IN THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, A. Philip Randolph Institute of Ohio, Tom Harry, Tracy Beavers, Valerie Lee, Iris Meltzer, Sherry Rose, Bonnie Bishop, *Relators*, v. Ohio Redistricting Commission, Michael DeWine, Frank LaRose, Keith Faber, Matt Huffman, Robert R. Cupp, Vernon Sykes, and Emilia S. Sykes, *Respondents.*	APPORTIONMENT CASE Original Action Pursuant to Ohio Constitution, Art. XI and S.Ct.Prac.R. 14.03 2021-1193

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INTRODUCTION

The Ohio Redistricting Commission's plan violates both Section 6(A) and Section 6(B) of Article XI of the Ohio Constitution. The Commission's own Section 8(C)(2) Statement admits that the plan provides the Republicans with 64.4% of the seats in the General Assembly notwithstanding their 54% statewide vote share, in violation of Section 6(B). Experts on both sides agree with these figures. And all objective measures of the partisan bias of the plan demonstrate that it was drawn primarily to favor the Republican party, in violation of Section 6(A).

Respondents' rationale for these violations—that Section 6 is not actionable—is baseless. In particular, their suggestion that Section 9 does not provide a remedy for violations of Section 6 ignores the plain import of Section 9(B). Their alternate contention—that their negotiating against the Democratic Commission members satisfied Section 6—is similarly flawed. And Respondents' excuse that they attempted Section 6 compliance but failed—because the only alternative to the enacted plan would be a pro-Democratic gerrymander—is contrary to fact and law.

I. Section 6 Is Actionable.

A. Section 9 Provides a Remedy for Violations of Section 6.

Section 9(B) provides that, when a plan or district is "determined to be invalid," the Commission shall reconvene to "determine a general assembly district plan in conformity with such provisions of this constitution as are then valid." Ohio Constitution, Article XI, § 9(B). And Section 3(B)(2) provides that "[a]ny general assembly district plan adopted by the commission shall comply with all applicable provisions of the constitution[] of Ohio[.]" *Id.* § 3(B)(2). Accordingly, if a plan violates Section 6, then the plan is "invalid" under Section 9(B).

The availability of additional remedies under Section 9(D)(3), for violations of other specified articles, does not negate this Court's jurisdiction over "all cases arising under this article" or the global remedy provided in Section 9(B). Section 9(D)(3) simply provides ***specific remedies***

to be applied when a plan violates Section 2, 3, 4, 5, or 7 of Article XI.[1] If those other sections are violated, this Court can direct three different remedies: (a) that isolated errors be corrected; (b) that an entirely new plan be enacted, if there are at least six invalid House districts and/or two invalid Senate districts; or (c) that an entirely new plan be enacted, even where these numerical minima are not met, whenever a violation of Section 2, 3, 4, 5 or 7 results in partisan unfairness. *See* § 9(D)(3)(a)-(c).

Nothing in Section 9(D)(3), or elsewhere, precludes this Court from remedying a Section 6 violation.[2] Indeed, the text of Section 9(B) makes this plain. In contrast to the Statewide Elected Officials' argument that Section 9(B)'s "general language cannot override the more specific language linking certain remedies to certain problems with a map," SEO Br. at 33, Section 9(B) expressly provides a path for the Commission to be reconstituted to fix an invalidated plan or district "*notwithstanding any other provisions of this constitution*." Ohio Constitution, Article XI, § 9(B) (emphasis added). No one is arguing that the general remedy "overrides" the other, specific remedies; just that different remedies apply to different violations.

And nothing in Section 9(B) indicates, as Respondents argue, that ***only*** violations of Sections 2, 3, 4, 5, or 7 would trigger the remedy in Section 9(B). HC Br. at 30-31 n.6. In fact, Respondents' reading would render Section 9(B) wholly superfluous. Respondents posit that Section 9(B)'s requirement that the Commission "shall be reconstituted as provided in Section 1 of this article, convene, and ascertain and determine a general assembly district plan in conformity

[1] Respondents spend much of their briefing countering an argument that the LWVO Relators have never made: that Section *9(D)(3)* of Article XI provides a remedy to enforce a Section 6 violation. SEO Br. at 9-10, 16-22, 33-34; HC Br. at 6, 29.

[2] Indeed, that the Constitution went out of its way to make sure that partisan-fairness considerations have extra weight in Section 9(D)(3)(c) only underscores the importance of those considerations to Article XI. In particular, Section 9(D)(3)(c) requires an entirely new statewide plan when the partisan-fairness norms of Section 6 are violated, even if the explicit thresholds for splitting infractions set out in Section 9(D)(3)(b) are not met.

with" the Ohio Constitution is "only triggered" if the Court "invalidated a plan or a district under the provisions of Article XI that specifically give the Court authority to do so," which, in Respondents' view, are only Sections 2, 3, 4, 5, and 7. *Id.* But Section 9(D)(3) ***already*** provides that, if this Court "determines that a general assembly district plan adopted by the commission does not comply with the requirements of Section 2, 3, 4, 5, or 7," then the Court "shall order the commission to amend the plan to correct the violation" or "adopt a new general assembly district plan." Certainly Section 9 should not be read so as to create this complete redundancy.

