IN THE SUPREME COURT OF OHIO

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

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INTRODUCTION

Article XI, Section 6 of the Ohio Constitution prohibits partisan gerrymandering. In fact, the partisan drawing of maps is prohibited by two different provisions. Section 6(A) states that "[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party," Ohio Constitution, Article XI, § 6(A). And Section 6(B) further states a clear and objective test: that the number of seats whose voters favor a particular political party in the Ohio General Assembly "shall correspond closely to the statewide preferences of the voters of Ohio" over the previous decade, *id.* § 6(B).

The plan of General Assembly districts enacted by the Ohio Redistricting Commission on September 16, 2021, on a 5-2 party line vote, violates both of those provisions. Respondents themselves admit these violations. According to the constitutionally-mandated statement issued *by the Redistricting Commission*,[1] Republicans have garnered an average of only 54% of the votes in statewide elections over the past ten years. *See* Comm. Stip., Ex. Vol. 2 at STIP_0418-0419; Suppl. Vol. 1 at 50-51 (Section 8(C)(2) Stmt.). Yet, in this same statement, the Commission also admits that the enacted plan provides the Republican party with 64.4% of the seats in the General Assembly. *Id.*

This enacted plan perpetuates the partisan bias of the last decade. Under the maps created in 2011, the Republicans maintained a supermajority in the General Assembly, despite the fact that their vote share only ranged from 46.2% to 59.7% across the decade. *See* Compl. Citations, Ex.

[1] While the Statement was issued by the Commission and recites that it is the statement of the Commission, discovery has demonstrated that only two of the seven Commissioners "authorized" it. *See* Written Disc. Aff., Ex. Vol. 1 at RESP_0009; Suppl. Vol. 2 at 431 (DeWine Resp. to RFA No. 23); *see also* Written Disc. Aff., Ex. Vol. 1 at RESP_0020-0021; Suppl. Vol. 2 at 442-443 (LaRose Resp. to RFA No. 23); *see also* Written Disc. Aff., Ex. Vol. 1 at RESP_0031 (Faber Resp. to RFA No. 15); Suppl. Vol. 2 at 418; *see also* Comm. Stip., Ex. Vol. 2 at STIP_0420-0426; Suppl. Vol. 1 at 138-144 (Dem. Section 8(C)(2) Stmt.); *see also* Compls. and Answs., Ex. Vol. 1 at COMP_ANSW_0042 ¶ 81; Suppl. Vol. 1 at 159.

Vol. 1 at COMP_0269-0272; Suppl. Vol. 1 at 145-148; *see also* Compl. Citations, Ex. Vol. 1 at COMP_0273-0281; Suppl. Vol. 1 at 165-173.

In 2011, a group of voters challenged that plan on the basis of partisan gerrymandering, but this Court found, under the Ohio Constitution as it existed at that time, that it lacked clear commands and authority to enforce partisan fairness. *See generally Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, ¶ 14, 981 N.E.2d 814, 820.

That authority was soon provided. In 2015, the voters of Ohio amended Article XI of the Ohio Constitution. Central to the constitutional amendment was the addition of Section 6's dual prohibitions on partisan gerrymandering, which enacted the very commands that this Court had previously found lacking.

Despite the assertions of some Respondents in the instant case, the amended version of Article XI is not a mere collection of technical formalities. It does not relegate this Court to serve solely as a referee of intricate rules on splitting political subdivisions. To the contrary, the Constitution expressly provides this Court with the authority to hear and decide any claims regarding the invalidity of a General Assembly plan. *See* Ohio Constitution, Article XI, § 9. It is now necessary and appropriate for this Court to exercise its constitutional authority. It is beyond dispute that a plan can be designed in full compliance with *all* of the provisions of Article XI, including the gerrymandering prohibitions in Section 6. *See* Sections II.B.2, III.A.3, V, *infra*.

There is no doubt that this Court is the appropriate body to take action. While the U.S. Supreme Court has held that partisan gerrymandering claims are non-justiciable in federal court, it has also acknowledged that it is the province of state courts to address the scourge of partisan gerrymandering. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2507 (2019) ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

"Indeed, state courts are particularly well-positioned to adjudicate redistricting disputes," and "[s]tate courts' duty to decide constitutional cases applies with full force in the redistricting context." *Common Cause v. Lewis*, N.C. Super. No. 18 CVS 014001, 2019 WL 4569584, at *124-25 (Sept. 3, 2019); *see also League of Women Voters v. Commonwealth*, 645 Pa. 1, 8, 178 A.3d 737, 741 (2018) (Pennsylvania's Supreme Court finding that it could establish a workable standard to adjudicate partisan gerrymandering claims under the state constitution). *See also Householder v. Ohio A. Philip Randolph Inst.*, 140 S.Ct. 101, 101 (2019) (citing *Rucho*, 139 S.Ct. 2484).

Judicial intervention is necessary because the extreme partisan gerrymandering that has occurred once again in Ohio violates "the core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652, 2677 (2015) (citation omitted); *see also League of Women Voters*, 645 Pa. at 8, 178 A.3d at 740-41 ("It is a core principle of our republican form of government 'that the voters should choose their representatives, not the other way around.'") (citations omitted). "A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office." *Stanson v. Mott*, 17 Cal. 3d 206, 217, 551 P.2d 1, (1976) (citing The Federalist, Nos. 52, 53 (James Madison), 10 Richardson, Messages and Papers of the Presidents at 98-99 (1899) (President Jefferson)).

The primary election for candidates for the General Assembly is currently scheduled for May 3, 2022. The candidate filing deadline is scheduled for February 2, 2022. There is no time to lose.

LEGAL BACKGROUND

A. The Constitution of 1851 and the 2015 Amendment

"Prior to the [Ohio] Constitution of 1851, the apportionments of legislative districts had been made by the General Assembly with the result that oftentimes political advantage was sought to be gained by the party in power. Accordingly, Article XI was incorporated in the Constitution for the purpose of correcting the evils of former days." *State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 508, 41 N.E.2d 377, 382 (1942). "The objective sought by the constitutional provisions was the prevention of gerrymandering." *Id.*, 139 Ohio St., at 509. The Article XI in Ohio's 1851 Constitution aimed to prevent gerrymandering by imposing new constraints on Ohio's redistricting process and transferring the process from the General Assembly to the Ohio Apportionment Board.

But those safeguards proved inadequate. The maps that came out of Ohio's 2011 decennial apportionment process reflected an egregious partisan gerrymander. For example, in 2012 elections, when the new plan took effect, Democratic candidates won 50.2% of the statewide vote, but they won only 39.4% of Ohio's state house seats. *See* Compl. Citations, Ex. Vol. 1 at COMP_0022; Suppl. Vol. 1 at 199 (Warshaw Expert Aff.). This bias persisted throughout the decennial: in the 2020 state house elections, Democrats won 45.1% of the votes, but only 35.4% of the seats. *Id*. The extreme seat bias was the result of intentional self-dealing by the party that controlled the map-drawing process. Compl. Citations, Ex. Vol. 1 at COMP_0022-0026; Suppl. Vol. 1 at 199-203.[2]

[2] One example of the manipulated process employed in Ohio in 2011 was outlined in detail in the three-judge federal panel in *Ohio A. Philip Randolph Institute v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019). While that case addressed the congressional maps created by Ohio's General Assembly in 2011, those maps were drawn by many of the same actors involved here, including Respondents Faber and Huffman, and Republican map-drawer, Ray DiRossi. SDOH Dep Tr. Aff., Ex. Vol. 3 at DEPO_SDOH_0397:14-0398:14, 0408:21-0409:14, 0434:14-0435:3, 0440:7-15, 0509:11-15, 0523:6-13, 0577:24-0578:6, 0621:20-0622:3; Suppl. Vol. 2 at 235-247. Based on the court's review of extensive evidence, it found that "partisan intent predominated" the map-drawing process. *Ohio A. Philip Randolph Inst*., 373 F.Supp.3d at 1099.

When, in 2011, a group of voters challenged that plan for its partisan unfairness, this Court found it lacked the power to act because, at that time, the "words used in Article XI d[id] not explicitly require political neutrality, or for that matter, politically competitive districts or representational fairness, in the apportionment board's creation of state legislative districts." *Wilson*, 134 Ohio St.3d at 225, 2012-Ohio-5367, ¶ 14, 981 N.E.2d at 820. Despite the extreme partisan nature of Ohio's 2011 maps, Article XI, as it existed at that time, proved insufficient to bar this partisan gerrymander. *Wilson* at ¶ 14.

