IN THE SUPREME COURT OF OHIO

Regina C. Adams, *et al.*, ***Relators*,** ***v.*** **Governor Mike DeWine, *et al.*,** ***Respondents*.**	**Case No. 2021-1428** **Original Action Filed Pursuant to Ohio Const., Art. XIX, Sec. 3(A)**

RELATORS' REPLY BRIEF

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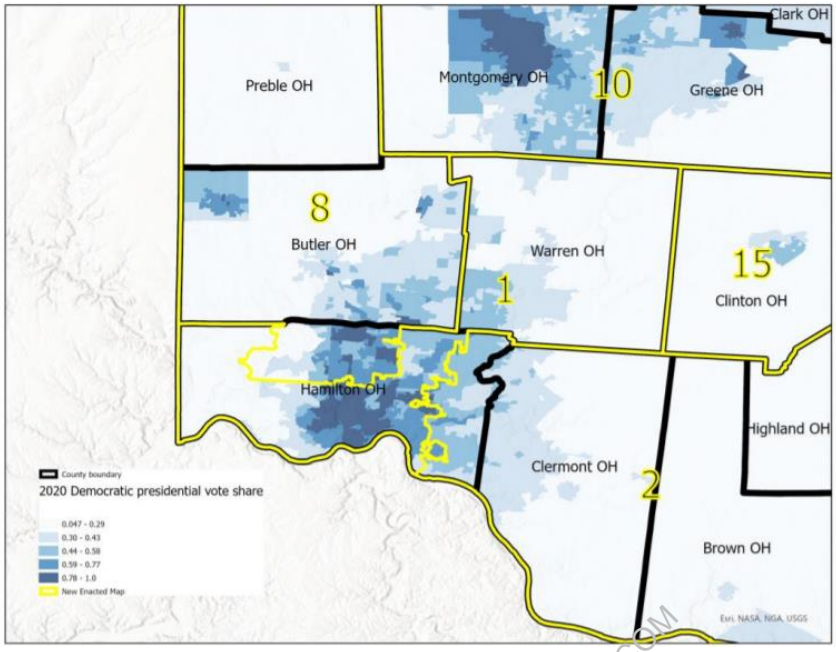
I. Introduction

Respondents Senate President Huffman and House Speaker Cupp ("Respondents") do not seem to believe that Ohioans meant it when they amended the Constitution to preclude the General Assembly from unduly favoring a political party or its incumbents. In response to clear evidence that they violated this edict in pushing the 2021 congressional plan (the "2021 Plan") through on a party-line vote, Respondents repeat their now tiresome refrain that the Court is incapable of doing what it is empowered to do: interpret and give effect to the plain language of the Ohio Constitution. Respondents make a mockery of the safeguards that they initially advertised as protection against the sort of legislative misbehavior at issue here, arguing that it must be left to *Respondents themselves* to decide whether the 2021 Plan unduly favors Republicans. But even their defense of the 2021 Plan admits that is exactly what it does: They say that because Republicans consistently won 12 seats under the 2011 Plan, *which a federal court held was an unconstitutional partisan gerrymander*, Adams Br. 1 n.1, it was reasonable to again create "12 districts that favored Republican incumbents." Respondents Br. 17.

The lines that the 2021 Plan draws further evidence this unavoidable truth. Respondents' brief defending the 2021 Plan devotes barely any space to discussing (or attempting to defend) those lines. This is understandable given what the 2021 Plan accomplished. Take, for example, Hamilton County. Relators showed through expert testimony, including simulated maps, that the bizarre contours of District 1 are drawn to unduly favor the Republican Party and its incumbent in that district. In fact, only *1.5%* of Dr. Chen's 1,000 computer-simulated maps split Hamilton County across three districts, as the 2021 Plan does. (Chen. Aff. fig. 13.) Respondents offer no response to this evidence, even pretending that Relators' undue-splits claim can be dismissed out of hand. There is nothing they could have said. District 1 speaks for itself:



(Rodden Aff. fig. 9 ("Partisanship and the Enacted Plan's Districts, Hamilton County and Surroundings").) Only the pursuit of partisan gain explains this district.

Relators showed that the map-drawers deployed the same "packing and cracking" tactics used in Hamilton County in Democratic-leaning areas across the state. But Respondents offer no response to that evidence either. Again, there is nothing they could have said. Instead, they retreat to claims of legislative deference, inapposite federal cases, and other attempts to obfuscate the simple facts: Ohio voters adopted a prohibition on partisan gerrymandering, it is the Court's duty to apply that prohibition, and the record evidence unmistakably shows that it was violated here.

To put it simply, the 2021 Plan is the partisan gerrymander it appears to be. The Court should declare it invalid and order that a remedial plan be drawn under Article XIX.

II. Argument

Respondents assert the Court has no role to play here; that it must defer unblinkingly to the General Assembly's response to the 2018 amendments, which was to ignore them and enact a 2021 Plan likely to elect 12 Republicans to Congress, just like the 2011 Plan. Notably, the 2011 Plan resulted in Ohioans saying enough was enough and enacting constitutional safeguards against

future partisan gerrymandering—the very safeguards Respondents now ask the Court to pretend do not exist. Voters did not adopt Article XIX to calcify the partisan outcomes of the 2011 Plan. They enacted Article XIX to prevent—through judicial intervention if necessary—another partisan gerrymander, i.e., a plan that unduly favors or disfavors a political party or its incumbents.

