IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. Citizens Not Politicians, *et al.*, Relators, v. **Ohio Ballot Board, *et al.*,** Respondents.	Supreme Court Case No. 2024-1200 Original Action in Mandamus Expedited Elections Case Supreme Court Rule of Practice 12.08

REPLY BRIEF OF AMICI CURIAE PROFESSORS NICHOLAS O. STEPHANOPOULOS, EDWARD B. FOLEY, RUTH M. GREENWOOD, DAVID NIVEN AND DAN TOKAJI

IN SUPPORT OF RELATORS STATE OF OHIO *EX REL.* CITIZENS NOT POLITICIANS, ET AL.

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INTRODUCTION

Orwell himself would have trouble topping the efforts of the Ohio Ballot Board. Legally obligated to draft ballot language that "fairly and accurately" summarizes Issue 1—a proposed constitutional amendment that would ***curb*** partisan gerrymandering in Ohio—the Board instead adopted text telling voters that Issue 1 would itself ***constitute*** gerrymandering. According to the Board's up-is-down summary, the amendment supposedly *"**[r]epeal[s]*** constitutional protections against gerrymandering." Relators_034 (emphasis added). In fact, Issue 1 dramatically *strengthens* these safeguards. The Board's summary also falsely accuses the amendment of "requir[ing]" the proposed commission "to ***gerrymander*** the boundaries of . . . districts to favor either of the two largest political parties." *Id.* (emphasis added). The whole point of Issue 1 is actually to *prevent* gerrymandering by ***stopping*** self-interested politicians from drawing district lines and subjecting district maps to a partisan fairness requirement.

Amici are scholars and attorneys who have researched and litigated over partisan gerrymandering (including in Ohio) for many years. Amici submit this brief to offer four responses to the arguments about gerrymandering by Respondents and their amici. *First*, while conceptions of gerrymandering abound, ***no*** common notion of this activity equates it with ensuring that parties' legislative representation is congruent to their popular support. On some accounts, this kind of congruence is the antithesis of gerrymandering. At worst, from other perspectives, such congruence is orthogonal to the injury inflicted by gerrymandering.

Second, Ohio's distinctive history establishes that, in this State, partisan gerrymandering cannot possibly mean correspondence between parties' statewide seat shares and vote shares ("seat-vote correspondence"). This is because Ohio already has a state constitutional requirement that "[t]he statewide proportion of districts . . . favor[ing] each political party shall correspond

closely to the statewide preferences of the voters." Ohio Const. art. XI, § 6(B). This Court is intimately familiar with this requirement, having decided a series of cases about it just two years ago. In these cases, all of the Court's members—both in the majority and dissenting—agreed that the requirement aims to thwart gerrymandering. No one voiced the Board's preposterous position that the requirement ***compels*** gerrymandering.

Third, because the U.S. Supreme Court has commented extensively on the relationship between partisan gerrymandering and proportional representation, it's important to set the record straight about what that Court has said. When a plurality of the Court recognized that gerrymandering could be unconstitutional, these justices held that a party's disproportionally low representation is an element of the offense—just not enough, alone, to prove liability. Over the years, several justices stated that a district plan's achievement of proportional representation is a valid defense to a charge that the plan is an unlawful gerrymander. And more recently, when the Court deemed partisan gerrymandering nonjusticiable, the majority asserted that plaintiffs challenging gerrymandering necessarily seek proportional representation. Proportional representation must be distinct from gerrymandering, then, since it would be nonsensical for gerrymandering's foes to ask for a remedy of more gerrymandering.

And *fourth*, the claim by one of Respondents' amici that seat-vote correspondence reduces minority representation is both irrelevant and wrong. The claim is irrelevant because it has nothing to do with whether requiring seat-vote correspondence is tantamount to mandating gerrymandering. The claim is also wrong because it's refuted by reams of evidence. A large academic literature demonstrates the absence of any consistent relationship between indicia of partisan fairness and levels of minority representation. Moreover, when Michigan adopted a partisan fairness criterion, its numbers of minority opportunity districts went up, not down.