In response, on November 3, 2015, Ohio voters—by an overwhelming margin of 71.5% to 28.5%, Compl. Citations, Ex. Vol. 1 at COMP_0282-0283; Suppl. Vol. 1 at 229-230—amended the Constitution by adding precisely what this Court had previously found missing: express constitutional commands that districts not be drawn "to favor or disfavor a political party," and that the distribution of seats "shall correspond closely to the statewide preferences of the voters of Ohio." Ohio Constitution, Article XI, §§ 6(A), 6(B). *Cf. Wilson* at ¶ 14 (finding that the pre-2015 version of Article XI did "not explicitly require political neutrality, or for that matter, politically competitive districts or representational fairness" because "[u]nlike Ohio, some states specify in either constitutional or statutory language that no apportionment plan shall be drawn with the intent of favoring or disfavoring a political party").

The clear intent of the voters in amending the Constitution was to end partisan gerrymandering in the State and require maps to be politically neutral and representationally fair. The ballot placed before Ohioans in the voting booth explained that the amendment's express purpose was to "[e]nd the partisan process for drawing Ohio House and Senate districts, and replace it with a bipartisan process with the goal of having district boundaries that are more compact and politically competitive." Compl. Citations, Ex. Vol. 1 at COMP_0284; Suppl. Vol.

1 at 231. The ballot measure was consistently characterized and promoted—including by several of the Respondent members of the Commission—as a reform to end partisan gerrymandering. Respondent Auditor Faber promised Ohioans that a "yes" vote on the ballot measure amending the Constitution would "make sure state legislative districts are drawn to be **more competitive** and compact, and ensure that no district plan should be drawn to favor or disfavor a political party." Compl. Citations, Ex. Vol. 1 at COMP_0285; Suppl. Vol. 1 at 174 (emphasis in original). Respondents President Huffman and Senator Sykes co-chaired a political campaign to pass the measure, and they stated in their campaign materials that the amendment would provide "fairness" by "[p]rotect[ing] against gerrymandering by prohibiting any district from primarily favoring one political party" and "[r]equir[ing] districts to closely follow the statewide preferences of the voters." They also promised that the amendment "creates a process for the Ohio Supreme Court to order the commission to redraw the map if the plan favors one political party." Dep. Stip., Ex. Vol. 4 at DEPO_00914:8-13, 00982; Suppl. Vol. 2 at 270 (V. Sykes Tr.) and 280 (campaign flyer, V. Sykes Dep. Ex. 3).

B. Partisan Fairness: Section 6

Section 6 of Article XI of the Ohio Constitution sets forth a pair of prohibitions against partisan gerrymandering, explicitly requiring that the Commission eschew any quest for unfair partisan advantage. Section 6 provides that the Commission "shall attempt to draw a general assembly district plan that meets all of the following standards":

> (A) ***No*** general assembly district plan ***shall be drawn*** primarily to favor or disfavor a political party.
>
> (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.

Id. § 6 (emphasis added).

Section 6 makes clear that map-drawers must satisfy both Section 6(A) and 6(B). *Id.* This is possible because the provisions are complementary. Section 6(A) provides that map-drawers must not draw maps primarily to favor one party or another. As such, Section 6(A) permits an inquiry into both the intent of the Commission, as well as whether the plan objectively functions to favor one party or the other, which can be determined under a variety of metrics. Section 6(B) then expressly articulates one specific test to measure partisan bias, *i.e.*, the deviation of the allocation of seats favoring one party or another from the preferences of the voters as expressed by the vote share in statewide elections over the past decade.

C. Commission Process and Deadlines: Sections 1 and 8

To provide procedural fairness, the amended Article XI established a bipartisan redistricting commission, which is responsible for drawing the State's House and Senate districts in compliance with Article XI of the Ohio Constitution. The Ohio Redistricting Commission consists of seven members: the Governor, the Auditor of State, the Secretary of State; one person appointed by the Speaker of the House of Representatives, one person appointed by the legislative leader of the largest political party in the House of Representatives of which the Speaker of the House of Representatives is not a member, one person appointed by the President of the Senate, and one person appointed by the legislative leader of the largest political party in the Senate of which the President of the Senate is not a member. Ohio Constitution, Article XI, § 1(A). Accordingly, the members of the 2021 Ohio Redistricting Commission (collectively, "Respondents") are Ohio Governor Michael DeWine, Ohio Secretary of State Frank LaRose, and Ohio Auditor Keith Faber (the "Statewide Elected Officials"); President of the Ohio Senate Matt Huffman and Speaker of the Ohio House Robert R. Cupp (the "Republican Legislative Leaders"); and Ohio Senator Vernon Sykes and Minority Leader of the Ohio House Emilia Sykes (the "Democratic Respondents").

"The affirmative vote of four members of the commission"—"including at least two" opposition-party members of the commission—"shall be required to adopt any general assembly district plan." *Id.* § 1(B)(3). The Commission was required to hold three hearings "[b]efore adopting, but after introducing, a proposed plan," *id.* § 1(C), and was to adopt a plan by September 1, 2021.

If the Commission was unable to reach consensus with the two opposition members by September 1, 2021, it could resort to an impasse procedure that permitted the introduction of a proposed General Assembly plan by simple-majority vote. *Id*. § 8(A)(1). At least one hearing was required after the introduction of a simple-majority plan, in which the public could give testimony and there could be amendments to the plan. *Id*. § 8(A)(2). Under the impasse procedure, the Commission had until September 15, 2021 to adopt a final plan. *Id*. § 8(A)(3).

If a plan were adopted with the two members of the opposition party voting in favor of the plan, it would be in force for ten years. *Id*. § 8(B). A plan adopted by a simple majority vote, without at least two of the opposition-party members, would be in force for only four years. *Id*. § 8(C)(1)(a). When a simple majority four-year plan is adopted, then pursuant to Section 8(C)(2), the Commission "***shall include*** a statement explaining what the commission determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party corresponds closely to those preferences." *Id*. § 8(C)(2) (emphasis added). Thus, even for maps passed without bipartisan support, the Commission was required to eschew partisan self-dealing and attempt to achieve partisan fairness, and to explain publicly how the maps satisfied the Ohio Constitution's representational fairness standard described in Section 6(B) of Article XI.

D. Jurisdiction and Remedy: Section 9

Article XI, Section 9 gives this Court "exclusive, original jurisdiction in all cases arising under this article" without limitation. Ohio Constitution, Article XI, § 9(A).

Section 9(B) authorizes this Court to remedy any violation of any valid provision of Article XI. Specifically, Section 9(B) states: "In the event that any section of this constitution relating to redistricting, any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid by an unappealed final order of a court of competent jurisdiction," then:

> [N]otwithstanding any other provisions of this constitution, the commission shall be reconstituted as provided in Section 1 of this article, convene, and ascertain and determine a general assembly district plan in conformity with such provisions of this constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next time for redistricting under this article in conformity with such provisions of this constitution as are then valid.

Id. § 9(B).

Section 9(B) thereby provides the global remedy for any case in which the Court determines that the plan or any district is "invalid." It provides that, where this Court determines that a plan or district is "invalid," it shall direct that the Redistricting Commission be reconstituted to "ascertain and determine a general assembly district plan" that conforms with the terms of the Ohio Constitution. Article XI, Section 6—and its specific partisan fairness requirements—is one such provision that must be met in order for a plan to be "valid" under the Ohio Constitution.

STATEMENT OF FACTS

A. The Partisan Gerrymander

The maps that Respondents adopted on September 16, 2021 were drawn primarily to favor Republicans and disfavor Democrats, contrary to Section 6(A)'s requirements. And the statewide proportion of districts in the plan whose voters favor each political party does not correspond

closely to the statewide preferences of the voters of Ohio, contrary to Section 6(B)'s requirements.

Over the past decade, Republicans have received an average of about 54% of the vote in statewide elections. Comm. Stip., Ex. Vol. 2 at STIP_0418-0419; Suppl. Vol. 1 at 50-51 (Section 8(C)(2) Stmt.); *see also* Imai Rep. ¶ 21; Suppl. Vol. 1 at 8; *see also* Compl. Citations, Ex. Vol. 1 at COMP_0009; Suppl. Vol. 1 at 186 (Warshaw Expert Aff.) (Democrats have won 45.5% of the two-party vote share). Yet under the Commission's own calculations, 85 General Assembly districts, or 64.4% of the total seats in the enacted plan, favor Republicans. Comm. Stip., Ex. Vol. 2 at STIP_0418-0419; Suppl. Vol. 1 at 50-51 (Section 8(C)(2) Stmt.). Conversely, over the past decade, Democrats have averaged 46% of the statewide two-party vote. Comm. Stip., Ex. Vol. 2 at STIP_0418-0419; Suppl. Vol. 1 at 50-51 (Section 8(C)(2) Stmt.); *see also* Compl. Citations, Ex. Vol. 1 at COMP_0009, 0028-0029; Suppl. Vol. 1 at 186, 205-206 (Warshaw Expert Aff.). But as admitted in the Commission's own statement, the enacted plan contains 47 districts favoring the Democrats in the General Assembly, or only 35.6% of the total seats. Comm. Stip., Ex. Vol. 2 at STIP_0418-0419; Suppl. Vol. 1 at 50-51 (Section 8(C)(2) Stmt.).