A. The 2021 Plan violates Article XIX, Section 1(C)(3)(a).

1. Section 1(C)(3)(a) sets forth a clear and judicially manageable standard.

Realizing at the outset that they cannot hope to defend the 2021 Plan's compliance with Article XIX, Respondents opt to go to war with the Ohio Constitution itself. As their primary line of attack, Respondents suggest that Section 1(C)(3)(a)'s prohibition of plans that unduly favor or disfavor one party or its incumbents fails to supply a judicially manageable standard. Respondents Br. 20. Respondents offer two muddled versions of this argument, neither of which have any merit.

First, Respondents cite to federal cases applying the political question doctrine to partisan gerrymandering claims brought under the U.S. Constitution. Respondents Br. 20 (citing, for example, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Vieth v. Jubelirer*, 541 U.S. 267 (2004)). But *Rucho* itself acknowledges both that state courts have a key role to play in remedying partisan gerrymandering and that state constitutional provisions, like Article XIX, can supply judicially manageable standards. *See Rucho*, 139 S. Ct. at 2507 (noting that states "are actively addressing the issue of partisan gerrymandering," as demonstrated by the Florida Supreme Court invalidating a congressional districting plan under a Florida constitutional provision that, similar to Ohio's, provides that no plan "shall be drawn with the intent to favor or disfavor a political party"). Thus, the cases upon which Respondents rely do not support their position.

Second, Respondents demand that the Court cede unreviewable discretion to the General Assembly. They argue that "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." Respondents Br. 20. Not only is there nothing in the text or history of the provision that supports this astonishingly brazen position, its mere suggestion evinces its absurdity. Under Respondents' reading, judicial review of Section 1(C)(3)(a) claims would amount to nothing more rigorous than the Court asking the General Assembly, "Did you unduly favor the majority party or its incumbents?" So long as the General Assembly assures the Court, "No, we looked into it and concluded we did a good job," Respondents would demand that the Court simply shrug its shoulders and end the judicial inquiry. To describe Respondents' position is to refute it. Article XIX was adopted after the General Assembly gerrymandered the congressional map in 2011. It owes its very existence to voters' desire to ensure that no map like the 2011 Plan would ever be enacted again. If the voters trusted the General Assembly to do the right thing and resist the temptation of partisan gerrymandering, there would have been no need for this unprecedented constitutional overhaul of congressional redistricting. The Court should reject Respondents' baseless and nonsensical claim that they, not this Court, have authority to interpret the Ohio Constitution under these reforms.

And there *is* a judicially manageable standard to govern Respondents' partisan gerrymandering claim. We know this because Ohioans *wrote one into the Constitution*: "The general assembly *shall not* pass a plan that unduly favors or disfavors a political party or its incumbents." Ohio Constitution, Article XIX, Section 1(C)(3)(a) (emphasis added). Respondents and Relators agree that "undue" means "excessive or unwarranted." Respondents Br. 13; Adams Br. 36. Thus, a plan violates Section 1(C)(3)(a) if it (1) excessively or (2) unwarrantedly, favors or disfavors a political party or its incumbents. Courts can, and often do, give meaning to terms like "unduly." The Anglo-American legal tradition is replete with examples of courts defining terms ranging from "excessive force," *Kingsley v. Hendrickson*, 576 U.S. 389, 391-92 (2015), to

"reasonable person," *Cleveland v. Oles*, 152 Ohio St.3d 1, 2017-Ohio-5834, 92 N.E.3d 810, ¶ 33, to "chicken," *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, 190 F.Supp. 116 (S.D.N.Y. 1960) (Friendly, J.). The Court need not declare itself stumped by the word "unduly."

Ohioans gave the Court a rule of decision to apply in Section 1(C)(3)(a). The Court can readily apply these standards to the facts of this case. Other state courts already have. *See, e.g.*, *League of Women Voters of Pennsylvania v. Commonwealth (LWV PA)*, 178 A.3d 737, 817 (Pa. 2018); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 at *127 (N.C.Super. Sep. 3, 2019); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015).

2. The 2021 Plan unwarrantedly and excessively favors the Republican Party.

First, a plan unduly favors a political party or its incumbents if such favoritism is unwarranted. Favoritism is unwarranted when it is not justifiable by compliance with other Article XIX requirements. At least one court has already successfully applied an analogous standard to its own state constitution. In *LWV PA*, the Pennsylvania Supreme Court determined that the congressional plan passed by that state's legislature violated the Free and Equal Elections clause because it pursued "partisan political advantage" at the expense of "neutral [redistricting] criteria" like compactness, contiguity, and avoiding subdivision splits. 178 A.3d at 817; *see also Common Cause*, 2019 WL 4569584, at *112 (applying a similar standard under the North Carolina Constitution). The "unwarranted" test asks the same question in different terms: Is the partisan imbalance of the map explainable by other redistricting criteria in the Ohio Constitution?