Accordingly, this Court should issue a writ of mandamus directing the Board to draft lawful ballot language for Issue 1 and Secretary LaRose to draft a lawful ballot title for the amendment.

INTEREST OF AMICI

Amici are scholars and attorneys who have researched and litigated over partisan gerrymandering (including in Ohio) for many years. Amici have an interest in the fair and accurate description of proposals to curb gerrymandering, so that voters may make up their own minds about these efforts free from any distortive influences. Nicholas O. Stephanopoulos is the Kirkland & Ellis Professor of Law at Harvard Law School and the Director of Strategy of the Election Law Clinic at Harvard Law School. Edward B. Foley is the Charles W. Ebersold and Florence Whitcomb Ebersold Chair in Constitutional Law at the Moritz College of Law at the Ohio State University and the Director of Election Law at Ohio State. Ruth M. Greenwood is an Assistant Clinical Professor of Law at Harvard Law School and the Director of the Election Law Clinic at Harvard Law School. David Niven is an Associate Professor of Political Science at the University of Cincinnati. Dan Tokaji is the Fred W. & Vi Miller Dean and Professor of Law at the University of Wisconsin Law School. Amici submit this brief exclusively in their personal capacities.

STATEMENT OF FACTS

Amici adopt the Relators' statement of facts, as described in their Complaint.

ARGUMENT

I. No Accepted Definition of Partisan Gerrymandering Equates this Practice with Requiring Seat-Vote Correspondence.

Gerrymandering is a pejorative term, denoting manipulation, irregularity, and unfairness. *See, e.g.*, *Gerrymandering*, WIKIPEDIA, https://en.wikipedia.org/wiki/Gerrymandering ("The term has negative connotations, and … is almost always considered a corruption of the democratic

process."). This is an initial reason why the Board's ballot language is improperly "in the nature of a persuasive argument in favor of or against the issue." *State ex rel. Bailey v. Celebrezze*, 67 Ohio St.2d 516, 519 (1981) (internal quotation marks omitted). No one trying to describe a ballot proposal neutrally would say that it "require[s]" state officials to "gerrymander." Relators_034. The use of this derogatory term is an obvious, heavy-handed effort to convince voters to oppose Issue 1.

Gerrymandering is also a complex concept. It comes in at least three varieties: partisan, bipartisan, and racial. As discussed below, within the partisan gerrymandering category that's relevant here, there are numerous understandings of the underlying harm and how to cure it. This is another preliminary reason why the Board's ballot language doesn't "fairly and accurately" summarize the amendment. *State ex rel. Voters First v. Ohio Ballot Bd.*, 2012-Ohio-4149, ¶ 41 (per curiam). The ballot language includes a contestable and multifaceted term, "gerrymander," that's likely to "mislead" or "deceive" at least some voters. Ohio Const. art. XVI, § 1. To clearly convey the substance of Issue 1—to minimize the likelihood that the amendment would be misunderstood—the Board should have used simpler words whose meaning is generally agreed upon.

Of course, partisan gerrymandering is not an ***infinitely*** complex concept. There are a few standard definitions of the practice, widely known to judges, lawyers, scholars, and interested laypeople. The fundamental reason why the Board's ballot language is Orwellian, then, is that ***none*** of these standard definitions equates gerrymandering with requiring parties' legislative representation to match their popular support. To the contrary, this sort of match is the precise opposite of gerrymandering, on some accounts. On others, at most, it is simply unrelated to either committing or redressing gerrymandering.

