections in the state decided by less than 5% have become increasingly rare.⁹ And Ohio is not alone. In the 2012 election, there were 61 fewer competitive general elections in state legislatures nationwide than there were in 2010,¹⁰ a result of partisan gerrymanders in the 2010 redistricting cycle. Additionally, voters are less likely to participate in state legislative races when partisan gerrymandering moves them into new districts because they are unfamiliar with candidates who represent them.¹¹ Moreover, the votes of the minority party members do not affect the election in any event.

Once a candidate is fortified within a safe district, the candidate need only, and indeed must, direct her campaign efforts to the party's primary, where turnout is more limited and voters hew toward the ideological poles.¹² With primaries increasingly acting as de facto general

In response, the Democrats have created the National Democratic Redistricting Committee (NDRC), which aims to prevent Republican gerrymandering in 2020 by “backing litigation, supporting reforms, and electing fair-map Democrats.” *See Our Work*, <https://democraticredistricting.com/our-work/> (accessed Oct. 29, 2021). In short, both major political parties understand the importance of redistricting and have created a gerrymandering arms race for 2020.

⁹ Ballotpedia, *Electoral competitiveness in Ohio* (April 2015), https://ballotpedia.org/Electoral_competitiveness_in_Ohio (accessed Oct. 28, 2021).

¹⁰ Ballotpedia, *Margin of victory in state legislative elections before and after 2010 census redistricting*, https://ballotpedia.org/Margin_of_victory_in_state_legislative_elections_before_and_after_2010_census_redistricting (accessed Oct. 28, 2021).

¹¹ Nicholas Stephanopoulos and Chris Warshaw, *The Impact of Partisan Gerrymandering on Political Parties* at 6 (Aug. 21, 2019), <https://ssrn.com/abstract=3330695> (accessed Oct. 28, 2021).

¹² Turnout in Ohio's 2020 primary was less than 25%; in the general election it was nearly 75%. Compare Ohio Sec'y of State, *Voter Turnout in Primary Elections*, https://www.ohiosos.gov/elections/election-results-and-data/historical-election-comparisons/voter-turnout-in-primary-elections-even/?__cf_chl_jschl_tk__=pmd_jdZCuWYdosT03d4lkR134j4.9ar1JSiBzFTZBnTbxJA-1634766518-0-gqNtZGzNArujcnBszQil (accessed Oct. 28, 2021), with Ohio Sec'y of State, *Voter*

elections, the vocal minority has the power to seat candidates of their choice. It becomes this minority whom the candidate, once elected, must represent.

B. Partisan gerrymandering creates political dysfunction.

Legislative bodies comprised of ideologically extreme and politically unaccountable candidates breed partisan gridlock and rancor. Partisan gerrymandering incentivizes representatives to distance themselves from compromise at all costs—or face a primary challenge from the outside flank. Bipartisanship thus becomes toxic. Pragmatic solutions on which both parties can agree—and which many voters favor—become politically untenable in an environment where cooperation is punished rather than rewarded.

Many of Ohio’s most solution-oriented officials have left politics in dismay over partisan dysfunction. This group includes former Ohio Republican Representative Pat Tiberi, who likened moving legislation in today’s environment to “beat[ing] [his] head against the wall.”¹³ Next came Ohio Republican Representative Steve Stivers. In 2018, Stivers and Ohio Democratic Representative Joyce Beatty united to launch the congressional “Civility and Respect Caucus,” with the goal of restoring a Congress that can “disagree without being disagreeable.”¹⁴ Stivers resigned his congressional seat just three years later to extract himself from the dysfunctional

Turnout in General Elections, <https://www.ohiosos.gov/elections/election-results-and-data/historical-election-comparisons/voter-turnout-in-general-elections/> (accessed Oct. 28, 2021).

¹³ Darrel Rowland, *Capitol Insider: Tiberi gets why Portman is leaving; you 'beat your head against the wall'*, Columbus Dispatch (Jan. 31, 2021), <https://www.dispatch.com/story/news/politics/elections/2021/01/31/capitol-insider-tiberi-says-portman-tired-washington-rancor-gridlock/4257378001/> (accessed Oct. 28, 2021).

¹⁴ Rep. Steve Stivers & Rep. Joyce Beatty, *A Movement to #ReviveCivility*, The Hill (Apr. 10, 2018), <https://thehill.com/blogs/congress-blog/politics/382369-a-movement-to-revivecivility> (accessed Oct. 28, 2021).

partisan “circus” gerrymandered Washington had become.¹⁵ Legislators like Tiberi and Stivers will continue to leave public service if partisan gerrymandering, and the political breakdown it begets, persists in Ohio. Their more extreme replacements will be even less likely to bridge the divide that is the hallmark of partisan politics in the age of high-tech gerrymandering.

C. Modern mapmaking tools make gerrymanders more durable and increase polarization.

The technologically advanced tools now available to partisan map-drawers allow them to gerrymander electoral districts with surgical precision. While partisan gerrymandering has been a feature of American politics since the nineteenth century, modern map-drawers can use sophisticated computer models to predict voter behavior and preferences. With this added feature, map-drawers can then create maps that will reliably favor or disfavor a political party until new census data is released and the process repeats. Nothing is left to chance. The margin of error is tiny. The result is the demise of the once “core principle of republican government[:] . . . voters should choose their representatives, not the other way around.” *Ariz. State Legislature*, 576 U.S. at 824, quoting Berman, *supra*, at 781.