B. The Flawed Process

1. The Proceedings in August

The 2021 Ohio Redistricting Commission was convened on August 6, 2021. There were five Republicans on the Commission; the remaining two members were from the Democratic Party. All deliberations happened behind closed doors, and the process was controlled by the Republican Legislative Leaders. Dep. Stip., Ex. Vol. 2 at DEPO_00390:19-00391:18, 00408:9-22, 00412:1-13; Suppl. Vol. 2 at 347-348, 354-355 (E. Sykes Tr.); *see also* Dep. Stip., Ex. Vol. 4 at DEPO_00882:16-22, 00937:6-19; Suppl. Vol. 2 at 261, 276 (V. Sykes Tr.); *see also* Dep. Stip., Ex. Vol. 1 at DEPO_00034:13-00035:21; Suppl. Vol. 2 at 285-286 (LaRose Tr.) (explaining that Speaker Cupp and Senator Huffman "exclude[d] [LaRose] from the mapmaking").

The partisan dynamics of this year's process were on display at the Commission's August 31, 2021 hearing, the day before the constitutional deadline to adopt a plan. *See* Ohio Constitution, Article XI, § 1. With the constitutional deadline looming, and having never been consulted by Republican members of the Commission about the map-drawing process, Senator Sykes—the Democratic co-chair of the Commission—presented a proposed plan on August 31, 2021, in advance of the Commission's constitutional deadline. At that time, the Republican members of the Commission refused to inform the Democratic members as to when they would be introducing any plan. Comm. Stip., Ex. Vol. 1 at STIP_0164-0165; Suppl. Vol. 1 at 56-57 (8/31 Hrg. Tr.).

At the August 31, 2021 hearing, House Minority Leader Emilia Sykes indicated that she had "not been privy to any of those conversations" regarding other maps that Commission members were working on, and she asked what, if anything, she could "expect in terms of participating" in the drawing of other maps the Commission would consider. Comm. Stip., Ex. Vol. 1 at STIP_0163-0164; Suppl. Vol. 1 at 55-56. She received no answer. *See id.*

Despite the constitutional mandate that any general assembly district plan must be adopted, including with the support of at least two Democratic members of the Commission, by September 1, 2021, Ohio Constitution, Article XI, §§ 1(B)(3), 1(C), the Republicans failed to even present a plan publicly until eight days after that constitutional deadline.[3]

[3] In flouting the constitutional deadlines of Section 1 of Article XI, the Republican members of the Commission repeatedly invoked the delayed release of the Census data as a rationale. Comm. Stip., Ex. Vol. 1 at STIP_0170, 0177, 0197; Suppl. Vol. 1 at 62, 69, 89 (9/9 AM Hrg. Tr.); *see also* Comm. Stip., Ex. Vol. 1 at STIP_0202-0203; Suppl. Vol. 1 at 94-95 (9/9 PM Hrg. Tr.). But this delayed data did not come as a surprise to the Commission, which was well aware by early 2021 that the Census data would be received later than usual. In fact, Ohio Republican leadership filed a lawsuit seeking an earlier release of Census data, but withdrew their request when the Census Bureau announced that it would produce Census data by August 16, 2021, over a month earlier than the previously-announced release date of September 30, 2021. With full awareness of both this new release date and its constitutionally-mandated deadline to adopt a general assembly district plan, the Republican administration represented to the Sixth Circuit that, "[a]lthough Ohio would prefer to get its data sooner, Ohio agrees that an August 16 delivery would allow it to

2. The Republicans Draw Maps Using Partisan "Scoring" for Each District

The two individuals primarily responsible for drawing the Senate and House maps were Ray DiRossi, who worked at the direction of President Huffman, and Blake Springhetti, who worked at the direction of Speaker Cupp. *See* Dep. Stip. Ex. Vol. 3 at DEPO_00480:11-16, 0482:20-0483:4; Suppl. Vol. 2 at 303, 305-306 (R. DiRossi Tr.); *see also* Dep. Stip. Ex. Vol. 6 at DEPO_01278:23-01279:6, 01288:12-16; Suppl. Vol. 2 at 373-374, 376 (B. Springhetti Tr.).

DiRossi and Springhetti used a software program called Maptitude for Redistricting 2020 ("Maptitude") to draw the maps. Dep. Stip., Ex. Vol. 3 at DEPO_00558:12-19; Suppl. Vol. 2 at 323 (R. DiRossi Tr.); *see also* Dep. Stip., Ex. Vol. 6 at DEPO_01282:20-23; Suppl. Vol. 2 at 375 (B. Springhetti Tr.). It is a feature of Maptitude that, next to each district being drawn, a "Display Window" (per DiRossi) or "DataView" (per Springhetti) can appear on a screen—on either the same monitor as the district at issue, or a separate screen if the map-drawer uses multiple monitors.

Respondents entered into a contract with Ohio University so they could load election data into Maptitude as a layer, which would supply the data that could be imported into a DataView window in Maptitude. Dep. Stip., Ex. Vol. 6 at DEPO_01303:8-12; Suppl. Vol. 2 at 385 (B. Springhetti Tr.). At the Republican Legislative Leaders' direction, DiRossi and Springhetti loaded this election data into Maptitude. *Id.*; *see also* Dep. Stip., Ex. Vol. 3 at DEPO_00491:3-00492:23; Suppl. Vol. 2 at 309-310 (R. DiRossi Tr.); Dep. Stip., Ex. Vol. 6 at DEPO_01296:16-20; Suppl. Vol. 2 at 380 (B. Springhetti Tr.). Consequently, the Display Window/DataView showed, *inter alia*, the partisan leaning of the district being drawn by representing the projected Democratic and Republican vote-share percentage based on prior elections. Dep. Stip., Ex. Vol. 3 at

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complete its redistricting process." *Ohio v. Raimondo*, 848 Fed.Appx. 187, 188 (6th Cir. 2021). The data was in fact released on August 12, 2021. Discovery Docs. Aff., Ex. Vol. 3 at GOV_000297-298; Suppl. Vol. 1 at 232-33.

DEPO_00467:5-10, 00469:8-21; Suppl. Vol. 2 at 300-301 (R. DiRossi Tr.); *see also* Dep. Stip., Ex. Vol. 6 at DEPO_01294:11-01295:23; Suppl. Vol. 1 at 378-379 (B. Springhetti Tr.).

DiRossi called the partisan information that appeared in the Display Window a "scoring." Dep. Stip., Ex. Vol. 3 at DEPO_ 00528:23-00529:6; Suppl. Vol. 2 at 321-322 (R. DiRossi Tr.). Both DiRossi and Springhetti agreed that this information showed the predicted percentage of Republican and Democratic votes in that district based on a certain set of prior elections. Dep. Stip., Ex. Vol. 3 at DEPO_00469:8-21; Suppl. Vol. 2 at 301 (R. DiRossi Tr.); *see also* Dep. Stip., Ex. Vol. 6 at DEPO_01295:1-23; Suppl. Vol. 2 at 379 (B. Springhetti Tr.). Each time the map-drawers changed the boundaries of the district, the display window showed what if any change they were making to the partisan "score" of the district. Dep. Stip., Ex. Vol. 3 at DEPO_00470:8-10; Suppl. Vol. 2 at 302 (R. DiRossi Tr.); *see also* Dep. Stip., Ex. Vol. 6 at DEPO_01296:5-11; Suppl. Vol. 2 at 380 (B. Springhetti Tr.).

The "scoring" was largely based on the votes in three statewide elections: 2020, 2018, and 2016. Dep. Stip., Ex. Vol. 3 at DEPO_00503:15-00504:3, 00528:23-00529:6; Suppl. Vol. 2 at 314-315, 321-322 (R. DiRossi Tr.). The source for 2020 was the Ohio Common Unified Redistricting Database ("OCURD"); the source for 2018 and 2016 was a website called Dave's Redistricting.[4] Dep. Stip., Ex. Vol. 3 at DEPO_00487:12-20, 00489:14-24; Suppl. Vol. 2 at 307-308 (R. DiRossi Tr.); Dep. Stip., Ex. Vol. 6 at DEPO_01303:2-14; Suppl. Vol. 2 at 296 (B. Springhetti Tr.). DiRossi testified that the scoring was based on a simple averaging of the votes in those elections. Dep. Stip., Ex. Vol. 3 at DEPO_00496:23-00497:6, 00503:15-00504:3; Suppl. Vol. 2 at 311-312, 314-315 (R. DiRossi Tr.). DiRossi and Springhetti received vote-share data for

[4] "Dave's Redistricting" is "a free web app to create, view, analyze and share redistricting maps," which contains "demographic data from the 2020 and 2010 censuses, 2019 and 2018 5-Year ACS/CVAP estimates, and extensive election data." Dave's Redistricting, *About DRA*, https://bit.ly/3mlwbeD (last accessed Oct. 28, 2021).