"One cleavage that divides scholars of partisan gerrymandering is whether the crux of the practice should be seen as partisan intent or partisan effect." Nicholas O. Stephanopoulos, *Partisan Gerrymandering*, *in* Oxford Handbook of American Election Law 593, 605 (forthcoming 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294248. According to the partisan intent model, the essence of gerrymandering is the line-drawing party's subjective purpose of advantaging its (and disadvantaging the opposing party's) candidates and voters. On the U.S. Supreme Court, Justice Stevens once advocated a gerrymandering test asking whether "partisan advantage" was the "predominant motive of the legislators who designed" the challenged district. *Vieth v. Jubelirer*, 541 U.S. 267, 336, 340 (2004) (Stevens, J., dissenting). In the academy, some scholars concur that "[t]he invidious purpose is the constitutional flaw" of gerrymandering. Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993, 2017 (2018).

From this perspective, Issue 1's seat-vote correspondence requirement does not directly strike at the heart of partisan gerrymandering. It does not explicitly forbid the aim of benefiting the line-drawing party and handicapping the opposing party. At the same time, however, Issue 1's seat-vote correspondence requirement in no way induces or compels redistricting with the goal of partisan advantage. This provision is facially silent about the intent that should animate mapmakers. The provision also implicitly discourages redistricting for partisan gain by mandating that maps cannot have the ***effect*** of "favor[ing] one political party and disfavor[ing] others." Relators_016. This strategy of using a disparate impact standard to police discriminatory intent is a common one in antidiscrimination law. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (disparate impact can be seen as "an evidentiary tool used to identify … intentional discrimination"). And Issue 1's structural reforms (as opposed to its redistricting

criteria) go even further in stamping out partisan intent. Self-interested politicians are infamous for prioritizing the pursuit of partisan advantage in redistricting. But if Issue 1 is approved, the foxes will no longer be responsible for guarding the henhouse.

In their comments on the partisan intent model, Respondents and their amici seem to think that it defines partisan gerrymandering as *any* consideration of *any* partisan information. *See, e.g.*, Merit Br. of Resp'ts at 16 (complaining that Issue 1 requires redistricting to be "based almost entirely on partisan political considerations"). Not so. As Justice Kagan recently explained, the purpose that is prohibited by the partisan intent model is "state officials' intent ***to entrench their party in power***"—"the naked purpose ***to gain partisan advantage***." *Rucho v. Common Cause*, 588 U.S. 684, 736 (2019) (Kagan, J., dissenting) (emphasis added). This illicit motive is plainly absent when line-drawers consult partisan data to make certain that ***no*** party is entrenched in power or enjoys an advantage in how its votes translate into seats. As Justice Kagan elaborated, it's "non-problematic when state officials use[] political data to ensure rough proportional representation between the two parties." *Id.* In this case—which is Issue 1's case—mapmakers hope to ***avoid***, not to ***secure***, partisan gain for either side.

The other major conception of partisan gerrymandering is the partisan effect model. As its name suggests, this model views the core injury of gerrymandering as legislative representation that (irrespective of anyone's intent) fails to accurately reflect voters' partisan preferences. Partisan effect is typically assessed using quantitative measures that examine parties' votes and seats. These include simpler metrics like the correspondence (or lack thereof) between votes and seats as well as more involved metrics like partisan asymmetry, the efficiency gap, the mean-median difference, and the declination. *See, e.g.*, *Adams v. DeWine*, 2022-Ohio-89, ¶ 63 (discussing these metrics). In the past, several U.S. Supreme Court justices expressed openness to tackling gerrymandering using

these measures of partisan effect. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 419-20 (2006) (opinion of Kennedy, J.); *id.* at 466-68 (opinion of Stevens, J.); *id.* at 483-84 (opinion of Souter, J.). Today, numerous state constitutions (including Ohio's) seek to prevent gerrymandering by codifying partisan effect proscriptions. *See* Ohio Const. art. XI, § 6(B); *see also, e.g.*, Mich. Const. art. IV, § 6(13)(d); Mo. Const. art. III, § 3(b)(5).