Prior to the 2015 amendment, Section 9(B) was the *only* remedy available in Article XI (at that time, located in now-repealed Section 13). And prior to the amendment, when faced with a challenge to a plan, this Court never suggested that Article XI had *no* remedy. *Cf. Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 10. The provision of *additional* remedies, for other violations, does not strip Section 9(B) of its force.

B. The Word "Attempt" Does Not Render Section 6 Optional.

Respondents argue that the fact that Section 6 requires an "attempt" to meet its standards renders the section optional. Alternatively, they contend that the "attempt" requirement merely required them to engage in good-faith negotiations—but not to actually endeavor to comply with the achievable requirements of Section 6. Not so.

The construction of the term "attempt" must start with the substance of the task that must be "attempted." And the text and structure of Section 6 make clear what must be attempted: (1) not to primarily favor or disfavor a party, (2) to adhere to the statewide voter preferences, and (3) to draw compact districts. If the Commission can meet these three standards without violating Sections 2, 3, 4, 5, and 7, it must do so. Merely engaging in negotiations over the plan does not constitute an attempt to meet the Section 6 standards. Even if it did, a review of the record reveals that the Republican Respondents did not engage in good-faith negotiations.

1. The Text of Section 6 Makes Plain What "Attempt" Means.

The final sentence of Section 6 explains exactly why the term "attempt" appears in that section, and exactly what it means. Stating that "[n]othing in this section permits the commission to violate the district standards described in Section 2, 3, 4, 5 or 7 of this article," the sentence articulates one singular basis for deviation from the standards set forth in Sections 6(A) and 6(B): the partisan-fairness standards must give way as necessary to accommodate the requirements set forth in Sections 2, 3, 4, 5, and 7. Apart from, and only to the extent of, those enumerated exceptions, the Ohio Constitution provides no room for the Commission to reject or deviate from Section 6's mandatory standards.

Thus, deviation from the partisan-fairness requirements, as necessary to meet Sections 2, 3, 4, 5, and 7, would constitute a valid "attempt" to comply with Section 6. The requirements of Section 6 were therefore understandably couched in terms of an "attempt." But compliance with those other sections is the only exception that is articulated to Section 6, and the Court should not create additional escape clauses that permit a partisan gerrymander.[3]

2. Respondents Fail Even Their Own Definition of "Attempt": They Did Not Engage in a Good-Faith Negotiation.

Respondents alternatively claim that, if they had to comply with Section 6, then their negotiations with the Democratic Commissioners constituted their "attempt." But unilaterally

[3] The Republican Legislative Leaders contend that *State v. White* stands for the proposition that "the requirement that someone 'attempt' to do something gives the person or entity which must 'attempt' to do the task some discretion in determining how such an attempt occurs." HC Br. at 33-34 n.7. The statute at issue in that case mandated that the clerk "shall attempt to collect the costs from the person convicted." 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶14. But, as Respondents acknowledge, "*there was not a formula for the clerk to attempt* to collect costs." HC Br. at 33-34 n.7 (emphasis added). Here, in sharp contrast, Section 6(B) sets out the clear formula for the Commission to attempt. Moreover, in permitting discretion about *how* to attempt to collect the costs in *White*, the Court never suggested that the clerk had discretion regarding *whether* it must attempt to collect the costs.

creating partisan maps that blatantly fail to satisfy Section 6 and then negotiating over seat shares does not meet Section 6's mandates. Further, taking the side in a negotiation that is trying to maximize the overly-large seat share is not an "attempt" to come closer to the target seat share.[4]

But even if this Court were to accept Respondents' strained definition of "attempt," the facts belie any contention that Respondents ever tried to comply with Section 6's partisan-fairness requirements. As detailed in Relators' opening brief, the Republican Legislative Leaders created their maps with no input or involvement from any of the other Commissioners, *see, e.g.*, Br. at 17, 37-38, and with no consideration of Section 6, *see, e.g.*, *id.* at 15-16. The plan and its amendment were also introduced late, and rushed through, with no time for meaningful input from the public or other Commissioners, *see id.* at 16-17, 37.

