IN THE SUPREME COURT OF OHIO

Regina Adams, *et al.*, **Relators,** **v.** **Governor Mike DeWine, *et al.*,** **Respondents.**	**Case No. 2021-1428** Original Action Filed Pursuant to Ohio Constitution, Article XIX, Section 3(A)
League of Women Voters of Ohio, *et al.*, **Relators,** **v.** **Governor Mike DeWine, *et al.*,** **Respondents.**	**Case No. 2021-1449** Original Action Filed Pursuant to Ohio Constitution, Article XIX

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INTRODUCTION

In November 2021, the State of Ohio enacted highly competitive congressional districts for Ohio through the passage of Substitute Senate Bill 258 ("SB 258", "2021 Congressional Plan"). Of the fifteen newly established Ohio congressional districts in SB 258, seven are competitive. Experts from both sides, and even the media, have found the districts in SB 258 to be competitive.

Ohio's new congressional districts also more faithfully comply with the neutral and objective line-drawing rules of Article XIX than any other plan introduced by any member in the general assembly. SB 258 fully complies with the numerical limits on county splitting in the Ohio Constitution and other limits on the splitting of political subdivisions. But more importantly, no other plan introduced by any member in the general assembly, including any Democrats, did a better job at complying with Article XIX's rules.

Nevertheless, Relators ask this Court to sit as a super-redistricting panel, second-guessing and criticizing a plan that fully complies with the objective line-drawing rules in Article XIX and creates numerous politically competitive districts. Relators' Complaints are without merit and should be dismissed, and the 2021 Congressional Plan should be upheld.

BACKGROUND

On May 8, 2018, the voters of Ohio approved an amendment to Ohio's Constitution that, for the first time in Ohio's history, governs congressional redistricting. That amendment, Article XIX of the Ohio Constitution, was submitted to the voters by the general assembly. Similar to the amendments to Article XI that voters approved in 2015, Article XIX sets forth a detailed process for how a congressional district plan is to be adopted in Ohio.

Under Article XIX, the general assembly is initially tasked with the authority to adopt a congressional district plan. During this first stage of the process, the general assembly can only

pass a plan that will be effective for ten years. To do that, the plan must be supported by at least two-thirds of the members of each house of the general assembly, including at least one-half of the members of each of the two largest political party represented in each house.

If the general assembly does not pass such a plan by the last day of September during a redistricting year, congressional districting authority then transfers to the Ohio Redistricting Commission. Any plan adopted by the Commission at this stage must be one that will be effective for ten years. To do that, a Commission congressional district plan must receive the support of at least four of the seven Commission members, including at least two Commission members from each of the two largest political parties represented in the general assembly. *See* Art. XIX, Section 1(B).

If the Commission does not adopt such a plan before the last day of October during a redistricting year, congressional redistricting authority returns to the general assembly. Article XIX, Section 1(C)(1). At this final stage, the general assembly must pass a congressional district plan no later than the last day of November during a redistricting year. Article XIX, Section 1(C)(1). For a congressional district plan to be effective for ten years at this stage, it must be supported by at least two-thirds of the members of each house of the general assembly, including at least one-third of the members of each of the two largest political parties in each house. If, however, a congressional plan is only approved by a simple majority of each house of the members of the general assembly, any such plan will remain in effect for only four years ("simple majority map"). Article XIX, Section 1(C)(2)-(3).

All congressional district plans must comply with the requirements of Article XIX, Section 2. These requirements include that districts be single member districts, that each district have equal population, that the plan complies with the Ohio Constitution and federal law, and that each district

be contiguous. Article XIX, Section 2(A), 2(B)(1)-(3). All congressional district plans must also comply with criteria for the division of counties and townships and municipal corporations. Article XIX, Section 2(B)(4)–(8).

Article XIX also provides for an additional criterion that applies solely to simple majority maps. The relevant portions of Article XIX, Section 1(C)(3) state as follows:

> (a) The general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents.
> (b) The general assembly shall not unduly split governmental units, giving preference to keeping whole, in the order named, counties then townships and municipal corporations.
> (c) Division (B)(2) of Section 2 of this article shall not apply to the plan. The general assembly shall attempt to draw districts that are compact.
> (d) The general assembly shall include in the plan an explanation of the plan's compliance with divisions (C)(3)(a)-(c) of this section.

There is one notable standard in Article XIX that is distinct from those set forth in Article XI related to general assembly district plans. Under Section 6(B) of Article XI, the Constitution describes an attempt to draw a plan that "corresponds closely" to the "statewide preferences" of Ohio voters in certain elections. Article XIX has no such provision.

There is no such provision even though the voters of Ohio could have demanded it based on congressional election results prior to passage of the amendments. Under the 2011 Decennial Census, Ohio was apportioned 16 congressional seats. After Article XI was amended in 2015, Ohio voters elected 12 Republicans as members of Congress.[1] The percentage of Republicans elected to Congress in 2016 (75%) was 21 percentage points higher than the average of statewide votes cast in statewide partisan elections (54%). (RPTS_0049). But, despite this alleged statewide partisan election average, the people of Ohio consistently elected Republicans to represent 12 of

[1] See https://www.ohiosos.gov/elections/election-results-and-data/2016-official-elections-results/?__cf_chl_jschl_tk__=l.VrLtmIruAYKPRiS1MroUN9Zqefuahupoy3TiMbYKY-1639504121-0-gaNycGzNCSU

Ohio's 16 congressional districts, which are based not on statewide vote totals, but on geographically based districts. And while Ohio voters approved language in Article XI regarding statewide election totals in 2015, when Ohio voters approved Article XIX three years later, there was no provision calling for a comparison of the percentage of seats won by members of a political party to a statewide average of voters' partisan preferences. The general assembly and the people of Ohio made this choice, even consciously knowing that the percentage of Republicans winning congressional races in Ohio was higher than the purported statewide election average. A similar provision to Article XI, Section 6(B) could have been included in Article XIX, but was not.

I. THE 2021 CONGRESSIONAL REDISTRICTING PROCESS

1. The Constitutional Schedule for Redistricting.

To place the 2021 congressional redistricting process in perspective, it is important to understand the relationships between the deadlines established by Article XIX for congressional districts and those in Article XI for general assembly districts.