As Issue 1 states, it indeed "ban[s] partisan gerrymandering" as the practice is understood by the partisan effect model. Relators_016. The amendment identifies the best-known and most intuitive measure of partisan effect: the correspondence between parties' seats and votes. Issue 1 then forbids substantial discrepancies between parties' seats and votes by stipulating that "the statewide proportion of districts in each redistricting plan that favors each political party shall correspond closely to the statewide partisan preferences of the voters of Ohio." *Id.* The anti-gerrymandering logic here is irrefutable. Under the partisan effect model, gerrymandering is conceived as legislative representation that is noncongruent with voters' partisan preferences. The amendment flatly bans such noncongruence. It therefore makes it impossible for a gerrymander (defined this way) to arise. This is why the Board's ballot language is risible to anyone who's committed to (or even familiar with) the partisan effect model. On this account, Issue 1 does not "require[]" the proposed commission to "gerrymander" but rather fully blocks it from doing so. Relators_034.

Respondents and their amici invoke another, older notion of gerrymandering to defend the Board's handiwork. On this view, the gravamen of gerrymandering is disregard for traditional redistricting criteria like compactness, respect for political subdivisions, and respect for communities of interest. *See, e.g.*, Br. for Am. Redistricting Project as Amicus Curiae Supporting Resp'ts at 3 ("[G]errymandering occurs when a redistricting authority casts neutral criteria aside

…"). But this model of gerrymandering does not justify what the Board did either. First, as just noted, the model is dated. This is because, using modern redistricting technology, it is now child's play to craft maps that faithfully abide by traditional criteria while still conferring a large and durable advantage to the line-drawing party. *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018) (recognizing that "advances in map drawing technology and analytical software … allow mapmakers … to engineer congressional districting maps, which, although minimally comporting with [traditional] criteria, nevertheless operate to unfairly dilute the power of a particular group's vote"); Nicholas Goedert *et al*., *Asymmetries in Potential for Partisan Gerrymandering*, 49 Legis. Stud. Q. 551, 573 (2024) (successfully instructing a redistricting algorithm to generate "disguised" gerrymanders that "lead[] to much more reasonably shaped districts without sacrificing partisan effectiveness").

Second, disregard for traditional criteria has no particular link to ***partisan*** gerrymandering. These criteria's sacrifice could signify a bipartisan or a racial gerrymander just as easily as a partisan gerrymander. In federal redistricting law, notably, it is racial (not partisan) gerrymandering doctrine that has always put the most emphasis on whether "the legislature subordinated traditional race-neutral districting principles." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Third, Issue 1 does not actually call for traditional criteria to be ignored. Instead, it lists several such requirements—equal population, the equal ability of minority groups to elect candidates of choice, and the preservation of communities of interest—and insists that "[e]ach redistricting plan shall also comply, to the extent possible," with these criteria. Relators_017. True, the amendment could have ranked these criteria one notch higher, above rather than below seat-vote correspondence. But it is hardly novel to put a higher priority on thwarting gerrymandering than on satisfying traditional redistricting principles. *See, e.g.*, Fla. Const. art. III, §§ 20(b), 21(b) (requiring

traditional criteria to be followed "[u]nless compliance with [them] conflicts with" the state constitution's prohibition of partisan gerrymandering). Until now, no one has ever supposed that a slightly lower priority for traditional criteria somehow transforms them into a recipe for gerrymandering.

Lastly, as this Court knows from the 2022 redistricting litigation, it is feasible for Ohio maps to respect traditional criteria while achieving satisfactory seat-vote correspondence. *See, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, ¶ 126 (describing an expert's state legislative maps that "adhered to traditional redistricting principles" and would have complied with even Issue 1's stricter rule that parties' seat shares deviate by no more than three percentage points from their vote shares); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-342, ¶ 114 (Kennedy & DeWine, JJ., dissenting) (describing the commission's revised state legislative maps, whose "partisan makeup" was "almost identical to the partisan makeup of [the expert's] original plan[s]"). In practice, then, the amendment's slightly lower priority for traditional criteria in no way forces them to be spurned for the sake of seat-vote correspondence. Heeding these criteria "to the extent possible" without compromising seat-vote correspondence, Relator_017, entails heeding them carefully indeed.