The Republican Legislative Leaders' contention that they gave up seats during the negotiations is at best a diversion.[5] The Republicans started with an extremely aggressive proposal on September 9, 2021. The testimony from Republican and Democratic Commissioners alike confirms that first plan was "egregious" in its partisanship, sparking concern from even Republican members of the Commission. Dep. Stip., Ex. Vol. 4 at DEPO_00932:15-00933:1 (V. Sykes); Suppl. Vol. 2 at 396:5-25, 397:3-12, 398:14-399:5 (Cupp) (testifying he was "surprised" because "the number of Republican leaning districts was more than I had anticipated it was going to be," and "concerned" that the skew "would not be acceptable to the Democrat members of the commission"); Suppl. Vol. 2 at 284:9-14 (LaRose). The final plan was only slightly modified to

[4] In fact, prior redistricting cycles had been characterized by just such horse trading, and if that was all that was contemplated by the constitutional amendment, there would have been no need to draft Section 6 of Article XI. *See, e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1006 (S.D. Ohio 2019).

[5] Notwithstanding the number of pages Respondents devote to the subject, the viability of the Sykes Plan is hardly the litmus test for whether the enacted plan comports with the Constitution.

what was still a severely gerrymandered plan on September 16, 2021. To put it numerically, the initial proposal started by claiming 68.9% of the seats for Republicans and ended with 64.4% of the seats (despite having 54% of the statewide vote share). Suppl. Vol. 1 at 50-51. Respondents' *minimal* retractions from an even *more extreme* starting position do not constitute even a postured attempt to achieve proportionality.

3. The 8(C)(2) Statement Confirms That Respondents Made No Attempt to Comply with the Basic Requirements of Section 6.

The extreme, irrational, and blatantly partisan "81%" metric set forth in the Commission's 8(C)(2) Statement—based on the number of statewide elections that the Republicans had won over the past decade—reveals the absence of any attempt to meet the requirements of Section 6. That statement is not only a mockery of the plain, calculable standard set forth in Section 6(B) but also a vivid demonstration of the intent to enact a plan that primarily favors Republicans, in willful violation of Section 6(A). The absurd content of the 8(C)(2) Statement, now augmented by their *post hoc* protest that good-faith negotiations satisfied Section 6, lay bare that Respondents never tried to comply with the requirements of Section 6.

C. The Legislative History Does Not Teach That Section 6 Is Optional.

1. Ohio Voters, Who Enacted Section 6, Intended It to Be Mandatory and Enforceable.

Fundamental to the construction of a constitutional amendment that was ratified by direct vote is "how the language would have been understood by the voters who adopted the amendment." *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 22. When interpreting the Ohio Constitution, "'[i]t is the duty of the court to ascertain and give effect to the intent of the people.'" *Id.* (citing *State ex rel. Sylvania Home Tel. Co. v. Richards*, 94 Ohio St. 287, 294, 114 N.E. 263 (1916)). Accordingly, "courts will attempt to reconcile constitutional conflicts with the following proposition in mind: 'In the interpretation of an

amendment to the Constitution the object of the people in adopting it should be given effect; the polestar in the construction of the constitutional, as well as legislative, provisions is the intention of the makers and adopters thereof.'" *State v. Kinney*, 69 Ohio St.2d 567, 570, 433 N.E.2d 217 (1982) (internal citation omitted).

The historical context of Article XI's adoption, including how it was understood by voters, makes abundantly clear that Section 6 was the very heart of the amendment, and that it would be mandatory and enforceable. Following floor passage of HJR 12, Article XI was overwhelmingly approved by 71.5% of Ohio voters—with a majority in every county. Suppl. Vol. 1 at 229-230. The ballot language explained that the amendment's purpose was to "[e]nd the partisan process for drawing Ohio House and Senate districts." Suppl. Vol. 1 at 231.

Respondent Auditor Faber promised Ohioans that a "yes" vote on the ballot measure amending the Constitution would "ensure that no district plan should be drawn to favor or disfavor a political party." Suppl. Vol. 1 at 174 (emphasis in original). Respondents President Huffman and Senator Sykes co-chaired a campaign to advocate for passage of the measure and explained in their campaign materials that the amendment would provide "fairness" by "[p]rotect[ing] against gerrymandering by prohibiting any district from primarily favoring one political party" and "[r]equir[ing] districts to closely follow the statewide preferences of the voters." Suppl. Vol. 2 at 270, 280. They also specifically promised that the amendment "[c]reates a process for the Ohio Supreme Court to order the commission to redraw the map if the plan favors one political party." *Id.* It was these promises—not splitting technicalities—that Respondents emphasized to the voters and that shaped the intent of the voters who passed the amendment. *See id.* at 280.

2. Representative Clyde's Comments Do Not Undermine the Intent of the Voters or Express the Intent of the Legislature as a Whole.