The Ohio Constitution contemplates that general assembly redistricting will begin and be completed by the Ohio Redistricting Commission before the general assembly begins its consideration of congressional plans. Under Article XI, Section 1, the Ohio Redistricting Commission is tasked with adopting a final general assembly district plan no later than the first day of September during any redistricting year. Article XI, Section 1(C). Any plan passed by September 1 must have the support of at least four of the seven Commission members, including two Commission members who represent each of the two largest political parties in the general assembly. Article XI, Section 1(B)(3). If the Commission does not adopt a general assembly district plan by September 1 with the requisite support, it must adopt a final plan no later than September 15 of any redistricting year, whether it be for 4, 6, or 10 years.

Article XIX clearly contemplates that congressional redistricting will not be performed until after the Commission concludes its process for general assembly redistricting. As noted above, the general assembly initially has until the last day of September to pass a congressional district plan (i.e. 15 days after the deadline for the Commission to enact a general assembly district plan), with the support of at least two-thirds of the members of each house (including one-half of the members of the two largest parties, in both houses). Article XIX, Section1(A). If the general assembly does not enact a plan at this stage, the Redistricting Commission is then reconstituted and has until the end of October to adopt a congressional district plan. It may only do so with the support of at least four Commission members, "including at least two members of the commission who represent each of the two largest political parties represented in the general assembly." Article XIX, Section1(B). Should the Commission not be able to do so, the general assembly must then adopt a congressional district plan by the end of November. Article XIX, Section 1(C)(1).

2. Planning and Consideration of Congressional Redistricting Delayed by the Late Receipt of Census Data.

Redistricting cannot take place without population data from the latest United States Decennial Census. This year that data, which historically is available by March, did not arrive until August 12, 2021, over 134 days later than anticipated. (DEPO_GA_0327:1-5). This delay substantially hampered the ability to prepare a general assembly district plan. (DEPO_GA_0092:19-25; 98:14-17). While the data was received on August 12, it took several more weeks to configure the data in a way that could actually be used to draw districts. (DEPO_GA_334:11-335:1). In the meantime, Senate staffer Raymond DiRossi and House staffer Blake Springhetti made logistical arrangements to ensure that once the data was ready, the general assembly district plan could be drawn as quickly as possible. (DEPO_GA_454:22-455:22).

Because of the delay in the arrival of census data, it became impossible for the Redistricting Commission to comply with Article XI's initial September 1 deadline for general assembly redistricting. (DEPO_GA_334:11-335:1). The 2021 general assembly district plan was ultimately not adopted by the Commission until shortly after midnight on September 16, 2021. The same two staffers assigned by Senate President Matt Huffman and Speaker Robert Cupp to work on the general assembly district plan were also separately tasked with preparing a proposed congressional district plan for their respective Republican leader. Because of responsibilities related to the wrap up of general assembly redistricting, and because of litigation challenging the general assembly district plan, neither Mr. DiRossi nor Mr. Springhetti could begin to work on congressional redistricting until mid-October 2021. (HC22:11-25; HC329:18-22).

3. The General Assembly Enacts a Congressional District Plan.

Because the Redistricting Commission did not adopt a congressional district plan by October 31, 2021, the responsibility of passing a congressional district plan returned to the general assembly. Correspondingly, Mr. DiRossi and Mr. Springhetti began working on separate congressional plans in mid to late October, 2021. (HC22:11-25;HC329:18-22). The Republican and Democrat caucuses for the Ohio House and the Ohio Senate each put forth their own separate proposed congressional district plans. Mr. Springhetti worked on the House Republican caucus plan with Speaker Cupp. Mr. DiRossi worked on the Senate Republican caucus plan with Senator Robert McColley, who ultimately introduced his proposed plan in Senate Bill 258. (HC29:17-22).

Unlike the drafting of the 2021 general assembly district plan, Mr. DiRossi and Mr. Springhetti worked separately on their respective congressional district plans. (HC32:18-20; HC35:2-9). While both Mr. Springhetti and Mr. DiRossi had access to statewide election data, each chose to utilize different elections when determining the competitiveness proposed districts. (HC338:2-

339:25; HC52:5-10; 53:14-18; 59:15-25 109:19-23). Mr. DiRossi testified that he was specifically instructed to create maps in compliance with Article XIX, and which included more competitive districts than Ohio's current congressional plan. (HC60:4-19). SB 258 was ultimately passed by a super-majority vote in the Ohio Senate, and separately passed by a simple majority in the Ohio House of Representatives. Governor Mike DeWine signed that legislation into law; therefore, SB 258 is set to become the congressional district plan in Ohio beginning with the 2022 primary election to be held on May 3, 2022.

The 2021 Congressional Plan keeps each of Ohio's largest cities in a single district, with the exception of Columbus, which has a population too large for a single congressional district. (HC825; HC 789-90). In fact, the 2021 Congressional Plan keeps 98 of Ohio's 100 largest cities intact, excluding Columbus for the reason described above. (HC308).

Because it was clear that the people of Ohio wanted more competitive districts, creating competitive districts was a priority for Senator McColley and Senate President Huffman. (HC60:4-19). But, determining how to assess the competitiveness of a district is challenging. (HC177:1-15). There was significant and diverging public testimony about how to measure competitiveness. Catherine Turcer of an organization called "Fair Districts Ohio" testified that "competitive districts" were districts with a political swing of +/-5% , while "hyper competitive districts" were districts with a +/-3% political swing. (HC676-677, HC739). Others testified to a +/-4 % political swing as being competitive, while others testified to different metrics involving either smaller or larger political swings. (HC670, HC177:1-15).

After consideration of public testimony, Senator McColley and Senate President Huffman decided to define "competitive" as districts with a political swing of +/- 4%. (HC177:1-15). In order to apply this standard, Mr. DiRossi utilized an index called "FEDEA." This index consisted

of the statewide federal election results for President of the United States and United States Senate for the last ten years in Ohio, rounded to the nearest tenth of a percent. (HC52:5-10;53:14-18; 59:15-25 109:19-23). This index was used because the districts that were being drawn (i.e. congressional districts) are districts for federal elections. Unlike legislative districts, which are state elections, it would be more appropriate to use federal election results. (HC54:24-55:1; 56:18-25). Specifically, this decision was made because members of Congress interact with "our U.S. Senators" and "President of the United States" and therefore it seemed like an "easy" decision to make. (HC61:12-21). For instance, someone may vote for State Auditor based on local concerns, such as how they audit local school districts and those rationales are different than the roles played by members of Congress shaping federal policies. (HC62:7-25).