II. Ohio's Recent History Confirms that Requiring Seat-Vote Correspondence Is Distinct from Partisan Gerrymandering.

Most of the above discussion would apply to any State in which someone tried to argue, implausibly, that requiring parties' legislative representation to match their popular support is tantamount to partisan gerrymandering. But this argument is particularly weak with respect to Ohio for two reasons. First, unlike any other State, Ohio already has a seat-vote correspondence requirement on the books. So if Issue 1 compels gerrymandering, then so does the existing provision on which it's based. Second, this Court has had the repeated opportunity to analyze

Ohio's current seat-vote correspondence requirement. In these cases, every member of the Court has agreed that this provision does not constitute, but rather combats, gerrymandering.

The similarities between Ohio's current and Issue 1's proposed seat-vote correspondence requirements are staggering. Both provisions refer to the same two quantities: the statewide proportion of districts that favor each political party and the statewide preferences of the voters of Ohio. *See* Ohio Const. art. XI, § 6(B); Relator_016. Both provisions also state that the first of these quantities (each party's seat share) "shall correspond closely" to the second quantity (each party's vote share). *Id.* In contrast, the only non-semantic differences between the provisions are that Issue 1 shortens the timeframe in which voters' preferences are calculated from the last ten to the last six years, and that Issue 1 specifies exactly what it means for a party's seat share to correspond closely to its vote share. *See id.* It means that "the statewide proportion of districts … that favors each political party may deviate by no more than three percentage points in either direction … from the statewide partisan preferences of the voters of Ohio." Relator_016.

The upshot of these striking similarities is that Ohio's current and Issue 1's proposed seat-vote correspondence requirements cannot be meaningfully distinguished. If Issue 1 amounts to partisan gerrymandering, then so does the provision that indisputably inspired it. If this existing provision ***does not*** inscribe gerrymandering into Ohio's higher law (which no one thinks it does), then neither would Issue 1. One of Respondents' amici responds that Issue 1 diverges from its model in that, as noted above, it ranks seat-vote correspondence one notch higher than Ohio's constitution does at present. *See* Br. for Am. Redistricting Project as Amicus Curiae Supporting Resp'ts at 15. But this response is a non sequitur. Yes, Issue 1 assigns a slightly higher priority to seat-vote correspondence, but this in no way changes the nearly identical substance of the provision. And to reiterate, the practical consequences of this slightly higher priority are modest.

Issue 1 still mandates compliance with traditional redistricting criteria, and it still remains possible to satisfy both these criteria and the seat-vote correspondence requirement simultaneously.

Turning to this Court's recent case law, it confirms that Ohio's current seat-vote correspondence requirement—and, ipso facto, Issue 1—are attacks on, not embodiments of, partisan gerrymandering. In the Court's first confrontation with this provision, Justice Stewart's opinion for herself, Justices Brunner and Donnelly, and Chief Justice O'Connor observed that, when the provision was adopted, its proponents "told Ohio voters that [it] would '***protect*** against gerrymandering'" by "'***requir[ing]*** districts to closely follow the statewide preferences of voters.'" *League of Women Voters of Ohio*, 2022-Ohio-65, at ¶ 101 (internal alterations omitted) (emphases added). These proponents included the president of the Ohio Senate, who later disputed the application of the seat-vote correspondence requirement to this decade's state legislative plans. *See id.* When this provision was up for debate, even its eventual critics thus shared the view that it sought to ward off gerrymandering.