Respondents cite then-Representative Kathleen Clyde's remarks during the December 4,

2014 House floor debate to argue that Section 6 is merely optional. But as courts in Ohio have warned, "[a] single legislator does not speak for the entire Ohio General Assembly." *Nichols v. Villarreal*, 113 Ohio App.3d 343, 349, 680 N.E.2d 1259 (4th Dist. 1996). Rather, courts "must determine the intent of the Ohio General Assembly not from the expressions of a single legislator, but from the expression of the legislative body as a whole." *Id.*

Moreover, during floor passage, then-Representative Huffman, the chief sponsor of the legislation, stated "[t]here's specific language in there about how the map can't favor or disfavor one political party." Hist. Rec., Ex. Vol. 1 at HIST_0030:6-7. He further added: "So it's [] basically the concepts that I think the public has demanded, and most of us have said is important when we're drawing these maps. Basically, for basic issue of fairness." *Id.* at HIST_0030:10-13. Contemporaneously, Representative Huffman said he thought HJR 12, the joint resolution that would become Article XI, "represents some big compromises on the majority's part. The majority will not be able to do the kind of things that have happened in the last several years." Jim Siegel, *Ohio Legislators Come to Redistricting Agreement*, Cincinnati Enquirer (Dec. 5, 2014), https://bit.ly/3D44n4B. Representative Alicia Reese explicitly endorsed HJR 12, in part, because "one of the best lines . . . for my constituents is . . . no district plan shall be drawn primarily to favor or disfavor a political party." Hist. Rec., Ex. Vol. 1 at HIST_0048:12-15. One lawmaker, Representative John Becker, even opposed HJR 12 because of Section 6's constitutional requirements, disapproving that Section 6(B) "guarantees, we will forever have a very close 50-50 split in this chamber." *Id.* at HIST_0047:4-8.

II. Respondents Violated Section 6.

A. Respondents Violated Section 6(B).

1. All Parties and Experts Agree on the Seat Share Conferred by the Enacted Plan.

In its 8(C)(2) Statement, the Commission relied on the 2016, 2018 and 2020 elections to determine the partisan leaning of the districts in the enacted plan and concluded that it has 64.4% Republican-leaning districts. Suppl. Vol. 2 at 314:15-315:3, 321:23-322:6; Suppl. Vol. 1 at 50-51. All of the parties' experts who relied on those same three elections to determine the seat share in the enacted plan arrived at the same or substantially the same calculations of vote share.[6] The Commission's 8(C)(2) Statement further concedes that Republicans have commanded only a 54% vote share in the statewide elections conducted over the past decade. Suppl. Vol. 1 at 50-51. The disparity between 64.4% and 54% means that the plan is a clear facial violation of Section 6(B), unless, as explained above, it can be justified by a need to comply with Section 2, 3, 4, 5, or 7.

2. Under Any Reasonable Construction, the Enacted Plan's Gap of More Than Ten Percentage Points Does Not "Correspond Closely" to the Preferences of the Voters of Ohio.

That Section 6(B) requires that the plan "correspond closely" to the parties' ten-year statewide vote share does not render that provision uncertain or unmanageable. Respondents do not contest that the number of seats that favor Republicans fails to "correspond closely" to the preferences of the voters. Nor could they, given the facts of this case.

Ohio courts have described the word "closely" as a "term[] of common usage" that can be readily understood by lay persons. *State v. Bilder*, 99 Ohio App.3d 653, 659, 651 N.E.2d 502 (9th Dist. 1994) (explaining that "closely related in time" was "a phrase of common usage," and

[6] For Respondents' experts, *see* HC Ev., Vol. 3 at HC_0572 (Barber); *Id.* at HC_0631-34 (Hood). For Relators' experts, *see* Imai Rep. ¶¶ 41, 43; Rodden Rep. at 6-7, 13; Latner Rep. at OOC_0064-68.

accordingly did "not require elaboration" in jury instructions). Merriam-Webster's common dictionary definition of "close" is "being near in time, space, effect, or degree." Merriam-Webster, *Close*, https://bit.ly/3bQrofg (last accessed Nov. 10, 2021).

The common meaning of "closely" makes clear that the qualification "corresponds closely" does not permit a gross deviation from proportionality. By the Commission's own admission, the gap between the proportion of statewide voters who prefer Republicans (54%) and the proportion of districts that favor Republicans (64.4%) is more than *ten percentage points*: a margin that, in common election parlance, would transform a competitive election into a landslide, or "blowout."[7]

This point is driven home by the fact that the enacted plan has a stronger partisan skew—in other words, less correspondence—than *any* of Dr. Imai's 5,000 plans for both the House and Senate. Imai Rep. ¶ 3, 14-15. Dr. Imai's representative plans have, on average, 58.9 Republican-leaning House districts; the enacted plan has 63. *Id.* ¶ 41.