This Court can easily answer that question, especially as it pertains to the 2021 Plan. As discussed in Relators' opening brief, the 2021 Plan favors the Republican Party on every single widely accepted metric for partisan fairness.[1] However, such a significant partisan skew is *not*

[1] Indeed, Respondents do not appear to dispute this and note only that it is not unconstitutional to favor one party over another, so long as such favoritism is not "undue." Respondents Br. 16.

necessary in order to meet any neutral redistricting objective, such as preventing subdivision splits or drawing compact districts. Respondents do not dispute that the districts in the 2021 Plan are less compact than alternative plans submitted to the General Assembly; nor do they dispute that the 2021 Plan is comparable to alternative proposals on the number of subdivision splits. *See* Respondents Br. 9-10. They offer no express justification for the 2021 Plan's unmistakable Republican slant. The one potential (oblique) justification offered by Respondents is their desire to prevent the double-bunking of Republican incumbents. Respondents Br. 11-12. But this cannot justify the 2021 Plan's partisan bias, as such an interest roughly equates to a need to preserve the 2011 gerrymander. If Article XIX is to mean anything, it cannot be read as a mandate to preserve the 2011 status quo. The partisan favoritism of the 2021 Plan is therefore unwarranted.

Second, the 2021 Plan's favoritism is "excessive." To determine whether a plan's favoritism is excessive, courts can consider a host of metrics. One is the plan's departure from partisan proportionality. That is, when considering whether a plan unduly favors a party, a good starting point is to ask if the parties' statewide vote share bears any resemblance to the likely partisan breakdown of the plan at issue. If not, it suggests that district lines may have been warped to skew electoral outcomes in favor of one political party. For example, if the 2021 Plan is likely to allot 80% of the seats to Republican candidates and Republicans have garnered only 53% of the statewide votes, it suggests that that the 2021 Plan excessively favors the Republican Party.

Respondents spill much ink attacking the relevance of proportionality in the congressional redistricting context. They miss the point. To be sure, there is different language in Article XI (requiring the Ohio Redistricting Commission to attempt to draw proportional legislative maps) than in Article XIX (barring the General Assembly from "unduly favor[ing] or disfavor[ing]" a party or its incumbents). The significance of this difference, however, is lost on Respondents. Far

from barring consideration of proportionality, Article XIX's broad "unduly favor[] or disfavor[]" language merely opens the door to other metrics (beyond proportionality) that can be considered as *evidence* that a plan excessively favors one party. These include the efficiency gap, the lopsided margins measure, electoral bias, and others. (*See* Rodden Aff. ¶ 42-69; Chen Aff. ¶ 37-51.) Respondents do not dispute that each metric evinces that the 2021 Plan is excessively partisan.

Importantly, the 2021 Plan's partisan favoritism cannot be ascribed to Ohio's geography. As Respondents' expert Dr. Barber acknowledges in his report, while many Democratic voters in Ohio are clustered around densely populated urban areas, this phenomenon "is not unique to Ohio and is occurring throughout the United States with some exceptions." (Barber Aff. 7, HC782.) But the 2021 Plan's partisan lean is an outlier on multiple metrics even compared to other states. As Dr. Rodden concluded, when 2016 presidential election data is considered, "[t]he efficiency gap associated with the [2021] Plan is larger than those observed in Colorado, Florida, Missouri, Arizona, Virginia, Indiana, Minnesota, Michigan, Georgia, and Wisconsin, surpassed only by Pennsylvania's notorious (and ultimately invalidated) map." (Rodden Aff. ¶ 62.)

Further, Dr. Rodden describes many ways the 2021 Plan *departs* from the placement of district lines that Ohio's geography would suggest. (*See id.* ¶ 83-98.) Respondents offer no response. Moreover, when compared to Dr. Chen's simulated plans, the outlier status of the 2021 Plan is even more stark: 99.5% of Dr. Chen's 1,000 simulated plans had a lower efficiency gap than the 2021 Plan. (Chen Aff. ¶ 41.) Dr. Chen explains that "[t]his comparison reveals that the significant level of Republican bias exhibited by the [2021] Plan cannot be explained alone by Ohio's political geography or the redistricting criteria in the Ohio Constitution." (*Id.*)

Respondents' efforts to undermine Dr. Chen's analysis backfire dramatically. They complain that Dr. Chen prohibited his simulated maps from splitting Cuyahoga and Hamilton

Counties more than once. *See* Respondents Br. 16 n.3. That is incorrect. Instead, Dr. Chen programmed his simulations to minimize splits of counties, as Article XIX, Section 1(C)(3)(b) demands. (Chen Aff. ¶ 14.) Any difference between the number of splits in the 2021 Plan and the simulated maps is simply the *neutral result* of Dr. Chen's approach. This distinction is clear on the face of Dr. Chen's report. (*See, e.g., id.* fig. 13 (showing that only 1.5% of the simulated maps *did* split Hamilton County twice into three districts).) Dr. Chen's simulated maps are useful precisely because they comply with Article XIX's nonpartisan criteria without putting a thumb on the scale for any partisan outcome or particular split. In doing so, they show that the 2021 Plan is an extreme outlier—on both its partisan characteristics and the number of times it splits certain counties.[2]

In any event, Dr. Imai produced his own 5,000 simulated maps and similarly concluded that the 2021 Plan "is a clear statistical outlier, favoring the Republican Party." (Imai Aff. ¶ 36, ADAMS_00072-73.) Respondents do not attempt to dispute Dr. Imai's analysis, which shows that his average simulated map has nearly three fewer Republican seats than the 2021 Plan. (*Id.* ¶ 26.)