Ultimately, Mr. DiRossi testified that whether he had "access to election results for this race or that race was not very consequential in the actual drawing of districts" but instead were used to make districts more "competitive" where they could be, as he had been instructed by Senator McColley. (HC56:12-17; HC57:11-14). In accordance with Article XIX, Mr. DiRossi testified that the focus was on drawing congressional districts based on whole counties, and balancing them to the person as required by the United States Constitution. (HC72:3-23). Because these districts had to be balanced to the person, Mr. DiRossi utilized municipal corporation and township boundaries, when considering where to divide district lines in an effort to avoid unduly splitting those communities. (HC73:8-17). Mr. DiRossi also was tasked with avoiding the pairing of incumbents. (HC197:15-198:5).

SB 258 incorporates suggestions made during the hours of public testimony, public comment and newspaper editorials, as much as possible. (HC133:8-24; HC135:1-12). For example, numerous requests were made to dismantle the "snake on the lake" district (2011 District 9), and

to re-draw that district in a more compact manner. Those requests were incorporated into SB 258. (HC132:24-133:11; HC138:20-139:4; HC825).

As a result, the enacted version of SB 258 was the result of consideration of a "tremendous amount" of public testimony, published editorials, and citizens of Ohio discussing what they wanted their map to look like. (HC132:24-133:11). SB 258 also incorporated ideas from other caucus plans, where feasible. (HC133:8-24; HC135:1-12). Consequently, SB 258 was based on a significant amount of public and bi-partisan input, while also resulting in the most competitive plan drawn in recent history, and certainly as compared to either map offered by the House and Senate Democratic caucuses or submitted by the public. (HC303-304).

4. Compliance with the Requirements in Article XIX Related to the Splitting of Counties and Municipal Corporations and Townships.

A key element of Article XIX is respect for political subdivisions – counties, municipal corporations, and townships – and a stated desire to keep them intact. The requirements recognize the importance of those subdivisions, and the fact that splitting up such subdivisions has been an historic avenue for gerrymandering. During the legislative debates over proposed congressional district plans, House Democrats introduced their proposed congressional plan (House Bill 483, hereinafter "House Democratic Plan") while Senate Democrats also introduced their own plan (Senate Bill 237, hereinafter "Senate Democratic Plan"). A comparison of the number of divided counties or divided municipal corporations and townships found in the 2011 Congressional Plan, as compared to the 2021 Congressional Plan, House Democratic Plan and Senate Democratic Plan is illuminating.

First, in an effort to keep counties intact, Art. XIX, Section 2(B)(5) provides that no more than 23 counties can be split into different congressional districts. Under the 2011 Congressional Plan, 23 counties were split into different congressional districts. The 2021 Congressional Plan reduced

that to 12 counties split into different districts. Moreover, both the Senate Democratic Plan and the House Democratic Plan would have divided 14 counties into different districts. (HC828-830).[2]

Second, Article XIX, Section 2(b)(4)(a-b), limits the general assembly from dividing certain municipal corporations and townships. While the 2011 Congressional Plan split 35 municipal corporations or townships, the 2021 Congressional Plan only splits 14. In contrast, the Senate Democratic Plan divides 15 municipal corporations and townships while the House Democratic Plan divides 20. (HC382-834).

Finally, under Art. XIX, Section 2(b)(4)(a), when the population of a municipal corporation or township exceeds the congressional ratio of representation, the general assembly is required to attempt to include a "significant" portion of the municipal corporation or township in a single district. Based on the 2020 decennial census, Columbus was the only city or township whose population exceeded the congressional ratio of representation. In compliance with Article XIX, Section 2(b)(4)(a), the 2021 Congressional Plan has 74% of the population of Columbus contained in Congressional District 3. (HC790). In contrast, under both the Senate and House Democratic Plans, only 70% of the population of Columbus is placed in a congressional district. (HC789-790).

5. The Residential and Voting Patterns of Ohio Voters Dictate the Partisan Lean of a Majority of Ohio's 15 Congressional Districts, Leaving only 7 Districts that can be Drawn as Competitive or Leaning Towards one Party or the Other.

A review of the residential patterns of Ohio voters and a comparison of the two Democratic maps demonstrates the areas of the state where Republicans and Democrats agree or disagree regarding the partisan composition of congressional districts. (HC789). The facts show that at least

[2] Article XIX, Section 2(B)(5) provides that only five counties may be split twice. Consistent with this requirement, only 2 counties (Cuyahoga and Hamilton) are split twice in the 2021 Congressional Plan. In contrast, under the 2011 Congressional Plan 7 counties were split more than twice (Cuyahoga, Franklin, Lorain, Mercer, Portage, Stark, and Summit) (HC829).

8 of Ohio's 15 congressional districts must be drawn as either safe Republican or Democratic seats. SB 258 does exactly that.

First, there can be little doubt that Republican voters are more evenly distributed throughout the state of Ohio while Democratic voters are largely clustered in urban areas. (HC781-785). This is demonstrated by a comparison of the partisan leaning of districts in the 2021 Congressional Plan with the House and Senate Democratic Plans that are either safe Republican or safe Democratic. All three plans create 6 out of 15 "safe Republican" districts and 2 that are "safe Democratic" districts. For safe Republican districts, all three maps overlap in the use of 52 counties to create these districts. (HC794-795). In contrast, under all three maps, safe Democratic districts are located in only 2 counties - Franklin and Cuyahoga. (HC793-798). This means that only 7 districts in approximately 34 counties may be drawn to be either competitive or lean towards one party or the other. (HC801-805).

When applying the FEDEA standard used in SB 258 to measure the competitiveness of a congressional district, all 7 of the remaining districts the 2021 Congressional Plan creates are competitive. (HC825-828; HC60-13-20). Under this same standard, the 2011 Congressional Plan had only 2 competitive seats while the House and Senate Democratic plans each have only 5 competitive seats. (HC828; HC809-810).

6. The Comparable Treatment of Incumbents under the 2021 Congressional Plan versus the House and Senate Democratic Plans.

In the 2020 general election, and subsequent special elections, the voters of Ohio elected twelve Republicans and four Democrats to serve as members of congress from Ohio. (HC821-823). Map drawers who represent a different party than an incumbent often draw districts to include the residence of more than one incumbent to put them at a disadvantage. (HC807-808). This political tactic is often described as "double bunking." *Id.*

For a simple majority plan, Article XIX, Section 1(C)(3)(a) provides that "[t]he general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents." Under the 2021 Congressional Plan, of the 14 incumbents who intend to seek reelection in 2022, the only incumbents who are double bunked are two Republicans who both live in the City of Cincinnati. (HC825; HC807-808). As noted above, Article XIX prohibits the City of Cincinnati from being split.