In her concurrence, Justice Brunner echoed the Court's position that the seat-vote correspondence requirement is a safeguard against partisan gerrymandering. "When electors are assigned to legislative districts by a plan that does not closely correspond to the statewide preferences of all Ohio voters," this is "evidence beyond a reasonable doubt of vote dilution through gerrymandering." *Id.* at ¶¶ 154, 164 (Brunner, J., concurring). In her dissent, while disagreeing with other aspects of the Court's opinion, then-Justice Kennedy characterized this provision the same way. "In ratifying the [seat-vote correspondence requirement], the voters of Ohio … provided additional language specifically aimed at gerrymandering." *Id.* at ¶ 261 (Kennedy, J., dissenting). This new language "make[s] the statewide [proportions] of districts closely correspond to the statewide preferences of Ohio voters." *Id.*

Two days after this decision, this Court addressed Ohio's congressional plan, to which the seat-vote correspondence requirement does not apply. *See Adams*, 2022-Ohio-89. In their joint dissent in that case, Justices Kennedy, Fischer, and DeWine acknowledged the validity of the partisan effect model of partisan gerrymandering. "[T]hose seeking to end partisan gerrymandering" frequently "claim that [it] unfairly entrenches one political party in power by drawing lines that maximize that party's political representation." *Id.* at ¶ 156 (Kennedy, Fischer & DeWine, J.J., dissenting). These Justices then portrayed seat-vote correspondence as a proper remedy for gerrymandering (defined this way). "To deal with" this kind of violation, "one could try to create a redistricting map that would ensure something akin to proportional representation." *Id.* at ¶ 158. "The idea would be to create a map that guarantees representatives who mirror as closely as possible the partisan makeup of the state." *Id.*

To be sure, these Justices also commented on other conceptions of partisan gerrymandering. *See id.* at ¶¶ 157, 159. But the remarks cited here indicate their support for the propositions that (1) gerrymandering can be conceived in terms of partisan effect and (2) so understood, gerrymandering can be cured by seat-vote correspondence. Of course, these propositions are damning to Respondents' case because they mean that the Board's ballot language falsely labels Issue 1 as gerrymandering when, in fact, the amendment is an anti-gerrymandering provision according to a standard account of the practice.

III. U.S. Supreme Court Case Law Treats Proportional Representation as Close to the Opposite of Partisan Gerrymandering.

Turning from state to federal constitutional law, it obviously doesn't control here, and its relevance is further limited by the contrast between the Ohio Constitution's extensive treatment of redistricting and the federal Constitution's silence on the subject. Still, the U.S. Supreme Court has opined at length about the relationship between partisan gerrymandering and proportional

representation in cases spanning more than half a century. These passages have shaped the public debate about these issues, and so are worth considering even though they're far from dispositive. What they reveal is again wholly inconsistent with Respondents' stance that gerrymandering and proportional representation are synonymous. In the eyes of many justices over many years, gerrymandering and proportional representation are closer to opposite concepts.

The U.S. Supreme Court first recognized a cause of action for partisan gerrymandering in *Davis v. Bandemer*, 478 U.S. 109 (1986). The test endorsed by the *Bandemer* plurality included an important role for evidence of a plaintiff party's disproportionally low representation. Alone, such evidence was not enough to demonstrate a discriminatory effect. "[T]he mere lack of proportional representation [is not] sufficient to prove unconstitutional discrimination." *Id.* at 132 (plurality opinion). But evidence of a plaintiff party's underrepresentation, ***combined*** with evidence that other aspects of the electoral system "consistently degrade[d] … a group of voters' influence on the political process as a whole," ***did*** suffice to prove a discriminatory effect. *Id.* "[E]qual protection violations *may* be found … where a history (actual or projected) of disproportionate results appears in conjunction with similar indicia." *Id.* at 139-40 (emphasis added); *see also id.* at 157 (O'Connor, J., concurring in the judgment) ("Implicit in the plurality's opinion … is at least some use of simple proportionality as the standard …").