These data show that the 2021 Plan's partisan favoritism is excessive. Whether the Court finds the Plan's favoring of the Republican Party and its incumbents is excessive, unwarranted, or both, it is undeniable that the 2021 Plan unduly favors the Republican party and its incumbents.

[2] Respondents wrongly attempt to discount Dr. Chen's simulations by noting that this Court in *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 47, did not rely on an expert's alternative map submitted in litigation to assess the validity of the state legislative apportionment plan at issue. Respondents Br. 16 n.3. But Dr. Chen did not submit one or two alternative maps to show that the General Assembly could have drawn a "better" map; he ran a computer simulation to generate 1,000 maps to demonstrate the range of possible outcomes, in order to evaluate the 2021 Plan's partisan bias. (Chen Aff. ¶ 9-13.) Dr. Chen has employed similar analyses in other states, and numerous courts have adopted his conclusions. *See, e.g., Common Cause*, 2019 WL 4569584, at *18; *LWV PA*, 178 A.3d at 818-20.

3. A congressional map drawn to comply with Section 1(C)(3)(a) would not unduly favor Democrats.

Respondents also argue, confusingly, that enforcing Section 1(C)(3)(a) will somehow lead to intentionally gerrymandering districts in Democrats' favor. Respondents Br. 18-19, 28. Not so.

Section 1(C)(3)(a) requires that the entire congressional *plan* not unduly favor or disfavor a party or its incumbents—not that each *district* may not favor one party over the other. And the unsurprising reality is that in areas of the state where many voters favor Democrats, districts drawn in a neutral fashion are likely to favor Democrats, just as is true for Republicans in parts of Ohio where many voters favor Republicans. (*See* Rodden Aff. ¶ 83-98; Imai Aff. ¶ 37-44.)

Respondents' assertion that enforcing a prohibition against unduly favoring either political party would somehow *mandate* gerrymandering in favor of Democrats in "areas of the state where Ohio's geography and voter patterns do not dictate the outcome" is ultimately just a complaint that they do not like how the undue partisanship requirement constrains their ability to wring political advantage from the map. Respondents Br. 19. Nowhere do Relators suggest (as Respondents incorrectly claim) that "proportionality trumps geography." *Id.* at 28. And, in fact, Relators' evidence and arguments expressly account for geography. *See* Adams Br. 25-34, 39-40. A more appropriate adage is that, in Respondents' view, "partisan advantage trumps geography."

But in the end, there is no more persuasive rebuttal to Respondents' claim that enforcing Section 1(C)(3)(a)'s "unduly favor" standard requires a Democratic gerrymander than simply looking at the 2021 Plan they champion. Districts drawn in the alternative plans submitted to the General Assembly (all of which draw more Democratic districts) are actually more compact than those in the 2021 Plan. (Rodden Aff. ¶ 102 & tbl.7.) It is *Respondents* who trisected Hamilton County and drew a narrow corridor to Warren County for patently partisan purposes. (*Id.* ¶ 84.) It is *Respondents* who drew a visibly noncompact District 15 ringing Columbus to separate the city's

Democratic-leaning suburbs into much more Republican-leaning outlying areas. (*Id.* ¶ 91; *see also* Adams Supp. 5-8.). It is *Respondents* who painstakingly carved up northeastern Ohio, including by using single census block strips to connect contorted districts. (Rodden Aff. ¶ 95.) And it is *Respondents* who drew District 5 to snake 180 miles from the Indiana border to Lorain County, subsuming the Democratic-leaning cities in Lorain County and splitting those cities from Toledo, to prevent the emergence of a naturally forming Democratic-favoring district. (*Id.* ¶ 97-98.)[3]

It is not easy to draw a map in which 80% of the districts favor Republicans in a state where 47% of the electorate has voted for Democrats in recent years. Geography does not explain the gross partisan skew of the 2021 Plan. Rather, given Ohio's political geography, *not* gerrymandering the state naturally results in the emergence of more Democratic-favoring districts.

4. The 2021 Plan unduly favors Republican incumbents.

Respondents' argument about the treatment of incumbents in the 2021 Plan relies on misleading facts, distractions, and a misconception of the relevant constitutional requirement. First, Respondents disingenuously repeat that they double-bunked two Republican incumbents, Respondents Br. 21, even though one of those incumbents has announced his intent to run in a separate district in 2022 (Compl. Ex. 38).[4] Second, Respondents fixate on the treatment of incumbents in the Democratic Caucus Plans, which are not before this Court. Respondents Br. 22.