3. An Analysis of Seat Share That Considers Only Five Selected Counties Does Not Demonstrate Compliance with Section 6.

Respondents contend that the enacted plan was not drawn primarily to favor the Republicans because they can select and point to five counties where the enacted plan produced a collective Democratic leaning seat share of 63%, although the Democratic vote share in those counties totals only 57%. HC Br. at 37. But a myopic view of a cherry-picked portion of the state does not mean that the plan complies with Section 6.

First, the language of Section 6 clearly requires an assessment of the statewide plan as a whole, not just of a set of selected counties. Section 6(B) requires proportionality in the "[s]tatewide proportion of districts" whose voters favor each party, based on the "*statewide*

[7] *See, e.g.*, Geoffrey Skelley, *Are Blowout Presidential Elections A Thing Of The Past?*, FiveThirtyEight (May 28, 2019), https://53eig.ht/303n4qB (describing election wins by double-digit percentage points as "blowouts").

preferences of the voters of Ohio." Ohio Constitution, art. XI, § 6(B) (emphasis added). Notably, Section 6(A) takes the same approach, stating that "[n]o *general assembly district plan* shall be drawn primarily to favor or disfavor a political party," and thus looks to the plan as a whole rather than individual districts or counties. *Id.* § 6(A) (emphasis added). The text of these provisions makes clear that they apply, and must be analyzed, at the *statewide* level.

Second, the selection of these five counties is arbitrary. Respondents focus only on counties where the enacted plan and the Sykes Plan diverge—Franklin, Pickaway, Montgomery, Hamilton and Lorain—and claim that outside these counties "[n]o political discretion can be exercised . . . to draw different numbers of Democratic and Republican seats." HC Br. at 17, 37. But there are other counties with a substantial number of Democratic voters (such as Cuyahoga and Summit) where the plan could have been drawn differently and created an additional Democratic seat in each county. Imai Rep. ¶ 70. In fact, Dr. Imai's 5,000 plans add, on average, nearly a full additional Democratic seat in the Cuyahoga County area, and his sample plan creates additional Democratic or toss-up districts in several other counties. *Id.* ¶ 70, App. D.

Third, even in the counties selected by the Respondents, their analysis fails. In Hamilton County, for instance, Respondents claim that "[u]nder the Adopted Plan, 57% of the districts lean Democratic as compared to 55% of their vote share." HC Br. at 20. But Dr. Imai's analysis shows the imbalance is actually in the other direction, and that the enacted plan yields a *higher* proportion of Republican seats than their vote share would entitle them. Imai Rep. ¶¶ 22, 60. The enacted plan provides 3.3 Republican seats in Hamilton County, whereas Dr. Imai's 5,000 plans—which, as Respondents do not contest, have been drawn according to strictly non-partisan criteria—yield an average of only 2.3 Republican seats in Hamilton County. *Id.*

Respondents' gerrymandering is further revealed in the enacted plan's combination of

House districts into Senate districts. Dr. Imai has demonstrated six possible options to combine the House districts in Hamilton and Warren Counties into Senate districts. The enacted plan chooses the option that packs the most Democratic voters possible into a single district, creating the two safest possible Republican districts. *See* Imai Rep. ¶¶ 61-62, Fig. 14.

Similarly, in the Franklin County area, where 153 possible combinations exist, the enacted plan chooses the most pro-Republican of 153. Imai Rep. ¶¶ 66-67, Fig. 16. This pattern extends elsewhere, such as in the Cuyahoga County area, where the enacted plan chooses the most pro-Republican of 27 combinations. *Id.* ¶ 71, Fig. 18.

4. Political Geography Cannot Justify Violation of Section 6(B).

Respondents contend that enforcement of the proportionality requirement of Section 6(B) is improper because it fails to accommodate Ohio's natural political geography: that Democratic voters tend to be more clustered in urban areas. SEO Br. at 4, 20-22, 27; HC Br. at 14-16, 40-43. But Sections 3 and 4 of Article XI already do reflect and incorporate the political geography of the State. They require that counties and municipalities be kept whole to the extent possible. Ohio Constitution, Article XI, §§ 3–4. In addition, Section 6 requires that compactness be considered along with partisan fairness. *Id.* § 6. Thus, Respondents' argument that Relators ask the Court to ignore political geography lacks merit.

What Section 6 requires is that, after the requirements of Sections 2, 3, 4, 5, and 7—which *themselves* account for the natural political geography of the State—have been accommodated, partisan fairness must be respected. The drafters of Section 6 decided to use proportional representation based on statewide vote share to achieve the goal of partisan fairness. And, by an overwhelming margin, Ohioans amended the state constitution to add an express requirement that the distribution of legislative seats "shall correspond closely to the statewide preferences of the voters of Ohio." Suppl. Vol. 1 at 229-230. Both Section 6(A) and 6(B) are now enshrined in

Article XI. Under Article XI's scheme, natural political geography will impact a plan to the extent dictated by Sections 2, 3, 4, 5 and 7.