Plainly, if ***underrepresentation*** was an element of a constitutional violation, under the *Bandemer* plurality's test, then ***proportional*** representation was not a required showing. To the contrary, the existence of proportional representation necessarily meant that a plaintiff party couldn't establish underrepresentation and would therefore lose its partisan gerrymandering claim. Put differently, the corollary of underrepresentation being an aspect of unlawful gerrymandering is that proportional representation must be a defense to a gerrymandering charge.

This corollary was confirmed by cases both before and after *Bandemer*. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court unanimously rejected a challenge to a Connecticut state house plan that "aimed at a rough scheme of proportional representation of the two major political parties." *Id.* at 738. The Court declared that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Id.* at 754. Partisan gerrymandering warranting judicial intervention simply isn't present when a district plan aims "not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Id.*

Likewise, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Justice Souter contemplated how "defendants [could] justify" a district plan if the burden of proof shifted to them. *Id.* at 351 (Souter, J., dissenting). One of the "legitimate objectives" he thought a State might assert was "proportional representation among its political parties through its districting process." *Id.* If proportionality was, in fact, "better served by the lines drawn" by the State "than by the plaintiff's hypothetical" map, then there should be no liability. *Id.* In *LULAC* as well, Justice Kennedy noted that the "party balance" under a Texas congressional plan was relatively "congruent to statewide party power." 548 U.S. at 419 (opinion of Kennedy, J.). This rough proportionality weighed against a finding of partisan gerrymandering. "[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority." *Id.*

One of Respondents' amici points out that a few cases have referred to the Connecticut plan at issue in *Gaffney* as a bipartisan gerrymander. *See* Br. for Am. Redistricting Project as

Amicus Curiae Supporting Resp'ts at 2-3, 5, 10-11. It is unclear if this designation is appropriate since the crux of bipartisan gerrymandering is the suppression of competition that threatens the two major parties, *see generally* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593 (2002), and *Gaffney* never mentioned this anticompetitive dynamic. But even if the plan in *Gaffney* was a bipartisan gerrymander, not all maps that achieve proportional representation can be tarred with this brush. This is because, across the entire set of modern American plans, no correlation exists between fairer representation and lower competition. Fairer representation, that is, can readily be attained without stifling competition. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1523 (2018). Accordingly, no matter what the situation was in *Gaffney*, it is untrue that Issue 1 compels bipartisan (or any other kind of) gerrymandering.

The last way in which the U.S. Supreme Court has wielded proportional representation is also the most recent. In *Rucho*, the majority contended that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." 588 U.S. at 704. This argument paralleled the *Vieth* plurality's earlier claim that plaintiffs' proposed tests for gerrymandering all "rest[] upon the principle that [political parties] have a right to proportional representation." 541 U.S. at 288 (plurality opinion); *see also Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment) (gerrymandering claims rely on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes").

As Justice Kagan countered in *Rucho*, at least some standards for identifying partisan gerrymanders have nothing to do with current underrepresentation or a wish for future proportional representation. *See* 588 U.S. at 734 (Kagan, J., dissenting). But set aside this exchange. The key

point here is that, if the *Rucho* majority is right that all plaintiffs challenging gerrymandering yearn for proportional representation, then proportional representation can't itself be gerrymandering. After all, why would litigants trying to ***stop*** gerrymandering want a remedy that amounts to ***more*** gerrymandering (if proportional representation and gerrymandering are one and the same)? The desire the *Rucho* majority ascribes to all gerrymandering plaintiffs is comprehensible only if—contra the Board's ballot language—proportional representation is a solution to, not a perpetuation of, gerrymandering.