In contrast, the House Democratic Plan double-bunks 9 incumbents (8 Republicans and 1 Democrat). (HC835-836). And two sets of Republicans (4 incumbent members) are placed in 2 districts (House Democratic District 1 and District 4). (HC835). The House Democratic plan also "triple bunks" 3 Republicans together in its proposed District 6. (HC808). Finally, the House Democratic Plan places an incumbent Republican and Democrat into its proposed District 3. (HC808). Similarly, in the Senate Democratic Plan, 8 incumbents are double bunked (7 Republicans and 1 Democrat). (HC808). Three pairs of Republicans (i.e. 6 incumbent members) are placed together in the Senate Democratic Plan in its proposed Districts 5, 12, and 15, while a Republican and Democratic incumbent are placed together in its proposed District 1. (HC808; HC835-836).

ARGUMENT

I. Standard of Review

"Generally speaking, in construing the Constitution, we apply the same rules of construction that we apply in construing statutes." *Wilson v. Kasich*, 134 Ohio St. 3d 221, 2012-Ohio-5367, 915 N.E.2d 814, ¶ 13 (quoting *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 57)).

First, the Court looks "to the plain language of the statute itself to determine the legislative intent." *Summerville v. Forest Park*, 128 Ohio St.3d 221, 225, 2010-Ohio-62890, 943 N.E.2d 552, ¶ 18 (quoting *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 573 N.E.2d 878, ¶ 11)). If a statutory provision is "plain and unambiguous and conveys a clear and definite meaning, then there is no need for th[e] court to resort to the rules of statutory interpretation[.]" *State v. Parker*, 157 Ohio St. 3d 460, 2019-Ohio-3848, 137 N.E.2d 1151, ¶ 21 (citation omitted). *See also Toledo City Sch. Dist. Bd. of Educ v. State Bd. of Educ. of Ohio*, 146 Ohio St. 3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16 ("Where the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to define what the drafters intended it to mean." (quoting *State ex rel. Maurer v. Sheward*, 71 Ohio St.2d 513, 520 664 N.E.2d 369 (1994)). Thus, only when a statute or constitutional provision is ambiguous, does the Court look to cannons of construction and statutory interpretation. *See Toledo City Sch. Dist. Bd. of Educ.*, at ¶ 16 ("If the meaning of a provision cannot be ascertained by its plain language, a court may look to the purpose of the provision to determine its meaning.").

Article XIX, Section 1(C)(3)(a) states that the general assembly "shall not pass a plan that unduly favors or disfavors a political party or its incumbents." The word "unduly" is not defined within the constitution; therefore, the Court looks to its common ordinary meaning. *Toledo City School Dist. Bd. of Educ.*, at ¶ 16. "Undue," as defined by Black's Law Dictionary (11th ed. 2019) means "excessive or unwarranted."

II. Presumption of Constitutionality and Deference to the General Assembly's Interpretation.

Acts of the general assembly are entitled to a strong presumption of constitutionality. *State ex rel. Ohio Cong. of Parents and Teachers v. State Bd. of Ed.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 20 (citations omitted). In districting cases, the presumption is only overcome

if Relators "rebut the plan's presumed constitutionality by proving beyond a reasonable doubt that the apportionment plan is unconstitutional." *Wilson v. Kasich*, 134 Ohio St. 3d 221, 228, 2012-Ohio-5367, 915 N.E.2d 814, ¶ 22.

The Court may not substitute its own judgment with that of the judgment of the general assembly regarding the wisdom of where lines were drawn or why they were drawn in a certain way. In fact, "[w]hen the constitutionality of legislation is attacked, courts must interpret the applicable constitutional provisions and acknowledge that a court has nothing to do with the policy or wisdom of a statute; that is the exclusive concern of the legislative branch of the government." *State ex rel. Ohio Cong. of Parents and Teachers v. State Bd. of Ed.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 20 (internal quotation omitted). As this Court has noted, it is "essential" to the success of the three branches of government that "the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." *State v. Bodyke*, 2010-Ohio-2424, ¶ 40, 126 Ohio St. 3d 266, 275, 933 N.E.2d 753, 763.

The authority to draw Ohio's congressional district plan is initially vested in, and ultimately, with the general assembly. *See* Article XIX, Section 1(A) ("Except as otherwise provided in this section, the general assembly shall be responsible for the redistricting of this state for congress based on the prescribed number of congressional districts apportioned to the state pursuant to Section 2 of Article I of the Constitution of the United States."). The 2021 Congressional Plan, like all other acts of the general assembly, is entitled to the deference afforded to it by law and precedent.

III. The 2021 Congressional Plan Complies with Article XIX, Section 1(C)(3).

Relators contend that the 2021 Congressional Plan violates Article XIX, Section 1(C)(3) in two respects. Relators contend that the 2021 Congressional Plan "unduly" splits governmental units in violation of Article XIX, Section 1(C)(3)(b). They also contend that the 2021 Congressional Plan "unduly favors or disfavors a political party or its incumbents," in violation of Article XIX, Section 1(C)(3)(a). *See LWVO Merit Brief* at 37-46*, Adams Brief* at 35-40.

The first argument may be easily rejected. It is undisputed that the 2021 Congressional Plan divides fewer governmental units than the 2011 Congressional Plan as well as the two Democratic proposed congressional plans. (HC828-834). In fact, the 2021 Congressional Plan keeps 98 of Ohio's 100 largest cities intact, excluding Columbus which has a population too large for a single congressional district. (HC308; HC825; HC 789-90).

Furthermore, while Article XIX, Section 2(B)(5) provides that no more than 23 counties can be split into different congressional districts, the 2021 Congressional Plan splits only 12 counties. This a vast improvement as compared to the 23 counties that were split under the 2011 Congressional Plan. The 2021 Congressional Plan also splits fewer counties than the House and Senate Democrat's plans which each split 14 counties. (HC828-830).

The general assembly also complied with the Article XIX, Section 2(b)(4)(a-b) limits on dividing certain municipal corporations and townships. While the 2011 Congressional Plan split 35 municipal corporations or townships, the 2021 Congressional Plan only splits 14. In contrast, the Senate Democratic Plan divides 15 municipal corporations and townships while the House Democratic Plan divides 20. (HC382-834).

As a result, Relators only remaining claim is that the 2021 Congressional Plan "unduly favors or disfavors a political party or its incumbents." *See* Article XIX, Section 1(C)(3)(a). As to this

claim, however, the general assembly's interpretation of Article XIX, Section 1(C)(3) is entitled to deference and Relators cannot carry their burden to show that the 2021 Congressional Plan is unconstitutional beyond a reasonable doubt. *See supra* Section I.