B. Respondents Violated Section 6(A).

As the new Article XI presents issues of first impression, LWVO Relators have provided the Court with a clear test to determine when a plan primarily favors or disfavors a political party: *first*, consider whether the plan was drawn with intent to favor or disfavor a political party, using the same evidence typically considered in racial gerrymandering cases (*see* Br. 34-35); and *second*, consider whether the plan has the effect of favoring or disfavoring a political party, using a standard set of partisan bias metrics. Here, the facts are clear: all of the partisan bias metrics point in the same direction, and they are extreme across all of the metrics. *See* Suppl. Vol. 1 at 206-208. This simple test provides guardrails and prevents the Court from having to intervene in borderline cases where partisan advantage did not predominate. *See Householder*, 373 F. Supp. 3d at 1097 (courts should intervene when the plan is an outlier across all metrics).

1. The Partisan Bias Metrics Are Undisputed.

Respondents do not dispute the accuracy of the analysis of any of the partisanship metrics conducted by either Dr. Warshaw or Dr. Imai: efficiency gap, mean-median difference, declination, and symmetry. *See* Compl. Citations, Ex. Vol. 1 at COMP_0029-31; Suppl. Vol. 1 at 11-12, 206-208; Imai Rep. ¶¶ 32-36 & Fig. 1; Suppl. Vol. 1 at 11-12.[8] Indeed, they offer no expert testimony whatsoever attempting to either replicate Dr. Warshaw or Dr. Imai's calculations or independently calculate these metrics. They merely assert that such metrics are irrelevant because

[8] Respondents suggest Dr. Warshaw's metrics are based on out-of-date redistricting plans and data, HC Br. at 16 n. 3, but this criticism is misplaced. Though Dr. Warshaw provides a historical overview of Ohio's legislative districts, his conclusions that the enacted plan violates Section 6 based on analysis of partisanship metrics is not dependent on these comparisons. Suppl. Vol. 1 at 205. Historical comparisons only serve to highlight the extremity of the skew of the enacted plan.

Section 6(A) is somehow unmanageable. HC Br. at 34-35. But their argument is empty and circular. It is only by ignoring all of the undisputed evidence of the violation of Section 6(A) that Respondents can contend that there is no way to show a violation of Section 6(A).

2. A Plan Can Violate Section 6(A) Even If It Complies with the *Other* Provisions of Article XI.

Respondents' contention that Relators cannot prove a violation of Section 6(A) "unless absolute proportionality trumps every other criteria [sic]" is fundamentally flawed. HC Br. at 36. Though non-compliance with traditional redistricting principles is *one* way to show that a plan was drawn primarily to favor a party, many other metrics also show that a plan was primarily drawn to favor a party. *See* Br. 34-35 (listing other metrics). And, as courts have acknowledged, modern technology enables map-drawers to engineer maps that, "although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative." *League of Women Voters v. Commonwealth*, 645 Pa. 1, 122, 178 A.3d 737, 817 (2018).

In particular, Dr. Imai's analysis demonstrates that maps can be fully compliant with all other sections of Article XI—including compactness—while performing far better under all traditional partisan metrics. Imai Rep. ¶¶ 32-36, 38, 46-47, 49, App. E. This shows that compliance with the other sections of Article XI in no way precludes a finding that the plan was drawn primarily to favor one party. That the enacted plan is an extreme outlier on every spectrum corroborates that the plan was enacted primarily to favor the Republican party.

3. An Examination of the Enacted Plan Demonstrates That Its Lines Were Drawn Primarily to Favor The Republican Party.

Analysis of specific decisions made in the creation of the enacted plan helps to explain how Respondents drew a plan that primarily favors the Republican party. Consider Hamilton County as an example. It contains seven whole House districts, and its voters favor Democrats over

Republicans by a 56% to 44% margin. Latner Rep. at OOC_0090, Fig. 10b. As explained by Relators' experts, the enacted plan packs most of Hamilton County's Democratic voters into three heavily skewed House districts, allowing the plan to carve out three Republican-leaning districts elsewhere in the county. Imai Rep. ¶¶ 57-60; Latner Rep. at OOC_0088-90; *see also* Cincinnati Amicus Br. at 3-6. This point is depicted below in Figure 13 from Dr. Imai's affidavit:

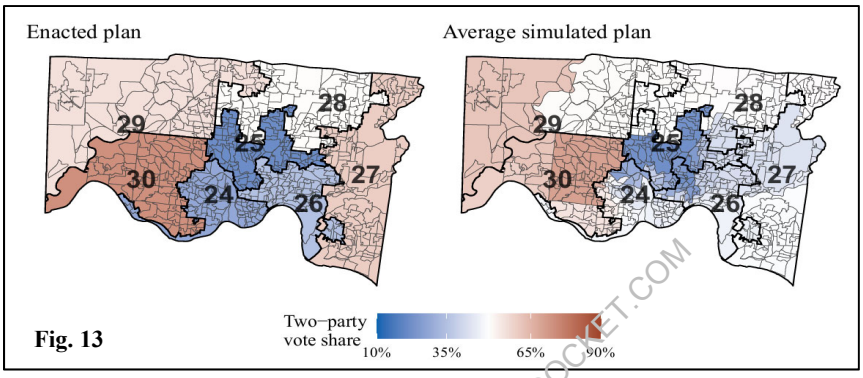

Fig. 13

Figure 13 compares the enacted plan (left) and the average of Dr. Imai's simulated plans (right). Both are overlaid with the House district boundary lines of the enacted plan. The plan on the right shows the average vote share of Dr. Imai's 5,000 plans, which are fully compliant with the other provisions of Article XI. As seen, that plan contains less red area than the enacted plan. Imai Rep. ¶ 60. And Dr. Imai's plans yield one more Democratic district and one less Republican district than the enacted plan, *id.*, changing the balance of power by two seats.

III. The Enacted Plan is a Pro-Republican Gerrymander; Drawing a Plan That Is Compliant with Section 6 Would Not Require a Pro-Democratic Gerrymander.

Respondents do not deny that they could have drawn a more proportional plan, but they contend that doing so would result in a Democratic gerrymander. HC Br. at 2, 16. Contrary to Respondents' contention, compliance with Section 6(B) need not result in a pro-Democratic gerrymander (thereby violating Section 6(A)). HC Br. at 2, 36-37. There is no conceptual tension between the two provisions. Section 6(A) provides that map-drawers must not draw maps primarily to favor one party or another. As such, Section 6(A) permits (but does not require)

inquiry into the intent of the Commission, as well as whether the plan objectively functions to favor one party under various partisan metrics. Section 6(B) then articulates one specific test to *measure* partisan bias: the deviation of the allocation of seats favoring one party or the other from the voters' preferences as expressed by the vote share in statewide elections over the past decade.

Further, liberated from the enacted plan's Republican gerrymander, the political geography of Ohio produces maps that correspond much more closely to Ohio voters' preferences. In fact, Dr. Imai produced 5,000 representative, non-partisan plans for both the House and Senate, and all of these plans are substantially closer to Ohio voters' preferences than the enacted plan. *See* Imai Rep. ¶¶ 40-41, 44, 52, 55.

It is worth reviewing several points, all undisputed by Respondents, concerning these 5,000 plans. First, each is a fully realized plan for all House and Senate districts, and therefore each is subject to the same political geography as the enacted plan. *See* Imai Rep. ¶¶ 12-13. Second, the algorithm that created these plans was coded to strictly adhere to non-partisan criteria when drawing districts, and therefore is incapable of carrying out a partisan gerrymander. *See id.* ¶¶ 15-18, App C. Third, ***each of these plans is at least as compliant as the enacted plan*** with all of Article XI's restrictions on drawing districts, including restrictions on compactness and on splitting counties and municipalities—the very restrictions that Respondents cite in an attempt to justify the extreme partisanship of their plan. *See id.* ¶ 14, App. B-C, E; HC Br. at 2, 16.

IV. Enforcing Section 6(B) Does Not Violate the Fourteenth Amendment.

Respondents' Fourteenth Amendment arguments miss the point twice over. *First*, to argue that there is "no precedent . . . to require" proportionality, Respondents cite case after case stating that the Fourteenth Amendment cannot be enforced to require proportionality. HC Br. at 39-40 (citing *Rucho v. Common Cause*, 139 S.Ct. 2484, 2500 (2019); *Davis v. Bandemer*, 478 U.S. 109, 130 (1986); *Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980)). There is no disagreement here; Relators

did not bring this case under the Fourteenth Amendment. This action arises under Article XI.

Second, to argue that a state constitution requiring proportionality would violate the Fourteenth Amendment, Respondents cite a case that held the *opposite*. In *Gaffney v. Cummings*, where state districts were "drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties," the U.S. Supreme Court held that "neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Gaffney v. Cummings*, 412 U.S. 735, 752, 754 (1973); *see also Rucho*, 139 S.Ct. at 2497. *Gaffney* makes plain that the Fourteenth Amendment provides no basis to strike down a plan designed to provide proportional representation, which is precisely what Section 6(B) requires.[9]