[3] Respondents, who otherwise do not try to rebut Dr. Rodden's analysis, express shock that Dr. Rodden would "advocate for the 2011 version of [] District 9." Respondents Br. 22. It is bizarre that Respondents' sole attempt to undermine Dr. Rodden is by critiquing his supposed support of a district in the 2011 Plan—a plan that Respondents repeatedly rely upon themselves to justify their 2021 Plan, *see id.* at 15, 17. But Respondents also mischaracterize Dr. Rodden's analysis. Dr. Rodden notes that alternative maps' configurations of a Toledo-based district, which comply with Article XIX and lean Democratic, are (in all but one instance) *more* compact than the 2021 Plan's configuration. (Rodden Aff. ¶ 98.)

[4] Respondents also take pains to note that Democratic Congressman Ryan is currently not running for re-election, Respondents Br. 17 n.4, but they fail to mention that Republican Congressman Gonzalez is also not running for re-election (Rodden Aff. ¶ 70).

Third, and relatedly, Respondents characterize any double-bunking of Republican incumbents elected under the gerrymandered 2011 Plan as unduly disfavoring Republican incumbents. Respondents Br. 17 n.3, 21. No party to this case disputes that the 2011 Plan was a partisan gerrymander where district lines were drawn to advance Republican political interests. The three-judge panel in *Ohio A. Philip Randolph Institute v. Householder* detailed that fact in exhaustive detail. 373 F.Supp.3d 978, 1109-36 (S.D. Ohio 2019). The current incumbents did not win their districts in the state of nature; they were elected under that same gerrymander. *See* OEC Amicus Br. 19-20. It may well be that drawing a congressional plan in compliance with the new Article XIX standards, and thereby undoing the 2011 gerrymander, will double-bunk some incumbents. But by that same token, going to great lengths to avoid such pairings—as Respondents did here—attempts to preserve ill-gotten gains and flouts the mandate demanded by Ohio voters.

That mandate is now enshrined in the state's constitution, which prohibits "a plan that unduly favors or disfavors a political party or its incumbents." Ohio Constitution, Article XIX, Section 1(C)(3)(a). While some states discourage the pairing of incumbents in drawing districts, *see, e.g.*, Kansas Legis. Rsch. Dep't, *Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting*, (2012), available at http://kslegislature.org/li_2012/b2011_12/committees/misc/ctte_h_redist_1_20120109_01_other.pdf (last accessed Dec. 20, 2021) ("Contests between incumbent members of the Legislature or the State Board of Education will be avoided whenever possible."), Ohio does not. In fact, Ohio's incumbency provision explicitly recognizes that a map might, as here, favor incumbents *too much*. The difference is meaningful and must be given effect.[5] *See Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 144 Ohio St.3d

[5] The fact that the map-drawer Ray DiRossi "was tasked with avoiding the pairing of incumbents," Respondents Br. 8, provides further evidence that Respondents misunderstood the constitutional mandate, which includes no such requirement.

387, 2015-Ohio-3705 at ¶ 13-14 ("It is axiomatic in statutory construction that words are not inserted into an act without some purpose.").

Finally, favoring or disfavoring incumbents is about more than double-bunking. Respondents' success in keeping all Republican incumbents in Republican-favoring districts while putting a Democratic incumbent (Congresswoman Kaptur) in a Republican-favoring district clearly shows that Respondents unduly favored Republican incumbents while disfavoring Democratic incumbents, in direct violation of Article XIX.

5. Respondents' focus on "competitive" districts is a distraction.

As set out above, by any measure, the 2021 Plan unduly favors the Republican Party and its incumbents. Respondents' main defense is that the Court must defer to their own judgment of what is "undue." Their fallback defense is the 2021 Plan passes constitutional muster because, by their telling, the 2021 Plan was drawn to be "highly competitive" and consistent with Article XIX. *See* Respondents Br. 1. This is beside the point as a matter of law and wrong as a matter of fact.

a. Section 1(C)(3)(a) does not mandate "competitive" districts.

Respondents spend pages defending the competitiveness of the 2021 Plan, apparently to suggest that this Court ought to find that a "competitive" plan cannot "unduly favor or disfavor" any political party. Despite Respondents' bald assertion that "[c]ompetitive districts are what the people of Ohio demanded in Article XIX," Respondents Br. 30, this interpretation finds no basis in Article XIX's text or history. First and foremost, Respondents agree with Relators that "unduly," as used in Section 1(C)(3)(a), means "excessive" or "unwarranted." *Id.* at 13. Section 1(C)(3)(a) thus prohibits a plan that excessively or unwarrantedly favors a party or its incumbents—regardless of whether the plan has competitive districts. *See supra* Part II.A.1.

Second, the word "competitive" does not appear in Section 1(C)(3)(a) at all. This omission is telling: The people of Ohio chose to prohibit undue splits and undue partisanship, but they did

not mandate "competitiveness." *See Northeast Ohio Regional Sewer Dist.* at ¶ 13 (when interpreting statutes, it is the court's duty to "give effect to the words used, not to delete words used or to insert words not used"). By contrast, several states that have adopted anti-gerrymandering provisions have required "competitive" districts and distinguished competitiveness from partisan fairness. *See* Adams Br. 49-50. That these constitutions mention both concepts separately underscores that partisan fairness and competitiveness are distinct.