Unlike the objective criteria contained elsewhere in Article XIX regarding the division of government units, Article XIX, Section 1(C)(3)(a) provides no similar definitive standard to guide the general assembly or to inform this Court in determining when a congressional district plan "unduly favors or disfavors a political party or its incumbents." By its plain terms, it is not unlawful under Article XIX, Section 1(C)(3)(a) for a plan to favor a political party or its incumbents – instead, it may only not "unduly" favor them.

Because of the omission of any definition of the term "unduly" this Court must defer to the general assembly's discretion and interpretation of whether a congressional district plan permissibly favors a political party or its incumbents, and when it "unduly" favors them. It is not the function of this Court to sit as a "super[legislature] to determine whether a plan presented by the relators [or Democrat members of the general assembly] is better than the plan adopted [by the general assembly or Relators' Expert]." *Wilson v. Kasich*, 134 Ohio St. 3d 221, 231, 981 2d. 814, 824 (2012).[3] Instead, this Court's role is to determine "whether the [general assembly] acted within its broad discretion conferred upon it." *Id*.

[3] This Court has previously discounted the usefulness of alternative districting plans, such as the simulated maps generated by Relators' expert Dr. Chen, where such plans were not submitted to Ohio's apportionment board for its review prior to adopting a districting plan. *See Wilson v. Kasich*, 134 Ohio St.3d 221, 234, ¶¶43-46 (2012). Moreover, even those Justices who favor a federal claim for gerrymandering have held that simulated plans are useful only when they use the same criteria as was used to draw the challenged map. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2516 (2019) (Kagan, J., dissenting) (stating that simulated maps may be useful only when they a "baseline a State's own criteria of fairness apart from partisan gain."). Dr. Chen guaranteed that his simulations would be different from the 2021 Congressional Plan by arbitrarily prohibiting his simulations from splitting Hamilton and Cuyahoga Counties twice into three districts, as was done by the 2021 Congressional plan. Dr. Chen also ensured that his political scoring would be different

Moreover:

> Whether the discretion conferred on the [general assembly] has been wisely or unwisely exercised in this instance is immaterial in this proceeding. It is sufficient that they had the power under the constitution to make the apportionment as they have made it. For the wisdom, or unwisdom, of what they have done, within the limits of the powers conferred, they are answerable to the electors of the state and no one else.

Wilson, 134 Ohio St. 3d at 227, 981 S.E.2d at 821, *citing Voinovich v. Ferguson*, 63 Ohio St. 3d 198, 204.

Article XIX delegates to the general assembly the discretion to choose a reasonable interpretation. *See Wilson*, 134 Ohio St. 3d at 227, 981 S.E.2d at 821. Respondents Huffman and Cupp suggest that there may be several reasonable ways to interpret Article XIX, Section 1(C)(3)(a) to determine whether a plan "unduly" favors or disfavors a political party and its incumbents. For example, given that the general election of 2020 (including the subsequent special elections) resulted in the election of 12 Republicans and 4 Democrats, one reasonable interpretation of Article XIX, Section 1(C)(3)(a) would result in the creation of 12 districts that favored Republican incumbents and 4 that favored Democratic incumbents.[4]

from the general assembly's index (all federal statewide elections from 2012-2020) by using a different partisan index (all statewide partisan races, state and federal, from 2016-2020). (RPTS_0192). Dr. Chen's index not only differed from the index used by the State, it also differed from the index used by Relators' expert, Dr. Rodden, who used all partisan statewide elections from 2012-2020. (RPTS_0109-110). Regardless, even under Dr. Chen's report, 6 of the 15 districts in the 2021 Congressional Plan are competitive (assuming a range of +/- 5%) with two others being close to competitive. *See* RPTS_0194. Finally, while Dr. Chen contends that 12 of the 15 districts are Republican-leaning, RPTS_0196-97, such an outcome is not an outlier when there are 12 Republican incumbents. Under these circumstances, drawing 12 Republican-leaning congressional districts would not unduly favor or disfavor the existing incumbents of either party.

[4] Congressman Tim Ryan (CD 13) is not running for re-election, which means that only 3 Democratic incumbents remain as candidates in 2022. Any impact of not creating 4 Democratic leaning districts could have been offset by the general assembly's decision to double bunk 2 Republican incumbents in District 1, and can also be attributed to Ohio's loss of a congressional seat.

But, in 2021, the general assembly decided to adopt a different and equally reasonable standard for ensuring that its congressional district plan complies with Article XIX, Section 1(C)(3)(a). Instead of drawing safe seats for all incumbents, the general assembly instead elected to draw safe districts for Republican and Democratic incumbents in those areas of the state where it is impossible not to do so. This meant that a total of only 8 districts were drawn as safe seats for current incumbents. These 8 seats were not the result of political discretion or intent to favor or disfavor any party or its incumbents. Rather, these 8 seats merely reflect the reality of the residential voting patterns of the citizens of Ohio. (HC781-788; HC794-800).

The general assembly then decided to draw all of the remaining 7 congressional districts within a partisan range that several witnesses during the redistricting process described as competitive. (HC676-677; HC743-772). In short, the 2021 Congressional Plan creates safe districts where it is impossible not to do so because of the residential and voting patterns of Ohioans, and 7 remaining districts to be competitive. Respondents Huffman and Cupp submit that this interpretation of Article XIX, Section 1(C)(3)(a) has resulted in the most balanced and politically fair congressional plan in recent Ohio history.

Relators' interpretation of Article XIX, Section 1(C)(3)(a) would require this Court to mandate some measure of proportional representation, regardless of whether it is called "partisan bias", "mean/medium", or even an "efficiency gap".[5] All of these standards are based upon statewide percentages of voters for both of the major parties, which Relators claim should be used to intentionally gerrymander Democratic districts where any discretion can be exercised to achieve

[5] Chief Justice Roberts of the United States Supreme Court is especially suspicious of the efficiency gap method, calling it social science "gobbledygook". See p. 40 of https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_bpm1.pdf

an overall proportional share for each party. *See LWVO* Brief at pp. 27-28; *Adams* Brief at pp. 22-23; 36-39. This would result in intentional packing and cracking of Republican voters in any areas of the state where Ohio's geography and voter patterns do not dictate the outcome. (HC795).