2012 and 2014 from Clark Bensen and John Morgan, Republican political operatives. Dep. Stip., Ex. Vol. 3 at DEPO_00501:5-23; Suppl. Vol. 2 at 313 (R. DiRossi Tr.); *see also* SDOH Dep. Tr. Aff., Ex. Vol. 2 at DEPO_SDOH_0187:7-10, 0226:3-11; Suppl. Vol. 2 at 250-251 (Bensen Tr.); *see also* SDOH Dep. Tr. Aff., Ex. Vol. 1 at DEPO_SDOH_0090:1-15; Suppl. Vol. 2 at 254 (Morgan Tr.). That 2012 and 2014 information appeared in the Data View, Dep. Stip., Ex. Vol. 6 at DEPO_ 1305:10-16; Suppl. Vol. 2 at 386 (B. Springhetti Tr.), although the 2012 and 2014 data may have been taken down at a later date, Dep. Stip., Ex. Vol. 3 at DEPO_00503:10-12, 00505:9-20; Suppl. Vol. 2 at 314, 316 (R. DiRossi Tr.).[5]

DiRossi fed the partisan data information to Huffman in oral communications. Dep. Stip., Ex. Vol. 3 at DEPO_00481:11-00482:1, 00508:16-00509:17; Suppl. Vol. 2 at 304-305, 317-318 (R. DiRossi Tr.). Sometimes Huffman would come to his office and look at the screens that displayed both the districts and the partisan data. Dep. Stip., Ex. Vol. 3 at DEPO_00481:11-00482:1, 00508:16-00509:17; Suppl. Vol. 2 at 304-305, 317-318 (R. DiRossi Tr.). Springhetti presented information regarding the partisan skew of the districts in meetings with Speaker Cupp. Dep. Stip., Ex. Vol. 6 at DEPO_01300:4-01301:9; Suppl. Vol. 2 at 382-383 (B. Springhetti Tr.). Springhetti testified that Cupp specifically asked Springhetti for the number of Republican seats and the number of Democratic seats corresponding to each draft map. Dep. Stip., Ex. Vol. 6 at DEPO_01297:2-11, 01300:4-1301:9; Suppl. Vol. Vol. 2 at 381-383 (B. Springhetti Tr.). And there was at least one further meeting between President Huffman, Speaker Cupp, Ray DiRossi, Blake Springhetti, Senate Chief of Staff and General Counsel John Barron, House Chief of Staff Christine Morrison, Senate Chief Counsel Frank Strigari, House Chief Counsel Paul DiSantis, and

[5] The 2012 and 2014 data was never used in the negotiations with the Democrats. Dep. Stip., Ex. Vol. 3 at DEPO_00503:15-00504:3; Suppl. Vol. 2 at 314-315 (R. DiRossi Tr.); *see also* Dep. Stip., Ex. Vol. 6 at DEPO_01305:3-9; Suppl. Vol. 2 at 386 (B. Springhetti Tr.).

Respondents' attorneys in this litigation, Phil Strach and Tom Farr, where the same information was presented. Dep. Stip., Ex. Vol. 3 at DEPO_00524:9-00525:3; Suppl. Vol. 2 at 319-320 (R. DiRossi Tr.); *see also* Dep. Stip., Ex. Vol. 6 at DEPO_01289:4-15, 01301:24-01302:22; Suppl. Vol. 2 at 377, 383-384 (B. Springhetti Tr.).

3. The September 9, 2021 Hearing

On September 9, 2021, the Republican Legislative Leaders presented their maps through the testimony of Ray DiRossi, the chief map-drawer. The maps were introduced at the first of two hearings that day, which took place at 10:00 A.M. Comm. Stip., Ex. Vol. 1 at STIP_0170; Suppl. Vol. 1 at 62 (9/9 AM Hrg. Tr.).

After DiRossi's presentation, Senator Sykes asked DiRossi how the maps "satisf[ied] the new requirement in Section 6(B) of the Constitution that deals with the statewide proportion of districts whose voters based on statewide and federal partisan general election results during the last 10 years favor each political party shall correspond closely to the statewide preferences of the voters of Ohio." Comm. Stip., Ex. Vol. 1 at STIP_0173-174; Suppl. Vol. 1 at 65-66 (9/9 AM Hrg. Tr.). DiRossi responded that President Huffman's staff had "not complete[d]" an "analysis of the election data contemplated by the Constitution," but represented that analysis was "ongoing." Comm. Stip., Ex. Vol. 1 at STIP_0174; Suppl. Vol. 1 at 66 (9/9 AM Hrg. Tr.). As DiRossi since admitted, however, that analysis never was completed. Dep. Stip., Ex. Vol. 3 at DEPO_00589:7-20; Suppl. Vol. 2 at 324 (R. DiRossi Tr.). Instead, DiRossi was asked to focus his efforts on issues that arose in subsequent negotiations, rather than on completing the requested 6(B) analysis. *Id.*

DiRossi's evasion of Senator Sykes' inquiry was consistent with the direction he had received from the Republican Legislative Leaders. Notwithstanding the partisan election data displayed on their computer screens, Senate President Huffman told DiRossi not to focus on the requirements of Section 6. Indeed, DiRossi was affirmatively told by Senate President Huffman

that Section 6 was "not his focus." Dep. Stip., Ex. Vol. 3 at DEPO_00610:1:17; Suppl. Vol. 2 at 325 (R. DiRossi Tr.). Speaker Cupp similarly told Springhetti to focus on other portions of Article XI and provided him with no instructions about considering or complying with Section 6. Dep. Stip., Ex. Vol. 7 at DEPO_01621:14-1622:9, 01623:3-14; Suppl. Vol. 2 at 400-402 (R. Cupp Tr.).

The maps introduced by the Republican Legislative Leaders were heavily weighted in favor of Republicans, as several Republican members of the Commission already recognized at the time the maps were introduced in the September 9 hearing. *See* Dep. Stip., Ex. Vol. 7 at DEPO_01599:5-24; 01600:3-13, 01606:14-01607:5; Suppl. Vol. 2 at 396-399 (R. Cupp Tr.) (testifying he was "surprised" because "the number of Republican leaning districts was more than I had anticipated it was going to be," and "concerned" that the skew "would not be acceptable to the Democrat members of the commission"); s*ee also* Dep. Stip., Ex. 1 Vol. 1 at DEPO_00028:9-14; Suppl. Vol. 2 at 284 (F. LaRose Tr.) (expressing "concern[,]" because even without seeing any "partisan data breakdown," he could tell "by looking at the map . . . that perhaps, you know, the way that it had been drawn would not be acceptable to our minority counterparts").

Even so, by a 5-2 vote along partisan lines, the Commission voted to introduce the Republican Legislative Leaders' maps as the Commission's official proposed plan. Comm. Stip., Ex. Vol. 1 at STIP_0201, 0204-0205; Suppl. Vol. 2 at 93, 96-97 (9/9 PM Hrg. Tr.). Not only did the Commission embrace the Republican Legislative Leaders' maps as its proposed plan over the objection of its Democratic members, but it selected the Republican Legislative Leaders' maps as the Commission's proposed plan before giving the public any meaningful opportunity to look at, much less review, the maps.[6]

[6] It bears emphasis that the Republican Legislative Leaders' maps were first presented to the public at 10:00 A.M., and the Commission selected that map as its proposed plan the same day at its 2:00 P.M. hearing. Comm. Stip., Ex. Vol. 1 at STIP_0170; Suppl. Vol. 1 at 62 (9/9 AM Hrg. Tr.); *see*

4. Republican Rejection of the Democratic Respondents' Efforts at Compromise

In the days that followed the introduction of the Republican Legislative Leaders' maps, Democratic members of the Commission engaged in a good-faith effort to negotiate a ten-year bipartisan plan. Dep. Stip., Ex. Vol. 4 at DEPO_00885:19-00886:22, 00887:11-00888:4, 00889:25-00890:11; Suppl. Vol. 2 at 262-263 (V. Sykes Tr.); *see also* Dep. Stip., Ex. Vol. 2 at DEPO_00367-00371, 00367:13-00368:4, 00372:12-00372:19, 374:1-00375:5, 00386:17-00387:22, 00396:1-9, 00397:8-17; Suppl. Vol. 2 at 330-336, 345-346, 351-352 (E. Sykes Tr.); *see also* Dep. Stip., Ex. Vol. 6 at DEPO_01445:21-01446:5; Suppl. Vol. 2 at 409-410 (C. Glassburn Tr.). The Democratic Respondents even gave Republican members direct access to their map-drawers. Dep. Stip., Ex. 1 Vol. 1 at DEPO_00100:15-00103:15; Suppl. Vol. 2 at 293-296 (F. LaRose Tr.); *see also* Dep. Stip., Ex. 1 Vol. 5 at DEPO_01066:23-24; Suppl. Vol. 2 at 368 (K. Faber Tr.); *see also* Dep. Stip., Ex. Vol. 6 at DEPO_01402:3-8, 01426:11-18; Suppl. Vol. 2 at 407-408 (C. Glassburn Tr.). The Republican Legislative Leaders did not reciprocate. Dep. Stip., Ex. Vol. 6 at DEPO_01310:15-1311:10; Suppl. Vol. 2 at 387-388 (B. Springhetti Tr.) (Springhetti had no direct communication with either Senator or Leader Sykes or their staff regarding proposed maps); Dep. Stip., Ex. Vol. 3 at DEPO_00656:3-9; Suppl. Vol. 2 at 326 (R. DiRossi Tr.) (same).[7]