And, in practice, partisan fairness and competitiveness can be meaningfully different. As Dr. Rodden explains, the most effective partisan gerrymandering strategy is to create as many as possible so-called "competitive" districts—that is, districts where the party in power is favored, but by as slim a margin as necessary to win. (Rodden Aff. ¶ 81.) In political-science terms, this increases the "efficiency" of the majority party's votes: By packing and cracking voters of the opposing party and keeping majority power sufficient to secure narrow victories in more districts, the majority party decreases its own "surplus" or "wasted" votes. (*Id.* ¶ 56, 81.)

That is precisely the strategy Respondents deployed here. Indeed, even considering Respondents' own list of "competitive" districts, five of the seven lean Republican, and three of those five are at the upper limit of Respondents' concededly self-serving and manipulated competitiveness range. (DIROSSI_005603.) Overall, the 2021 Plan creates more Republican-favoring competitive districts than the average simulated plan, and these "competitive districts" come at the expense of Democratic-favoring safe or competitive districts. (Chen Aff. ¶ 92; *see also id.* ¶ 85-91 & fig. 19.) This is textbook gerrymandering.

b. The 2021 Plan does not actually draw "competitive" districts.

As described above, whether a plan has some "competitive" districts is beside the point. The record also shows that Respondents' assertion that the 2021 Plan has seven competitive districts is misleading.

As Respondents tell it, the 2021 Plan is "the most balanced and politically fair congressional plan in recent Ohio history." Respondents Br. 18. One then wonders why it was passed in the way it was—rushed through in November, over the opposition of all Democratic representatives. Adams Br. 15-17. The record also shows that the 2021 Plan was drawn with hyper-focus on partisan performance. Astonishingly, Respondents claim in a single breath both that map-drawer DiRossi's access to partisan election results "was not very consequential in the actual drawing of districts" and that he used partisan data to make districts "competitive" under Respondents' definition. Respondents Br. 8. Respondents cannot get around the fact that partisan considerations dominated the map-drawing process.[6]

Respondents' own discussion of "competitiveness" only serves to further illustrate that this is a convenient talking point rather than sound analysis of the 2021 Plan's characteristics. Respondents do not dispute that DiRossi privately assessed the anticipated partisan performance of the 2021 Plan using various partisan indices and then simply cherrypicked for public consumption the data that would inflate the "competitiveness" of the 2021 Plan. *See* Respondents Br. 6-8.[7] DiRossi offered no empirical evidence to support either his decision to use a federal-only

[6] Respondents note that DiRossi was instructed to create competitive districts, Respondents Br. 7, but do not mention that DiRossi's counsel asserted "legislative privilege" over virtually any other discussion with legislators and staffers concerning congressional redistricting, including about what instructions DiRossi received. *See* Adams Br. 42 n.7. As a result, there is no evidence in the record—direct or circumstantial—that supports Respondents' assertion. In contrast, Relators have presented a mountain of evidence from which the only rational conclusion that can be drawn is that the 2021 Plan was intended to favor the Republican Party and its incumbents.

[7] Respondents appear to take issue with the partisan index that Dr. Chen and Dr. Rodden use (the "2016-2020 Statewide Election Composite"). Respondents Br. 16-17 n.3. However, it is undisputed that DiRossi, too, considered the 2016-2020 Statewide Election Composite to score districts, even though the General Assembly publicly relied on 2012-2020 federal election results only. (*See* DIROSSI_008948; *see also* DIROSSI_005603-04, 005607.) And Dr. Rodden explained why the 2016-2020 Statewide Election Composite more accurately predicts congressional election results than the federal one Respondents prefer. *See* Adams Br. 18 (citing Rodden Aff. ¶ 25-26).

index or to use a 46-54 range to define districts as "competitive." (Adams Br. 19; DiRossi Aff. ¶ 9-15). Dr. Rodden and Dr. Warshaw both explain in great detail why DiRossi's approach is not reliable, pointing to the low correlation between federal election results and congressional results in would-be competitive districts, the substantial role of incumbency advantage,[8] and the failure of districts with partisan indices between 46% and 54% to flip from one party to the other over the last decade. (Rodden Aff. ¶ 22-38; Warshaw Aff. 21-22 n.28, ADAMS_00044-45.) When these factors are considered and the more reliable state and federal index is used, the 2021 Plan produces, at most, two competitive districts, with all but three districts in the plan leaning (and in most cases, overwhelmingly favoring) Republicans. (Rodden Aff. ¶ 41.) Respondents' chosen data methodology was tantamount to shooting an arrow and painting a bull's-eye around it.