This is not a reasonable interpretation of Article XIX, Section 1(C)(3)(a), especially given the fact that there is no provision in Article XIX even remotely similar to the provision in Article XI, Section 6(B) for general assembly district plans.[6] In fact, the omission of any similar provision in Article XIX was specifically approved of by the voters, even after the general election of 2016 that some allege disproportionately elected Republican members to Congress. It is not reasonable for the Court to judicially amend Article XIX to provide a "proportionality" standard when the general assembly and the voters of Ohio did not include such a standard in Article XIX. *See Northeast Ohio Regional Sewer Dist. v. Bath Twp.,* 144 Ohio St.3d 387, 2015-Ohio-2705 at ¶¶ 13-14 ("[I]t is well known that our duty is to give effect to the words used, not the delete words used or to insert words not used.") (internal quotations omitted); *Columbus–Suburban Coach Lines, Inc. v. Pub. Util. Comm*., 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969) (it is the Court's duty to "give effect to the words used, not to delete words used or to insert words not used"); *see also State ex rel. Carmean v. Hardin Cty. Bd. of Edn.,* 170 Ohio St. 415, 422, 165 N.E.2d 918 (1960) ("It is axiomatic in statutory construction that words are not inserted into an act without some purpose").

[6] See Article XI, Section 6 ("The Ohio redistricting commission shall attempt to draw a general assembly district plan that meets all of the following standards:…(B) The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.")

IV. Relators Fail to Provide a Judicially Manageable Standard for the General Assembly and the Court to Determine when a Plan "Unduly" Favors a Party or its Incumbents.

The problem, among many, with Relators' claim is that they have utterly failed to provide a judicially manageable standard under which this Court, and future general assemblies, can determine "how much partisan dominance [becomes unduly or] is too much." *Gill v. Whitford*, 138 S.Ct. 1916, 1928 (2018_ citing *League of Latin American Citizens* ("*LULAC*") *v. Perry* 548 U.S. 399, 419 (2006) (rejecting "asymmetry as a reliable measure of unconstitutional partisanship"). Relators' experts can submit simulated maps after the fact that provide exact proportionality by making exact proportionality one of their criteria for drawing maps. *See Wilson,* 134 Ohio St. 221, 234 ¶¶43-46 (failing to consider alternative plans offered by relators that "were not timely submitted to the apportionment board, but were instead submitted as evidence in a case filed…after the board approved its 2011 plan."). But Relators have not provided guidance on when a departure from asymmetry, or any other alleged measurements of so-called "partisan bias," crosses the line from legal to illegal. This is not surprising because no court has been able to decipher where that line exists. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). Moreover, Article XIX intentionally gives the general assembly the sole discretion to reasonably determine where a plan permissibly favors a party or its incumbents versus when a plan "unduly" favors a party or its incumbents.

The serious problems presented to a court when asked to enforce standards similar to those proposed by Relators, was explained by Justice Scalia in his opinion for the Court in *Vieth v. Jubelirer,* 541 U.S. 267 (2004). In that decision, Justice Scalia critiqued a test proposed by the plaintiffs that is analogous to the Relators' proposed interpretation of Article XIX, Section 1(C)(3)(a). *Id*. at 285. The "predominant motive" test proposed by the *Vieth* plaintiffs was "borrowed" from cases involving claims of racial gerrymanders. Ironically, it is well established

that claims of racial gerrymandering can be defeated by evidence that the plan complies with "traditional districting principles" including "compactness, contiguity, and respect for political subdivisions." *Vieth*, 541 U.S. 3355, citing *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (dissenting opinion of Stevens, J.). Regardless, the question remains - how does a court determine whether politics was the predominant motive underlying a state redistricting plan? Does it mean "that partisan intent must outweigh all other goals - contiguity, compactness, preservation of neighborhood, etc. - statewide?" *Vieth*, 541 U.S. at 285. Further, how is the "statewide" result to be determined? For example, "[i]f three fifths of the map's districts forgo the pursuit of partisan ends in favor of strictly observing political subdivision lines, and only two-fifths ignore those lines to disadvantage the plaintiffs, is the observance of political subdivisions the predominant motive between the two?" *Id.*

Moreover, a strong case can be made that if any plans were drawn to primarily favor a political party it was the plans proposed by the House and Senate Democrats. One indicia of partisan intent can be gleaned from an analysis of how a particular plan treats incumbents of the different parties. This includes the way incumbents are assigned to districts. *Larios v. Cox*, 300 F. Supp 2d 1320, 1329 (N.D. Ga.), *affirmed, Cox v. Larios*, 542 U.S. 947 (2004).

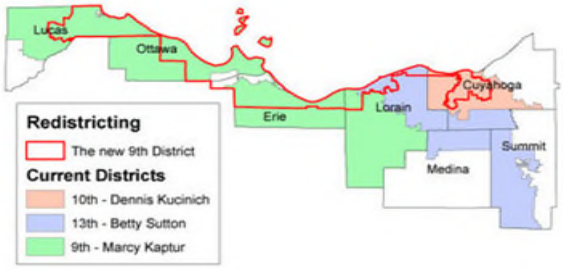
Under the 2021 Congressional Plan, the only incumbents seeking reelection in 2022 that are double bunked are the two Republicans living in Cincinnati. (HC825, HC807-808). Importantly, this double bunking only occurred because the 2021 Congressional Plan complies with the provisions of Article XIX requiring the general assembly to keep Cincinnati within a single congressional district. (HC219:3-8; 221:5-222:17). Therefore, the only incumbents double bunked were those required under the Ohio Constitution, even if doing so disfavored Republican incumbents. (HC219:3-8; 221:5-222:17).

This is in contrast to both the House and Senate Democratic plans, which were clearly drawn with the intent to unduly disfavor Republican incumbents. The House Democratic Plan double bunks 9 incumbents (8 Republicans and 1 Democrat) (HC835-836). Two sets of Republicans are placed in House Democrats' proposed District 1 and District 4. (HC835). The House Democratic plan also "triple bunks" 3 Republicans (6 total incumbent members) together in its proposed District 6. (HC808). Finally, the House Democratic plan places an incumbent Republican and Democrat into its proposed District 3. (HC808). Similarly, in the Senate Democratic Plan 8 incumbents are double bunked (7 Republicans and 1 Democrat). (HC808). Three pairs of Republicans (6 total incumbent members) are placed together in the Senate Democratic plan in its proposed Districts 5, 12, and 15 and an incumbent Republican and Democrat are placed together in its proposed District 1. (HC808; HC835-836). Such double bunking to the degree proposed by the House and Senate Democrats' Plans surely serves to "unduly" disfavor the Republican current incumbents under Article XIX, Section 1(C)(3)(a).