It is important to recall why gerrymandering cases brought under the Fourteenth Amendment were not considered judicially manageable under the Equal Protection Clause. As the U.S. Supreme Court explained in *Rucho*: "There are no legal standards *discernible in the Constitution* for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral," so "[a]ny judicial decision on what is 'fair' in this context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts." 139 S.Ct. at 2500 (emphasis added). That concern is obviated

[9] Respondents' invocation of *Cox v. Larios*, 542 U.S. 947 (2004), to invalidate Section 6 further misses the mark. Because Section 6 necessitates compliance with Sections 3 and 4 of Article XI, which set forth standards requiring districts to be "substantially equal" in "population," Section 6(B) expressly forbids the type of plan that the U.S. Supreme Court found unconstitutional in *Larios*. *Id.* at 947 (affirming violation of Fourteenth Amendment's one-person, one-vote principle based on "unconstitutional population deviations").

by the enumeration of standards with which a plan must comply. Indeed, the U.S. Supreme Court expressly acknowledged that that *Rucho* did not "condemn complaints about districting to echo into a void," and that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," 139 S.Ct. at 2507-08.

V. Respondents' Remaining Contentions Are Without Merit.

A. This Court Determines the Meaning of Article XI *De Novo*.

This Court has long held that "administrative bodies have no authority to interpret the Constitution." *See, e.g.*, *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 460, 1997-Ohio-253, 674 N.E.2d 1388 (1997). Even when an agency is empowered to conduct a hearing to interpret the law in the first instance, the standard of review for constitutional issues "is a *de novo* review, without deference being given to the agency's decision." *Lesiak v. Ohio Elections Comm.*, 128 Ohio App.3d 743, 746, 716 N.E.2d 773 (1998); *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278, 282, 2016-Ohio-7760, 88 N.E.3d 900, ¶ 16. Finding otherwise would vitiate "[t]he power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government." *State ex rel. Ohio Acad. of Trial Laws. v. Sheward*, 86 Ohio St.3d 451, 462, 1999-Ohio-123, 715 N.E.2d 1062 (1999). As this Court has affirmed, "the judicial branch is the final arbiter in interpreting the Constitution." *Id.* at 467.

B. The Appropriate Standard of Proof for Original Actions to Enforce Article XI is Preponderance of the Evidence, Not Beyond a Reasonable Doubt.

In *Wilson*, a majority of this Court quoted from a concurrence in a prior case that had, in turn, quoted from a mandamus action to impose a standard of proof that deferred heavily to the Apportionment Board. 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 17. Under this deferential "mandamus" framing, the Court held that the burden of proof was beyond a reasonable doubt." *Id.* at ¶ 24. But in the wake of *Wilson*, the people of Ohio, wanting enforceable

constitutional rights to end partisan gerrymandering, abrogated these rulings by amending the Ohio Constitution to impose non-discretionary standards on the Commission. A highly deferential legal standard for reviewing a plan would restore that very discretion and thwart the will of the voters. Such a deferential standard of review is especially inappropriate where, as here, Commissioners who voted to pass the plan disparaged it, expressly questioning its constitutionality and renouncing any claim to its constitutionality. Suppl. Vol. 1 at 126, 128, 175-179; Suppl. Vol. 2 at 298.

This Court sits in this apportionment case as a court of original jurisdiction, akin to a trial court. Accordingly, this Court should find the facts as it would in an ordinary civil case—by a preponderance of the evidence. *See, e.g.*, *Household Fin. Corp. v. Altenberg*, 5 Ohio St.2d 190, 192, 214 N.E.2d 667 (1966). Ultimately, regardless of the standard of proof this Court applies, Relators have met it. The facts are not in dispute, and Relators have carried their burden.

C. The Statewide Elected Officials Are Proper Respondents in Their Role as Members of the Commission.

The Statewide Elected Officials ask to be dismissed from this case because the Commission is tasked with drawing maps and the Court has the power to order the Commission to do so. *See* SEO Br. at 29-32.[10] Relators agree that this Court has the power to order the Commission to adopt a new plan. Indeed, Relators ask for this exact remedy. *See* Compl., Prayer for Relief ¶ 2. But this does not mean that the Statewide Officials are not proper respondents. The three statewide officeholders are the only mandatory members of the Commission. *See id.* And in addition to asking the Court to declare the enacted plan unconstitutional and order the Commission to adopt a new plan, Relators also asked this Court to issue a permanent injunction and judgment barring the Commission ***and*** all seven Commissioners from calling, holding, supervising, administering, or

[10] The Statewide Elected Officials stand alone in this argument; the remaining four Commissioners do not dispute that they are proper respondents, nor does the Commission.

certifying any elections under the plan. *See* Compl., Prayer for Relief ¶¶ 1-3. Although the Commission acts as an entity, its actions are determined by the votes of its individual members.

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CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that on November 10, 2021, I caused a true and correct copy of the following documents to be served by email upon the counsel listed below:

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