D. Partisan actors on the Redistricting Commission deliberately and brazenly flouted Article XI’s prohibition on partisan gerrymandering.

During the 2010 redistricting cycle, elected officials used advanced mapmaking tools to identify the “anticipated partisan effects” of various map proposals for congressional and state legislative districts. *See Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 716 (S.D. Ohio 2019) (describing the secretive process employed by elected officials and consultants in drawing the maps in 2012). This effort coincided with the most expensive Governor’s race in

¹⁵ Taylor Popielarz, *Rep. Steve Stivers reflects on tenure as he leaves Congress*, Spectrum News 1 (May 15, 2021), <https://spectrumnews1.com/oh/columbus/news/2021/05/14/steve-stivers-reflects-on-tenure-as-he-leaves-congress> (accessed Oct. 29, 2021).

Ohio's history, which tipped the balance of power and ensured that the favored party was in control of the redistricting process.¹⁶ One official on the former Ohio Apportionment Board noted that the entire process was “done in back rooms,” with “very little opportunity for public input” or input by the minority party. Brief for Amici Curiae Bipartisan Group of 65 Current and Former State Legislators in Support of Appellees, *Gill v. Whitford*, No. 16-1161, 2017 WL 4311096 (Sept. 5, 2017).

Today, despite the unequivocal mandate of the Ohio Constitution, the concurrent creation of the bipartisan Ohio Redistricting Commission, and the explicit will of the vast majority of Ohioans, partisan operatives precisely crafted the maps the Commission ultimately enacted to continue to ignore the will of the voters. Indeed, the evidence here shows that “Ohio’s new redistricting process, [which was] meant to promote collaboration and bipartisanship, in practice unfolded like Ohio’s much-criticized old redistricting process: a handful of politicians and staff, with ambivalent support of members of their own party, pushed through new maps with limited outside input.”¹⁷ The maps were drawn by “Republican staffers with oversight from Senate President Matt Huffman and House Speaker Bob Cupp, but with little input from anyone else on the seven-member Ohio Redistricting Commission.”¹⁸

The map that emerged from this process was a gerrymandered power-grab that the majority party admitted was drawn for partisan gain and could endure for another decade.¹⁹ Ironically, the

¹⁶ Laura A. Bischoff, *2010 governor’s race most expensive in Ohio history*, Dayton Daily News (Dec. 11, 2010), <https://www.daytondailynews.com/news/state--regional/2010-governor-race-most-expensive-ohio-history/HCttzseush6kJEoaKzuzuI/> (accessed Oct. 28, 2021).

¹⁷ Jeremy Pelzer, *Depositions of key players in Ohio redistricting lawsuits give a peek into a seemingly one-sided process*, Cleveland.com (Oct. 26, 2021), <https://www.cleveland.com/open/2021/10/depositions-of-key-players-in-ohio-redistricting-lawsuits-give-a-peek-into-a-seemingly-one-sided-process.html> (accessed Oct. 28, 2021).

¹⁸ *Id.*

¹⁹ *Id.*

majority party on the Commission justified the new maps by relying on the hyper-partisan plans the Republican Party created ten years prior, arguing that the success of the Republican Party in winning the majority of the (gerrymandered) seats in the last ten years showed that voters favored the Republican Party.²⁰ The argument and the results it yielded make a mockery of the edict of the Ohio Constitution that “[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party,” and “[t]he statewide proportion of districts whose voters . . . favor each political party shall correspond closely to the statewide preferences of [Ohio’s] voters.” Ohio Const. art. XI, § 6(A)-(B). As former Ohio Governor John Kasich affirmed in his State of the State address just five years ago: “Ideas and merits should be what wins elections, not gerrymandering. When pure politics is what drives these kinds of decisions, the result is polarization and division. I think we've had enough of that. Gerrymandering needs to be on the dust bin of history.”²¹ Ohio voters agreed. This Court should not allow the Commission to ignore their will.

CONCLUSION

Partisan gerrymandering diminishes the voting power of the minority party to entrench the power of the majority. Ohio voters sought to end this method of vote dilution when they amended Article XI to make clear that the Redistricting Commission could not enact state legislative maps that intentionally favor one political party over the other. The Commission’s plan, however, does just that. For the foregoing reasons, Amicus Curiae Campaign Legal Center urges this Court to declare that the maps adopted by Respondents are invalid for failure to comply with Article XI of

²⁰ Stipulated Exhibit 20, Stipulation of Evidence – Appendix of Exhibits (Volume 2 of 2), *League of Women Voters of Ohio v. Ohio Redistricting Commission*, No. 2021-1193 at HC_0397-HC_0398 (Oct. 22, 2021).

²¹ *Ohio State of the State Address*, C-SPAN (Apr. 6, 2016), <https://www.c-span.org/video/?407689-1/ohio-governor-john-kasich-state-state-address> (accessed Oct. 28, 2021).

the Ohio Constitution and to order the Commission to adopt a General Assembly map that does comply with Article XI.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via electronic mail this 29th day of October,

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