Even Respondents' own expert, Dr. Barber, does not try to justify DiRossi's chosen measure, and instead baldly claims that a district is competitive if a "Democratic and Republican candidate had won a majority of the two-party vote share in any of the federal elections from 2012-2020." Respondents Br. 24-25. Under this methodology, Dr. Barber found that the two Democratic Caucus Plans also had seven competitive districts. *Id.* at 25. But for some reason, the Republican majority in the General Assembly refused to consider those plans. *See* Compl. ¶ 78, 104. It is plain, then, that the General Assembly did not consider these alternative plans not because they were insufficiently "competitive," but because Republican advantage was the objective.

B. Respondents' recycled threat they will pursue a federal partisan gerrymandering claim if the Court dare give force to the Ohio Constitution is an empty one.

In a reprise of the coda to their brief in the General Assembly redistricting case, Respondents try to intimidate the Court by arguing that interpreting the Ohio Constitution to

[8] Even while attempting to downplay its significance, Dr. Barber acknowledges that the incumbency advantage is between 3 and 4 percentage points, which is sizeable when considering that the range of competitive districts itself is plus or minus 4%. (Barber Aff. 35.)

require statewide proportionality might violate the U.S. Constitution's Fourteenth Amendment. Respondents Br. 25-30. The argument is a baseless, last-gasp attempt to nullify Ohio voters' adoption of a ban on undue partisan gerrymandering. As a threshold matter, the argument mischaracterizes Relators' case, which asks that the Court apply the undue favoritism standard mandated by Article XIX of the Ohio Constitution, not the statewide proportionality standard of Article XI, Section 6(B). Adams' Br. 35-37. But, in any event, as Relators in *Bennett v. Ohio Redistricting Commission* explained, Respondents' argument has no teeth because it is nothing more than a poorly disguised federal partisan gerrymandering claim. Relators' Reply Br. 17, *Bennett v. Ohio Redistricting Commission*, Ohio Supreme Court Case No. 2021-1198. Federal partisan gerrymandering claims, the U.S. Supreme Court has explained, are nonjusticiable in federal court. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019). And for the reasons canvassed in the *Bennett* reply brief, none of the cases Respondents cite support their claim. Relators Reply Br., 17-18, 18 n.9, *Bennett v. Ohio Redistricting Commission*, Ohio Supreme Court Case No. 2021-1198. Perhaps most glaringly, *Gaffney v. Cummings* held that proportional partisan representation did *not* violate the Fourteenth Amendment, 412 U.S. 735, 752-54 (1973); and Justice (Sandra Day) O'Connor's concurrence in *Davis v. Bandemer* recognized that a "requirement of proportional representation . . . is judicially manageable." 478 U.S. 109, 158 (1986) (O'Connor, J., concurring), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Nor does the recent decision in Wisconsin lend Respondents' argument support. *See* Respondents Br. 28 (citing *Johnson v. Wisconsin Elections Comm'n*, 2021 WL 5578395, at *11 (Wis. Nov. 30, 2021)). Unlike Ohio, the Wisconsin Constitution does not contain an explicit provision barring partisan gerrymandering. Respondents' furious threats of federal litigation ultimately signify nothing but their inability to defend the 2021 Plan's compliance with Section 1(C)(3)(a) and (b).

C. The 2021 Plan unduly splits political subdivisions.

Respondents say almost nothing about the 2021 Plan's compliance with the undue-splits provision. The sparse arguments they do advance are without merit. Respondents first argue that the 2021 Plan does not unduly split political subdivisions because, on its own accounting, it splits fewer political subdivisions than the alternative plans submitted. Respondents Br. 15. But the constitutionality of the 2021 Plan does not rise and fall on how it compares to alternative proposals. The General Assembly has an independent—not a comparative—duty to comply with Article XIX. Moreover, while the total number of splits is relevant to the undue-splits inquiry, it does not tell the whole story. As Respondents acknowledge, the "common ordinary meaning" of "undue" is "excessive or unwarranted." Respondents Br. 13. Thus, a plan can unduly split subdivisions in violation of Section 1(C)(3)(b) if its splits are (1) excessive or (2) unwarranted. If a plan splits many subdivisions, or has a large total number of splits, then that plan's splits are excessive. But a plan's splits can also be "unwarranted," that is, not justifiable by other Article XIX requirements.

Besides, the parties agree Article XIX is replete with provisions pertaining to the *number* of subdivision splits that are permitted, all of which apply irrespective of the number of votes a plan receives. *See generally* Article XIX, Section 2. Were the undue-splits inquiry merely a numerical one, the provision would duplicate in general terms the already specific provisions of Section 2, rendering the former provision surplusage. *Compare* Article XIX, Section 2, *with* Article XIX, Section 1(C)(3)(b); *see State v. Moore*, 154 Ohio St.3d 94, 2018-Ohio-3237, 111 N.E.3d 1146, ¶ 13, quoting *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917) ("[W]e avoid construing any statute in a manner that might render some portion of the provision 'meaningless or inoperative.'"). Respondents' second argument—that the plan does not unduly split subdivisions merely because it complies with Section 2's numerical split provisions—fails for the same reason. Respondents Br. 15.