IV. Seat-Vote Correspondence Has No Relationship with Minority Representation.

Finally, Amici respond to the assertion that, if Issue 1's seat-vote correspondence requirement is adopted, minority representation will drop precipitously in Ohio. *See* Br. for Black Equity & Redistricting Fund as Amicus Curiae Supporting Resp'ts at 2, 10-11. This claim is completely irrelevant to the sole issue in this case: whether the Board's ballot language fairly and accurately describes the amendment. Issue 1's consequences for minority representation have no bearing on the veracity of the Board's summary. But the claim is also wrong on the merits, because seat-vote correspondence has no consistent relationship with minority representation.

This absence of a connection is apparent from Ohio's own redistricting history. Again, Ohio already has a seat-vote correspondence requirement, which was applied for the first time in the current cycle. If it is true that improvements in seat-vote correspondence lead to declines in minority representation, then Ohio's 2020s plans should have included fewer minority opportunity districts in which minority voters are able to elect candidates of choice. But no one has alleged that Ohio's state legislative plans reduced minority representation. And while a suit under Section 2 of the Voting Rights Act was filed against Ohio's congressional plan, a three-judge federal court unanimously dismissed it, precisely because plaintiffs could not show that any increase in the

number of minority opportunity districts was possible. *See Simon v. DeWine*, No. 4:22-cv-612, 2024 WL 3253267, at *2 (N.D. Ohio July 1, 2024).

Ohio's experience turns out to be typical of district maps historically and nationwide. One of the experts in the *Rucho* litigation studied the correlation between minority representation and a quantitative measure of partisan fairness across congressional plans from 1972 to 2016. In this large universe of plans, there was essentially no link between these variables. Minority representation tended neither to rise nor to fall as partisan fairness varied up and down. Minority representation certainly did not systematically decline as plans became fairer. *See* Rebuttal Rpt. of Simon Jackman at 11-12, *Common Cause v. Rucho*, 318 F. Supp.3d 777 (M.D.N.C. 2018), *vac'd and remanded*, 588 U.S. 684 (2019). Similarly, when scholars use computer algorithms to generate randomly large numbers of district maps, sometimes matching states' existing numbers of minority opportunity districts and sometimes allowing these volumes to decline, the maps with fewer opportunity districts are very similar, in partisan terms, to the maps with more opportunity districts. *See, e.g.*, Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 937 (2021) ("In most states, maps created without considering race have partisan breakdowns much like those of maps produced by matching enacted plans' volumes of opportunity districts.").

As for the Michigan example cited by one of Respondents' amici, it actually tells a story of minority representation ***improving*** along with partisan fairness. Michigan's 2020s plans (like Ohio's) had to comply with a new state constitutional requirement of seat-vote correspondence. *See* Mich. Const. art. IV, § 6(13)(d). This requirement led to massive gains in the partisan fairness of Michigan's plans. *See, e.g.*, Nick Corasaniti, *Ungerrymandered: Michigan's Maps, Independently Drawn, Set Up Fair Fight*, N.Y. Times, Dec. 29, 2021,

https://www.nytimes.com/2021/12/29/us/politics/michigan-congressional-maps.html. And these massive gains coincided with substantial increases in the numbers of minority opportunity districts. Michigan's new state house plan had sixteen districts in which Black voters could elect candidates of choice (compared to an alternative of ten if all Black opportunity districts had to be majority-Black districts), and Michigan's new state senate plan had six Black opportunity districts (versus an alternative of five majority-Black districts). *See* Emergency Appl. for Stay and Req. for Immediate Admin. Stay at 4-5, *Mich. Indep. Citizens Redistricting Comm'n v. Agee*, 144 S. Ct. 715 (2024) (mem.) (No. 23A641), 2024 WL 144446. Under these new plans, "[t]he 2022 elections saw historic gains for black voters," as "[t]he speaker of Michigan's house of representatives is black for the first time" and "black representatives occupy districts with a footprint in Macomb County for the first time." *Id.* at 14.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of mandamus directing the Board to draft lawful ballot language for Issue 1 and Secretary LaRose to draft a lawful ballot title for the amendment.

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Respectfully submitted,

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