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also Comm. Stip., Ex. Vol. 1 at STIP_0204-0205; Suppl. Vol. 1 at 96-97 (9/9 PM Hrg. Tr.). The September 9 hearings had been announced with only one day's notice. Comm. Stip., Ex. Vol. 1 at STIP_0209; Suppl. Vol. 1 at 101 (9/9 PM Hrg. Tr.). Many witnesses testified that they were provided insufficient notice to fully participate and did not have enough time to view the map in order to provide feedback. *See generally* Comm. Stip., Ex. Vol. 1 at STIP_0169-0198; Suppl. Vol. 1 at 61-90 (9/9 AM Hrg. Tr.); *see also* Comm. Stip., Ex. Vol. 1 at STIP_0199-0227; Suppl. Vol. 1 at 91-119 (9/9 PM Hrg. Tr.).

[7] Indeed, certain Republican Commissioners were not provided with access to the Republican map-drawers, Dep. Stip., Ex. 1 Vol. 1 at DEPO_00074:17-21, 00100:15-00103:15; Suppl. Vol. 2 at 292-296 (F. LaRose Tr.); *see also* Dep. Stip., Ex. 1 Vol. 5 at DEPO_01013:24-01014:3, 01020:17-01021:11; Suppl. Vol. 2 at 364-367 (K. Faber Tr.), and the Statewide Elected Officials neither "drew the [Republican Legislative Leaders'] map or *participated in any way* in its creation." 10/6 Statewide Elected Officials' Resp. to Rels.' Mot. to Compel at 6 (emphasis added).

On September 13, 2021, Senator Sykes and Leader Sykes submitted a new proposed plan. Dep. Stip., Ex. Vol. 2 at DEPO_00379:8-14; Suppl. Vol. 2 at 340 (E. Sykes Tr.). The Democratic plan submitted on September 13 was an amended version of the plan that Senate President Huffman introduced on September 9, reducing the number of Democratic-leaning districts from the initial plan that Senator Sykes had put forth on August 31, 2021. Dep. Stip., Ex. Vol. 4 at DEPO_00878:20-22; Suppl. Vol. 2 at 258 (V. Sykes Tr.); *see also* Dep. Stip., Ex. Vol. 2 at DEPO_00379:19-00380:2, 00383:23-00384:3; Suppl. Vol. 2 at 342 (E. Sykes Tr.).

After engaging with the Statewide Elected Officials and their staff, the Democratic Respondents introduced another proposed plan on September 15, 2021, which incorporated feedback from the Republican members of the Commission and further reduced the number of Democratic-leaning districts. Dep. Stip., Ex. Vol. 4 at DEPO_00879:19-00880:11, 00890:25-00891:5, 00894:8:19; Suppl. Vol. 2 at 259-260, 267-269 (V. Sykes Tr.). That evening, Governor DeWine, Senator Sykes, and Leader Sykes met to discuss "if it would be possible to come up with a way forward that would allow for there to be a ten-year map." Dep. Stip., Ex. Vol. 2 at DEPO_00394:2-6; Suppl. Vol. 2 at 349 (E. Sykes Tr.); *see also* Dep. Stip., Ex. Vol. 4 at DEPO_00929:7-16; Suppl. Vol. 2 at 271 (V. Sykes Tr.). In that conversation, Leader Sykes asked "whether or not the Republican members of the commission were willing to break ranks and vote for a map that would be a ten-year map," because "it was possible to pass a bipartisan ten-year map without a unanimous 7-0 vote" with consensus from as few as two members of each party. Dep. Stip., Ex. Vol. 2 at DEPO_00395:1-19, 00413:4-13; Suppl. Vol. 2 at 350, 356 (E. Sykes Tr.); *see also* Dep. Stip., Ex. Vol. 4 at DEPO_00930:9-13, 00935:6-9; Suppl. Vol. 2 at 272, 275 (V. Sykes Tr.). They received no affirmative response. Dep. Stip., Ex. Vol. 4 at DEPO_00930:11-13;

Suppl. Vol. 2 at 272 (V. Sykes Tr.); *see also* Dep. Stip., Ex. Vol. 2 at 00395:20-25; Suppl. Vol. 2 at 350 (E. Sykes Tr.).

5. The September 15, 2021 Hearing

On the night of September 15, 2021, Senate President Huffman convened the final Commission hearing and introduced an amendment to the Republican-proposed maps that the Commission had passed on September 9, revising several district boundaries. [8]

Within ten minutes of the introduction of Huffman's amendment, the Commission had passed the amendment along party lines. Comm. Stip., Ex. Vol. 2 at STIP_0393, 0395; Suppl. Vol. 1 at 121, 123 (9/15 Hrg. Tr.). Just after midnight on September 16, 2021, the Commission voted—again in a 5-2 vote along party lines—to adopt the Republicans' amended maps, introduced less than an hour earlier, as the general assembly plan for the next four years. Comm. Stip., Ex. Vol. 2 at STIP_0401-0402; Suppl. Vol. 1 at 129-130 (9/15 Hrg. Tr.).

At the final meeting, Senate President Huffman introduced a statement to comply with Section 8(C)(2) of Article XI (the "8(C)(2) Statement"), which requires the Commission to explain how a plan that does not obtain bipartisan support complies with the requirements of Section 6(B) (*i.e.*, that the distribution of seats in the proposed maps closely corresponds to the statewide vote share of each party in elections over the prior decade). *See* Ohio Constitution, Article XI, § 8(C)(2). Huffman said that the 8(C)(2) Statement "was prepared probably in the last five or six hours" by his staff and that the statement "simply list[ed] all" of the partisan metrics that could be "considered" to determine compliance with Section 6(B). Comm. Stip., Ex. Vol. 2 at STIP_0403; Suppl. Vol. 1 at 131 (9/15 Hrg. Tr.); *see also* Dep. Stip., Ex. Vol. 7 at DEPO_01742:11-21; Suppl.

[8] Senator Sykes, the co-chair of the Commission, did not know that the Commissioners were going to start the meeting and adjourn immediately, and was ambushed when the Republican amendment was introduced by his co-chair the moment the Commission came back into session. Dep. Stip., Ex. Vol. 4 at DEPO_00932:15-18; Suppl. Vol. 2 at 274 (V. Sykes Tr.).

Vol. 2 at 393 (M. Huffman Tr.). Despite purporting to be a statement of the Commission, multiple Commissioners had never even seen the 8(C)(2) Statement until "a minute before" they were asked to vote on it. Dep. Stip. Ex. 1 Vol. 1 at DEPO_00054:24-00056:3; Suppl. Vol. 2 at 288-290 (F. LaRose Tr.); Dep. Stip., Ex. Vol. 4 at DEPO_00939:16-19; Suppl. Vol. 2 at 278 (V. Sykes Tr.) (testifying that he first saw the statement "[t]hat evening when it was presented" at the commission hearing). The 8(C)(2) Statement was ultimately authorized by only *two* of the seven Commissioners. *See* Written Disc. Aff., Ex. Vol. 1 at RESP_0009; Suppl. Vol. 2 at 431 (DeWine Resp. to RFA No. 23); *see also* Written Disc. Aff., Ex. Vol. 1 at RESP_0020-0021; Suppl. Vol. 2 at 442-443 (LaRose Resp. to RFA No. 23); *see also* Written Disc. Aff., Ex. Vol. 1 at RESP_0031; Suppl. Vol. 2 at 418 (Faber Resp. to RFA No. 15); *see also* Comm. Stip., Ex. Vol. 2 at STIP_0420-0426; Suppl. Vol. 1 at 138-144 (Dem. Section 8(C)(2) Stmt.); *see also* Compls. and Answs., Ex. Vol. 1 at COMP_ANSW_0042 ¶ 81; Suppl. Vol. 1 at 159.