V. There is No Single Accepted way to Determine when a District is Competitive or When it is "Disproportionately" Republican or Democratic.

Relators' expert, Dr. Rodden, attacks the 2021 Congressional Plan on the grounds that it purportedly draws 11 Republican districts and only 3 Democratic districts. Dr Rodden particularly chastises the general assembly for transforming a formerly "safe" Democratic district (CD 9) to one that allegedly favors Republicans (RPTS_0050). It is ironic that Dr. Rodden would advocate for the 2011 version of Congressional District 9, the infamous "snake on the lake" district, which stretched along Lake Erie from Toledo to Cleveland. (HC822).[7]

[7] A key element of the former Ninth Congressional district, making it the "safe" Democratic district Dr. Rodden described, was the City of Toledo, which voted 69% for Joe Biden in 2020. With a population of just over 270,000, Toledo is 515,000 people short of what is needed for a 2021 Ohio Congressional district. Surrounded by Michigan to the north and very strong Republican areas to



Consisting of parts of five counties, this district would now likely violate Article XIX, Section 2 (B)(8), which requires the general assembly to attempt to include at least one whole county in every district other than districts drawn wholly within a single county. (HC830).[8] Indeed, witness after witness complained about the "snake on the lake". (HRG321, HRG474, HRG 501-502, GOVM0016-17)

In any case, all that Dr. Rodden's testimony shows is that different persons with different ideas can score districts in a different manner in order to support their ideas. Much of this depends on the elections that are used to score a district. (HC793). Political indices are useful but not perfect. (HC793). Every congressional race is different because of factors such as prior election experience of the candidates, professional background, gender, ties to the local community, campaign issues and the policies advocated by a candidate. (HC793). The actual results in a congressional election can therefore vary from as much as 5.8% to 15% as compared to a political index of prior statewide races. (HC793).

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the west and south, Toledo can only be made part of a "safe" or even leaning Democratic district by seeking to find more Democratic-leaning voters to the east in a district that would recreate the snake on the lake.

[8] The graphic above is from an article "Marcy Kaptur has homefield advantage in Democratic primary: Statistical Snapshot" originally published by Cleveland.com on January, 23, 2012 https://www.cleveland.com/datacentral/2012/01/marcy_kaptur_has_homefield_adv.html
The "new" 9th district references the 9th district in the 2011 Congressional Plan, not the 2021 Congressional Plan.

Dr. Rodden also has a different theory regarding the potential political outcomes in the districts established in the 2021 Congressional Plan. When using the competitiveness standard advocated for by witnesses during the legislative process, and ultimately used by the general assembly in SB 258 (+/- 4%), along with the elections results the general assembly used with SB258, 7 congressional districts are competitive. (HC826-827). Nevertheless, using that same plus or minus 4% standard, Dr. Rodden appears to score the 2021 Congressional Plan as having only 4 competitive districts. (RPTS_0050).[9] The problem with his analysis is that Dr. Rodden does not appear to report an index for the two Democratic plans so it is impossible to know how many competitive districts he believes might exist under them. Therefore, Dr. Rodden's criticism of SB 258 fails to contemplate that there were likely less competitive options than what the general assembly ultimately enacted in SB 258. Dr. Rodden and the general assembly also differ on the scoring of District 9. Under the index of federal elections used by the general assembly, that district leans Democratic with only a 47.77% Republican vote share. (HC827). Under the index of elections used by Dr. Rodden, District 9 has a Republican vote share of 50.3%. (RPTS_0050).

Respondents' expert, Dr. Barber, also agreed that the 2021 Congressional plan contains 7 competitive districts. Dr. Barber used two different standards to reach this conclusion. When Dr. Barber analyzed the districts using the same political index as the general assembly, he came up with the same outcomes. (HC810). Dr Barber also used a different test to determine competitiveness. He considered a district to be competitive if both a Democratic and Republican candidate had won a majority of the two-party vote share in any of the federal elections from 2012-

[9] Interestingly, Catherine Turcer of Fair Districts Ohio, who is affiliated with a group funding Relators, testified during a hearing that districts with a partisan range of +/- 5% would be competitive (HC676-677). Under this standard, Dr. Rodden would score the 2021 Congressional Plan as having 6 competitive districts. (RPTS_0050).

2020. Under this analysis, Dr. Barber determined that the 2021 Congressional Plan, the House Democratic Plan and the Senate Democratic plan all had 7 competitive districts. (HC809-811). In fact, Dr. Barber noted that, when looking at the 2018 general election results, Senator Sherrod Brown won the majority of the votes cast in 9 congressional districts established in the 2021 Congressional Plan, House Democratic Plan and Senate Democratic Plan. (HC804).

As noted by Dr. Barber, there are different ways to measure the competitiveness of a congressional district. Therefore, it is important to note that other independent sources, including Dave's Redistricting, have scored the 2021 Congressional Plan as having 6 to 7 competitive districts. (HC743-772). The general assembly acted well within its discretion by deciding to draw competitive congressional districts anywhere in the state where it is possible to make such districts, and the index used by the general assembly was just as reasonable, if not more, than any index proposed by Dr. Rodden or any other expert.

VI. Mandated Statewide Strict Proportional Representation Under the Circumstances of this Case may Violate the Fourteenth Amendment of the United States Constitution.

Relators continue to argue that the general assembly is required to adopt a congressional district plan with proportionality to the statewide preferences of the Ohio voters, without regard for the text of Article XIX of the Ohio Constitution. *See LWVO* Brief at pp. 27-28, *Adams* Brief at pp.22-23; 36-39. As discussed *infra* due to Ohio's geography and residential voting patterns, SB 258, the House Democrats' Plan and the Senate Democrats' Plan all align on the fact that 8 of Ohio's 15 seats had to be drawn as safe seats for either Republicans or Democrats, and that only 7 districts could be drawn as either competitive or to favor or disfavor a political party. Therefore the "proportionality" requirement espoused by Relators can only be achieved through the systematic destruction of Republican leaning districts in only the districts where political

discretion may be exercised to determine their political lean. Relators' arguments raise several issues under the Fourteenth Amendment of the Constitution.

Partisan gerrymandering claims, including this case, "rest on an instinct that groups with a certain level of political support enjoy a commensurate level of political power." *Rucho*, 139 S. Ct. at 2499. But there is no precedent, including in this case, to require "statewide elections for representatives along party lines." *Davis v. Bandemer*, 478 U.S. 109, 159 (1986). Because it is impossible to identify a judicially manageable standard distinguishing fair maps from unfair maps, "[p]artisan gerrymandering claims inevitably sound in a desire for proportional representation." *Rucho*, 139 S. Ct. at 2499. The United States Supreme Court has clearly rejected any argument that the Equal Protection Clause requires states to provide proportional representation "or to come as nearly as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote may be." *Id., citing Bandemer*, 478 U.S. at 130 (O'Connor, J., concurring in judgment), *Mobile v. Bolden*, 446 U.S. 55, 75-76 (1980) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organizations").