Looking, then, to the nature and quality of the splits in the 2021 Plan, many of those splits are unwarranted. Most notably, the 2021 Plan splits both Cuyahoga and Hamilton County into three districts for no reason other than to secure partisan advantage for Republicans. Adams Br. 44-48. Indeed, splitting Hamilton County into three districts is itself an outlier: In the 1,000 simulations Dr. Chen ran, only 1.5% split Hamilton County more than once. (Chen Aff. fig. 13.) Likewise, the 2021 Plan needlessly splits Cuyahoga County into three districts. Adams Br. 44-45. In each of the alternative plans submitted to the General Assembly, Cuyahoga is split into only two districts. *Id.* Why split Cuyahoga across three districts? As always, it comes back to partisanship. As Dr. Chen finds, the 2021 Plan's configuration of Cuyahoga County leads to a Cleveland-based District 11 that has a higher Democratic vote share than ***the most heavily-Democratic districts*** in ***virtually all of the 1,000*** computer-simulated plans. (Chen Aff. ¶ 82 & fig. 2.) District 11 also has a lower Polsby-Popper compactness score than 98.8% of all plans. (*Id.* ¶ 83.) This is a textbook case of "packing": cramming as many of one party's voters as possible into a district in order to limit their voting strength in other districts that may otherwise be competitive or favorable to that party. Similarly, the 2021 Plan splits Summit County, resulting in half the county being in a very red district and the other half being in a very competitive district, an example of "cracking": splitting up voters from a party to prevent the emergence of a majority district for that party. (Rodden Aff. ¶ 94, 116.).

Respondents offer no justification for their decision to split Hamilton and Cuyahoga counties across three districts, and Summit County across two. The General Assembly's desire to secure partisan advantage for Republicans cannot "warrant" such splits. The splits are therefore undue within the meaning of Section 1(C)(3)(b).

D. The General Assembly does not have unreviewable discretion to resolve both factual and legal questions under Article XIX.

Finally, part and parcel of their attempt to secure themselves virtually unreviewable discretion in congressional redistricting, Respondents advocate for a "beyond a reasonable doubt" standard of review. The standard of review the Court should apply to a congressional districting plan implemented under Article XIX is a matter of first impression. The material facts of this case are not in dispute, and so the evidentiary standard of review is not outcome-determinative. That said, the Court should reject application of the "beyond a reasonable doubt" standard.

While the Court applied a "reasonable doubt" standard to review the state legislative redistricting plan adopted by the Apportionment Board in 2011 prior to constitutional reforms, *Wilson*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, at ¶ 24, the circumstances of this case could not be more different. Unlike the version of Article XI at issue in *Wilson*, which contained competing discretionary standards, Article XIX sets out clear "unduly favor" and "unduly split" standards by which the Court can measure the 2021 Plan. Further, *Wilson*'s "reasonable doubt" standard is based on the presumption of constitutionality accorded to ordinary legislation. *Id.* ¶ 18. But Section 1(C)(3), as written, treats the General Assembly as suspect—it explicitly contains provisions that limit the General Assembly's power, presuming that incentives are such that a party that passes a plan in the General Assembly without bipartisan support is especially likely to benefit itself in the map-drawing process. Indeed, the entire premise of limiting the number of election cycles that Section 1(C)(3) plans are in effect is a presumption of unlawful partisanship. To grant deference to the very General Assembly that passed the plan is to allow the body to determine the scope of its own power. As the Florida Supreme Court held in considering a partisan gerrymandering challenge brought under an analogous provision of its own constitution, "the beyond a reasonable doubt standard is ill-suited for an original proceeding before this Court

in which we are constitutionally obligated to enter a declaratory judgment on the validity of the [appointment] plans" because unlike ordinary legislation, "the Legislature adopts a joint resolution of [] apportionment solely pursuant to the 'instructions' of the citizens as expressed in specific requirements of the Florida Constitution governing this process." *In re Senate Joint Resol. of Legislative Apportionment 1176*, 83 So. 3d 597, 607-08 (Fla. 2012). The same is true here.

Even if the Court were to find a presumption of constitutionality appropriate in this context, "[t]he presumption that laws are constitutional is rebuttable." *Adamsky v. Buckeye Local School Dist*., 73 Ohio St.3d 360, 361, 653 N.E.2d 212, 214 (1995). Here, the facts of this case overcome any such presumption and leave no reasonable doubt that the 2021 Plan violates Article XIX, as detailed at length in this reply and Relators' opening brief.

Finally, in advocating for a "reasonable doubt" standard, Respondents advocate for unreviewable discretion over not only factual questions, but *legal* questions as well. *See supra* Part II.A.1. Even if used, the "reasonable doubt" standard gives the General Assembly deference only when it comes to factual questions. And since the question of what "unduly" means in Article XIX of the Ohio Constitution is a question of law, this Court must decide it in the first instance.

III. Conclusion

For the foregoing reasons, Relators request that this Court declare the 2021 Plan invalid and order the General Assembly and, if necessary, the Commission to pass a new plan in compliance with the requirements of Article XIX of the Ohio Constitution. Given the filing deadline for congressional candidates, the Court should set forth clear directives for the remedial plan and retain jurisdiction to ensure the remedial plan complies with the Court's directives.

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Respectfully submitted,

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