And for good reason: the Statement did not provide a constitutionally valid justification, or even a credible rationalization, for the enacted plan. Instead, it made the incredible assertion that the Republicans were entitled to up to 81% of the seats in the General Assembly because Republican candidates had won thirteen out of sixteen statewide elections over the previous decade. But neither Section 8(C)(2) nor Section 6(B) suggests that the appropriate distribution of seats should be determined by reference to the number of elections won by each party. Rather, those provisions reference the ***vote share*** of each party. To suggest that the percentage of election victories sets an appropriate ceiling for the number of seats for a party in the General Assembly—which would merely replicate gerrymandering in past election cycles—demonstrates the Commission's complete disregard for the requirements of Article XI. *See* Section VI.A, i*nfra.*

C. The Commissioners' Admissions that the Maps Fail to Meet the Requirements of the Ohio Constitution

Though most of the Republicans' process took place behind closed doors, Republican Commission members have, by their own admission, made a series of public statements about the enacted maps. Their candid statements reveal that they knew their maps to be unduly partisan. They forthrightly conceded that the maps would not stand up to scrutiny under Article XI.

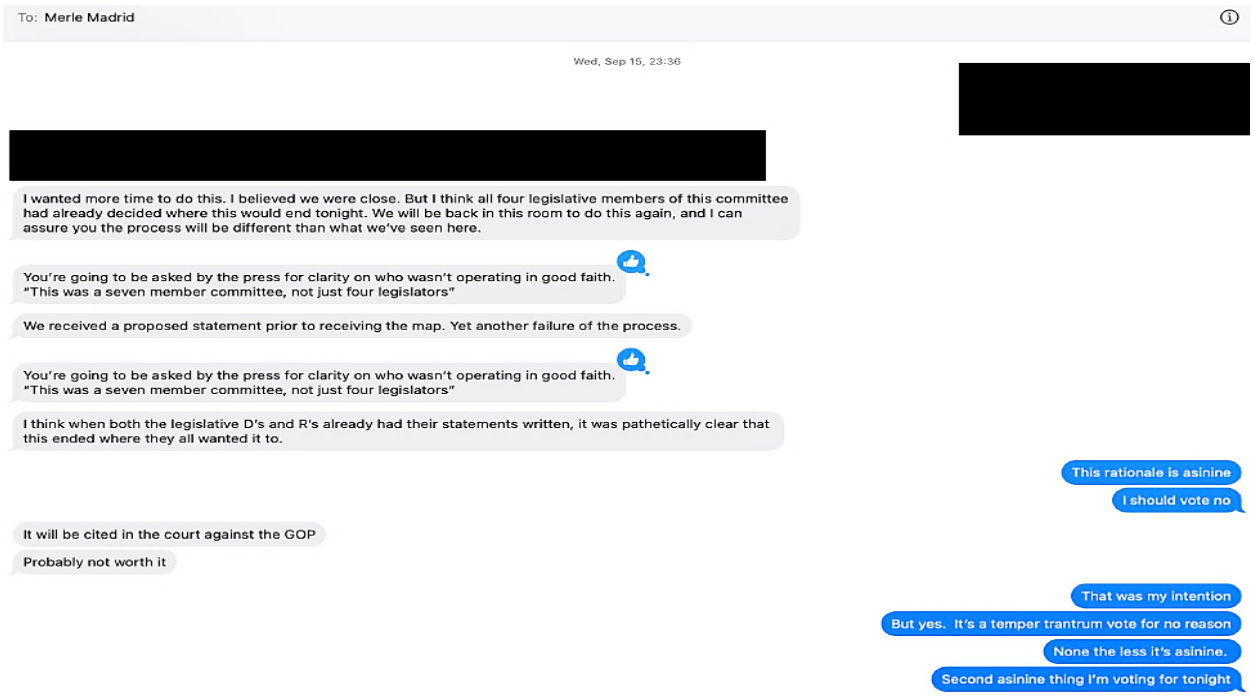
Governor DeWine expressed regret and doubt about of the legality of the final maps at the Commission's final hearing, stating he was "sure" the Commission could have reached an outcome "that was much more clearly, clearly constitutional," Written Disc. Aff., Ex. Vol. 1 at RESP_0005, 0007-0008; Suppl. Vol. 2 at 427, 429-430 (DeWine Resps. to RFA Nos. 8, 13-20). In a separate statement after the vote, Governor DeWine likewise said that the Commission's "job is to make [the redistricting plan] as constitutional as we can, and ***I thought we could have done better***." Written Disc. Aff., Ex. Vol. 1 at RESP_0007-0008; Suppl. Vol. 2 at 429-430 (DeWine Resps. to RFA Nos. 17-20) (emphasis added).

Secretary of State LaRose similarly lamented at the final meeting that the Commission's "***map has many shortcomings***." Written Disc. Aff., Ex. Vol. 1 at RESP_0017-0018; Suppl. Vol. 2 at 439-440 (LaRose Resp. to RFA Nos. 8-12) (emphasis added). And Auditor Faber acknowledged that the Commission's plan was "***not that good***." Written Disc. Aff., Ex. Vol. 1 at RESP_0029-0030; Suppl. Vol. 2 at 416-417 (Faber Resp. to RFA Nos. 8-12) (emphasis added).

During the Commission's final meeting on September 15, in fact, Secretary of State LaRose expressed concern that he had "been asking for the rationale [for compliance with Section 6(B)] for days" but had "not gotten an answer until tonight." Written Disc. Aff., Ex. Vol. 1 at RESP_0017-0020; Suppl. Vol. 2 at 439-442 (LaRose Resp. to RFA Nos. 8, 13-20). Behind the scenes, Secretary LaRose was even more blunt. During a recess in the September 15, 2021

meeting, Secretary LaRose admitted privately to Senator and Leader Sykes that the plan the Republicans had submitted was not fair, but he told them that he was not going to go against his Republican colleagues, even though he would hate to have to vote for their plan. Dep. Stip., Ex. Vol. 4 at DEPO_00931:4-18; Suppl. Vol. 2 at 273 (V. Sykes Tr.).

That evening, Secretary LaRose went further. In text messages exchanged shortly after 11:30 P.M. on September 15, 2021, Secretary LaRose's chief of staff messaged LaRose about how LaRose's staff had received a copy of Respondent Huffman's proposed 8(C)(2) Statement just prior to receiving the proposed plan that was introduced that evening, calling this sequencing "[y]et another failure of the process." In response, Secretary LaRose characterized both the official statement, and his vote in favor of it, as "asinine." He nonetheless voted for the proposed plan, apparently convinced by his Chief of Staff that if he voted no, it would be cited in this Court:



Dep. Stip., Ex. Vol. 1 at DEPO_00158; Suppl. Vol. 2 at 298 (F. LaRose Dep. Ex. 2).[9]

Respondent Governor DeWine likewise rejected the rationale provided in the 8(C)(2) Statement, testifying that "the percentage of statewide elections that were won by republicans versus democrats over a certain period of time . . . would not have been a rationale for me." Dep. Stip., Ex. Vol. 1 at DEPO_00240:1-9; Suppl. Vol. 2 at 359 (M. DeWine Tr.). In particular, he testified: "What I would not agree with is the reference to 81 percent. I don't think that could have -- that 81 percent is a -- any kind of mark that would indicate statewide preferences." Dep. Stip., Ex. Vol. 1 at DEPO_00241:1-8; Suppl. Vol. 2 at 360 (M. DeWine Tr.). And Respondent Auditor Faber, who was a state senator at the time that the constitutional reform enacting Article XI was being drafted, testified: "Look, I will tell you, when we drafted this [Article XI] nobody anticipated that the number 80 percent would show up at a redistricting discussion." Dep. Stip., Ex. 1 Vol. 5 at DEPO_01118:15-01119:1; Suppl. Vol. 2 at 369 (K. Faber Tr.).

ARGUMENT

I. Proposition of Law 1: Section 6 Sets Forth a Mandatory Prohibition of Partisan Gerrymandering.

A. "Shall" Means "Must."

Respondents contend that compliance with Section 6 is not "mandatory" under Article XI. 10/6 Legislative Leaders' Opp'n & Objs. to Rels.' Mot. to Compel at 2, 7. They dismiss Section 6 as merely "aspirational." *Id.* at 9. They are wrong.

Section 6 does not intone "aspirational" ideals without consequence. The text of Section 6 makes clear that it is a command. The word "shall" appears *three times* in the pertinent

[9] Respondent Secretary LaRose acknowledged in his deposition that he sent the messages on the right side of the image, that his Chief of Staff Merle Madrid sent the gray message on the left side of the image, that LaRose sent the blue thumbs-up reactions displayed on two of Madrid's messages, and that the exchange began at 11:36 P.M. on September 15, 2021. Dep. Stip., Ex. 1 Vol. 1 at DEPO_00064:2-19; Suppl. Vol. 2 at 291 (F. LaRose Tr.).

provisions of Section 6. First, Section 6 provides that the Commission "***shall*** attempt to draw a general assembly district plan that meets all of the following standards." Ohio Constitution, Article XI, § 6 (emphasis added). Then, in describing the standards that the Commission ***shall*** attempt to meet, Section 6(A) states that "[n]o general assembly district plan ***shall*** be drawn primarily to favor or disfavor a political party." *Id.* (emphasis added). Finally, Section 6(B) states that "[t]he 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." *Id.* (emphasis added).