While the federal constitution may not require proportional representation of the major political parties, United States Supreme Court precedent casts doubt on the constitutionality of mandated "proportional representation," particularly under the facts of this case. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court rejected claims brought by the Chairman of Connecticut's Republican Party that a legislative plan consisting of single member districts was drawn in a manner to ensure that the legislature's intentional decision to draw districts to provide "rough" proportionality violated the Fourteenth Amendment representation for the two major

parties. The Court rejected plaintiff's claim on the grounds that "[p]olitics and political considerations are inseparable from districting and apportionment." *Id*. at 753.

The next time the United States Supreme Court considered proportionality was in *Bandemer*. There the Court dismissed a claim brought by the Indiana Democratic Party that argued that a districting plan enacted by the majority Republican legislature violated the Fourteenth Amendment. By a plurality opinion, the Court concluded that the plaintiffs had not stated a claim but established a framework under which future plaintiffs might challenge districting plans on the grounds of partisan gerrymandering. *Bandemer,* 478 U.S. at 115-143.

Justice O'Connor concurred in the judgment in an opinion joined by Chief Justice Burger, holding that claims for political gerrymandering are nonjusticiable. *Id.* at 144-161. Justice O'Connor correctly forecasted that the "nebulous" test adopted by the plurality opinion would lead to an argument that political parties are entitled to proportional representation. *Id.* at 145. Justice O'Connor stated that members "of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims, if members of the major political parties are protected from vote dilution by the Equal Protection Clause." *Id.* at 147. Justice O'Connor also opined that a constitutional preference for proportionality would call the legitimacy of districting itself into question. *Id.* at 159. This was only because voters in groups who are less evenly distributed throughout the state benefit from a system requiring statewide proportionality at the expense of groups who are more evenly dispersed. *Id.*

Even assuming Article XIX requires some form of proportionality in the representation of the major political parties in the general assembly (it does not), the first question, as highlighted by Justice O'Connor, would involve the State's failure to grant equal rights of proportional representation for other political groups. Relators' arguments on fairness that requiring

"proportional representation" be based upon vote shares received only by the two major parties, excludes other parties or groups from equal consideration. Under Relators' interpretation of Article XIX, proportionality trumps geography. Thus, in the remaining areas of the state where there is any discretion on the political leanings of geographically based congressional districts, Relators want the general assembly to intentionally discriminate against Republican voters in order to make up for the geographic areas of the state where Democrats are unlikely to be elected. Why are only Democrats, and not other groups, entitled to play the proportional representation card?

Just weeks ago, the Wisconsin Supreme Court weighed in on this absurd idea, which is the logical conclusion of the arguments of both sets of Relators here:

> Perhaps the easiest way to see the flaw in proportional party representation is to consider third party candidates. Constitutional law does not privilege the "major" parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor parties. If Libertarian Party candidates receive approximately five percent of the statewide vote, they will likely lose every election; no one deems this result unconstitutional. The populace that voted for Libertarians is scattered throughout the state, thereby depriving them of any real voting power as a bloc, regardless of how lines are drawn. Only meandering lines, which could be considered a gerrymander in their own right, could give the Libertarians (or any other minor party) a chance. Proportional partisan representation would require assigning each third party a "fair" share of representatives (while denying independents any allocation whatsoever), but doing so would in turn require ignoring redistricting principles explicitly codified in the Wisconsin Constitution.

Johnson v. Wisconsin Elections Comm'n, N.W.2d___, 2021 WL 5578395, at *11 (Nov. 30, 2021).

Next, in any case of alleged vote dilution, whether or not parties can state claims for cognizable injuries, there can be no dispute that the way a district is drawn can injure a particular voter's right to receive equal treatment. *Gill,* 138 S.Ct. at 1930. For example, in *Cox v. Larios*, a districting plan intended to maximize the voting strength of Democrats located in cities and rural areas at the expense of Republican voters in suburban areas, was declared unconstitutional under the

Fourteenth Amendment. 542 U.S. 947 (2004). The legislature in *Larios* used two methods to accomplish its goal of preferential treatment of Democratic voters at the expense of Republicans. The most obvious tactic used by Democrats in *Larios,* just as the House and Senate Democrats did in their plant, was to double bunk more Republican incumbents than Democrats. *Id.* The second tactic was to systematically under populate Democratic performing districts located in Georgia's most urban areas while overpopulating Republican performing districts located in more suburban areas of Georgia. *Id.* at 947-48.

The intent and the effect of this unequal standard for populating districts was to pack Republicans in districts way beyond any percentage that would give them an equal opportunity to elect their candidate of choice, and thereby reducing the number of Republicans that could be assigned to other districts. The corollary intent and effect were also to maximize the voting strength of Democrats by reducing the population in Democratic districts in order to spread Democratic voters into other districts and thereby increase the number of Democratic performing districts. *Id.* at 948.[10] The ultimate holding was that the Equal Protection Clause was violated by the legislature's systematic application of different and discriminatory standards to satisfy the constitutional requirement that districts contain equal population. *Id.* at 948-49. Overpopulating Republican districts had the intent and effect of diminishing the voting rights of Republicans while under populating districts had the intent and effect of maximizing Democrats at the expense of Republicans. *Id.* at 948.

Relators proposed proportional requirements raise constitutional issues that are similar to the violations addressed in *Larios*. Relators ask this Court to mandate that the general assembly draw

[10] Both of the congressional district plans authored by the House and Senate Democrats crack and pack Republican voters to stretch Democratic voting strength in order to create more Democratic leaning districts.

all districts where there can be discretion as Democratic districts. To be sure, Democrat map drawers complied with this theory, drawing significantly more Democratic seats, while gerrymandering to pack and crack suburban Republican voters and submerge them in a Democratic district. (HC795). In contrast, in an attempt to comply with Article XIX, the general assembly used its discretion to draw districts that are competitive. Competitive districts are what the people of Ohio demanded in Article XIX—and that is exactly what the 2021 Congressional Plan has given them.

CONCLUSION

For the foregoing reasons, Respondents request that this action be dismissed with prejudice.

Respectfully submitted this the 17th day of December, 2021.

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