"'Shall' means must. . . . And [t]he word 'must' is mandatory." *Wilson v. Lawrence*, 150 Ohio St.3d 368, 371, 2017-Ohio-1410, ¶ 13, 81 N.E.3d 1242, 1245 (citations omitted); *see also Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 107, 271 N.E.2d 834, 837 (1971) ("The word 'shall' is usually interpreted to make the provision in which it is contained mandatory, especially if frequently repeated.") (citations omitted).

Nor does the inclusion of the term "attempt" lessen the mandatory force of the term "shall." *See State v. White,* 103 Ohio St.3d 580, 583, 2004-Ohio-5989, ¶ 14, 817 N.E.2d 393, 396 (holding that a statute stating that a clerk "shall attempt to collect costs" from a convicted person meant that the clerk had no discretion not to do so). In *White*, this Court concluded that the statute at issue conferred no discretion on the clerk: the "shall attempt" language meant that the clerk was "*required* to certify a bill of costs and attempt collection from nonindigent defendants." *Id.* (emphasis added); *see also State ex rel. Republic Steel Corp. v. Ohio Civil Rights Comm'n*, 44 Ohio St.2d 178, 180, 339 N.E.2d 658, 660 (1975) (holding that a statute that provided that the Civil Rights Commission "shall endeavor" to eliminate discriminatory practices through conciliation and persuasion before serving a complaint on the respondent established a

mandatory—indeed, jurisdictional—requirement that such an effort take place).

Indeed, Respondents themselves represented to the voters who passed the constitutional amendment enacting Article XI that Section 6 has teeth. The push for the amendment arose in response to this Court's decision in *Wilson v. Kasich*, which permitted Ohio's state maps to withstand a challenge on partisan gerrymandering grounds. The Respondents repeatedly told the voters exactly what this reform would accomplish: the end of unduly partisan district maps. *See supra* at Section A of Legal Background; *see, e.g.*, Compl. Citations, Ex. Vol. 1 at COMP_0284; Suppl. Vol. 1 at 231 (purpose of amendment was to "[e]nd the partisan process for drawing Ohio House and Senate districts, and replace it with a bipartisan process with the goal of having district boundaries that are more compact and politically competitive"); Compl. Citations, Ex. Vol. 1 at COMP_0285; Suppl. Vol. 1 at 232 (promising amendment would "make sure state legislative districts are drawn to be **more competitive** and compact, and ensure that no district plan should be drawn to favor or disfavor a political party"). When Ohioans overwhelmingly voted to pass the reform enacting Article XI, they were voting for actionable partisan fairness requirements—because that is what Respondents themselves told the voters they would get.

It bears emphasis that when a four-year plan is passed without bipartisan support, the Commissioners are required by Section 8(C) to be explicit about how their plan complies with Section 6. This fact underscores the centrality of Section 6. The Commissioners would not have issued this Section 8(C)(2) Statement had Section 6 been optional. It would have been more straightforward to shrug and say, "not applicable." As issued, the Section 8(C)(2) Statement makes plain that the enacted plan does not come close to complying with Section 6. Respondents' plan, which deviates so grossly from voter preference, indicates a failure even to "attempt" to meet the commands articulated in Section 6.

B. "Attempt" Merely Requires Consistency with Other Provisions of Article XI.

That Section 6 speaks of an "attempt" to comply with Section 6 does not lessen its mandatory force. The use of the word "attempt," where it appears in Section 6, is a necessary acknowledgement that the Commission, in its work to comply with parts A, B, and C of Section 6, must not abandon the other provisions of Article XI, as provided in Section 6's final sentence.

The interplay of Section 6 and the other provisions of Article XI is clear. On the one hand, Section 6 acknowledges that the standards set forth in Sections 6(A) and 6(B) do not "permit[] the commission to violate the district standards described in Sections 2, 3, 4, 5, or 7" of Article XI. Ohio Constitution, Article XI, § 6. At the same time, Section 6 instructs the Commission that it "shall attempt" to follow the standards set forth in Section 6, so long as compliance does not require a violation of Section 2, 3, 4, 5, or 7 of Article XI. Thus, if complying with Section 6 does *not* require a violation of any of those other sections, then the Commission "shall" follow the specific commands enacted in Sections 6(A) and 6(B).

II. Proposition of Law 2: Respondents Violated Section 6(B) of Article XI.

A. Section 6(B) Provides a Clear, Objective Test.

Section 6(B) expresses a calculable standard. The Commission must attempt to draw a plan that satisfies the following criteria: "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." Ohio Constitution, Article XI, § 6(B).

Section 6(B) expressly states that partisan fairness is to be determined by comparing two measures: (1) the proportion of ***districts*** in the plan whose ***voters*** favor a political party, based on statewide elections over the past ten years; and (2) the statewide preferences of the ***voters*** of Ohio. *Id.* As set forth by Dr. Imai, *see* Imai Rep. ¶¶ 21-23; Suppl. Vol. 1 at 8-9, the text of Section 6(B)

logically necessitates a four-step process to compare these metrics and determine whether a plan violates Section 6(B):

First, determine "the statewide preferences of the voters of Ohio" based on voting records from the statewide state and federal partisan general election results during the last ten years.

Second, to determine which political party the voters in a district "favor," look to the voting records from each statewide election over the past decade, and determine how the voters in each new district voted in that election.

Third, tally the average number of districts that favor each political party across elections, and divide this number by the number of districts to determine the "statewide proportion of districts whose voters . . . favor each political party."

Fourth, compare the outcome of the first step and the outcome of the third step. If these numbers do not "correspond closely," then the plan violates Section 6(B).

B. Respondents' Plan Violates This Standard.

1. Dr. Warshaw Has Shown Respondents' Violation of Section 6(B).

In his affidavit filed with the Complaint, Dr. Christopher Warshaw carries out, in plain terms, the comparison required by Section 6(B). Dr. Warshaw's comparison provides *prima facie* evidence that the enacted plan did not comply with the proportionality requirements of Section 6(B). Absent proof that the failure to meet the proportionality standard of Section 6(B) was necessitated by compliance with the other pertinent provisions of Article XI (*i.e.*, Sections 2, 3, 4, 5, and 7), the plan is invalid.

Dr. Warshaw first calculates "the statewide preferences of the voters of Ohio" based on statewide elections over the past ten years. Republicans have received 54.5% and Democrats have received 45.5% of the two-party vote in these statewide elections. Compl. Citations, Ex. Vol. 1 at COMP_0009, 0028-29; Suppl. Vol. 1 at 186, 205-206 (Warshaw Expert Aff.).

Dr. Warshaw then calculates 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." To do so, he calculates and then averages the proportion of districts in the enacted plan whose voters have favored each political party in each statewide election cycle over the past ten years. His calculations demonstrate that 67% of House districts and 69% of Senate districts in the enacted plan favor Republicans. *Id*.

Dr. Warshaw then compares these figures, concluding that the enacted plan "is predicted to lead Democrats to get 14-15% fewer seats than votes" in the Senate and "to lead Democrats to get about 12% fewer seats than votes" in the House. *See* Compl. Citations, Ex. Vol. 1 at COMP_0028-0029; Suppl. Vol. 1 at 205-206 (Warshaw Expert Aff.). Because these figures do not "correspond closely," Dr. Warshaw concludes that the enacted plan "fails the proportionality test established by the Constitution." *Id.* ("Overall, the enacted plan appears to violate both Article XI, Section 6(A) and (B) of Ohio's Constitution . . . . It violates Section 6(B) because the two-parties' seat shares do not correspond closely to their vote shares.").

2. Dr. Imai Demonstrates that Respondents Violated Section 6(B).

Dr. Kosuke Imai conducted an analysis demonstrating Respondents' failure even to attempt a plan that "correspond[s] closely to the statewide preferences of the voters of Ohio." Relying on a publicly-available algorithm published by Dr. Imai and his colleagues, he used a computer to generate a representative set of 5,000 redistricting plans that reflect Ohio's constitutional requirements and political geography. *See* Imai Rep. ¶¶ 3, 8, 12-18 & Appx. A-D; Suppl. Vol. 1 at 3-4, 5-7, 30-42.[10] Each of these plans is at least as compliant as the enacted plan with all of

[10] Dr. Imai "simulated 5,000 alternative House of Representatives plans and 5,000 alternative Senate plans," explaining that he could "easily generate additional compliant plans by running the algorithm longer, but for the purpose of [his] analysis, 5,000 simulated plans will yield statistically

Article XI's restrictions on drawing House and Senate districts. Imai Rep. ¶¶ 3, 14-15 & Appx. A-D; Suppl. Vol. 1 at 3-4, 6, 30-42. These 5,000 plans therefore provide an ideal basis to compare the enacted plan against other plans the Commission could have adopted.

Dr. Imai compares these 5,000 computer-generated maps to the enacted plan based on data from the nine elections considered by the Commission. He then conducts a further analysis, adding data from additional statewide elections conducted over the past decade that the Commission did not consider. Because these additional elections entailed results that were favorable to the Republicans, this further analysis was provided to make sure to give the Respondents the benefit of the doubt. Imai Rep. ¶ 45; Suppl. Vol. 1 at 16. Under either set of assumptions, the results of this comparison are clear-cut. The enacted plan creates more Republican districts in both the House and the Senate than *any* of the 5,000 plans generated by Dr. Imai. Imai Rep. ¶¶ 3, 40-44, 49-55 & Figs. 3-6, 9-12; Suppl. Vol. 1 at 3-4, 13-16, 18-21.

Under the Commission's assumptions, the enacted plan is a clear statistical outlier as regards its violation of the proportionality requirement of Section 6(B). Imai Rep. ¶ 40; Suppl. Vol. 1 at 13-14. Overall, the enacted plan yields six more seats for the Republicans than does the average of his computer-generated set of plans. Dr. Imai provides the breakdown for the House and Senate as follows.

Under the Commission's assumptions, Dr. Imai calculates that the Republican party is expected to win 63.0 seats in the House of Representatives under the enacted plan, which is about four seats higher than the average plan of 58.9 seats. Imai Rep. ¶ 41; Suppl. Vol. 1 at 14-15. He notes that "[n]one of my 5,000 simulated plans awards that many seats to Republicans." *Id.*

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precise conclusions. In other words, generating more than 5,000 plans, while possible, will not materially affect the conclusions of [his] analysis." *See* Imai Rep. ¶¶ 28-29; Suppl. Vol. 1 at 10.

Figure 3 of Dr. Imai's Report, reproduced below, shows the extent to which the enacted plan is an extreme outlier for House of Representatives.

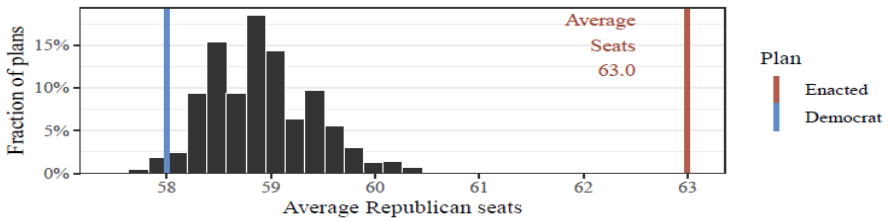

Figure 3: Average number of Repulican seats calculated for the 5,000 simulated House redistricting plans computed by averaging across the 9 statewide elections from 2016 to 2020. Overlaid are the values for the enacted plan (red) and the Democratic plan (blue).

[11]

Under the Commission's assumptions, Dr. Imai concludes that, like the House plan, the Senate Plan is a "clear outlier." Imai Rep. ¶ 43; Suppl. Vol. 1 at 15-16. He observes that, under the enacted plan, "the Republican party is expected to win 21.7 seats on average, which is much greater than any of my 5,000 simulated plans. On average, the simulated plans would award Republicans 19.7 seats, which is about 2 seats fewer than the enacted plan." *Id.* The enacted plan lies well outside the range of plans for the Senate, as shown in Figure 5 of Dr. Imai's Report:

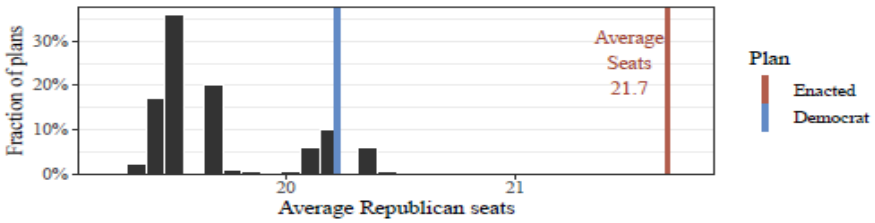

Figure 5: Average number of Repulican seats calculated for the 5,000 simulated Senate redistricting plans computed by averaging across the 9 statewide elections from 2016 to 2020. Overlaid are the values for the enacted plan (red) and the Democratic plan (blue).

Under the "benefit of the doubt" assumptions, which consider data from additional elections, the enacted plan is once again a clear statistical outlier in its partisan bias. In fact, the size of the discrepancy between Dr. Imai's neutrally generated plans and the enacted plans is

[11] Several figures in Dr. Imai's report (e.g., Figs. 1-5) contain a blue line representing Democratic Respondents' proposed plan. The blue line is included here only for context to show a plan provided during the public hearing process. Relators are not advocating enactment of that plan.

almost unchanged from the Commission's method to the "benefit of the doubt" method. Imai Rep. ¶ 49, Fig. 9; Suppl. Vol. 1 at 18-19 (showing enacted plan gives Republicans 64.5 House seats compared to a 60.9 seat average for all 5,000 plans); *see also* Imai Rep. ¶ 54, Fig. 11; Suppl. Vol. 1 at 20 (showing enacted plan gives Republicans 21.8 Senate seats compared to a 20.5 seat average for all 5,000 plans).

It would be absurd to claim that Respondents "attempted" to meet the requirement of Section 6(B), yet somehow arrived at a plan overwhelmingly more partisan than any of the 5,000 plans produced by Dr. Imai. On these facts, it is clear that the Republican members of the Commission made no effort whatsoever to enact a plan that closely corresponds to the preferences of Ohio's voters, and instead made an effort to favor their own party.

C. Respondents' Partisan Scoring of Each District Confirms that Section 6(B) Mattered.

Actions speak louder than words. The Republican map-drawers conduct demonstrates their understanding that Section 6(B) is a mandatory constitutional obligation. In particular, as set forth above, the Republican map-drawers engaged in the partisan scoring of each district when they drew and revised the maps, from the start of the map-drawing process to the time the final maps were submitted. DiRossi and Springhetti testified in their depositions that, when they were drawing the maps using the Maptitude software, a window that displays that the partisan leaning of the district—also known as "partisan scoring"—appears next to each district as they work on it. Dep. Stip., Ex. Vol. 3 at DEPO_00467:5-10, 00469:8-21, 00528:23-00529:6; Suppl. Vol. 2 at 300-301, 321-322 (R. DiRossi Tr.); *see also* Dep. Stip., Ex. Vol. 6 at DEPO_01294:11-01295:23; Suppl. Vol. 2 at 378-379 (B. Springhetti Tr.). Partisan scoring displays the percentage of Republican and Democratic votes in the district at issue based on averaging the votes across a certain set of elections. Dep. Stip., Ex. Vol. 3 at DEPO_00496:23-00497:6, 00503:15-00504:3;

Suppl. Vol. 2 at 311-312, 314-315 (R. DiRossi Tr.); Dep. Stip., Ex. Vol. 6 at DEPO_01295:1-23; Suppl. Vol. 2 at 379 (B. Springhetti Tr.).

Respondents needed to integrate this partisan scoring function into Maptitude because of a constitutional imperative. In the event of a four-year plan that was not approved by a bipartisan vote, Section 8(C)(2) of Article XI required Respondents to generate a statement that:

> explain[s] what the commission determined to be the statewide preferences of the voters of Ohio and the manner **in which the statewide proportion of districts** in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, **favor each political party** corresponds closely to those preferences, as described in division (B) of Section 6 of this article.

Ohio Constitution, Article XI, § 8(C)(2) (emphasis added). In other words, if the Commission could not reach bipartisan consensus on the plan, the Republicans needed to be prepared to tally up all the districts in Ohio, setting forth how many favored Republicans and how many favored Democrats. There simply is no way to calculate those numbers without first knowing the partisan leanings of each individual district. That is precisely the information that DiRossi and Springhetti had on their screens throughout the process of drawing the maps the Commission enacted.

Their possession of this partisan information did not occur by accident. The partisan data needed to produce the 8(C)(2) Statement did not come pre-installed on Maptitude. Instead, acquiring this data only happened by virtue of Respondents' consistent efforts to obtain the necessary databases and integrate partisan scoring into their map-drawing process. In particular:

- Respondents entered into a contract with Ohio University so they could load election data into Maptitude as a layer, which would supply the data that could be imported into a DataView window in Maptitude.
- At the Republican Legislative Leaders' direction, DiRossi and Springhetti loaded the election data into Maptitude, which caused the scoring data for each district to appear

in the DataView window.

- DiRossi and Springhetti reported the scoring results to the legislative leaders.

See Section B.2 of Statement of Facts. Through these efforts they made clear, beyond any doubt, that they understood, exactly, the meaning of Section 6(B).

To be sure, the enacted plan fell short of the requirements of that provision. Indeed, it did not even constitute a bona fide "attempt" at compliance. *See* Section IV, *infra*. On the contrary, even though the map-drawers set up their computers so that they could keep track of the partisan leanings of each district (as contemplated by Section 6(B)), Respondents ultimately opted for a plan that ignored the clear metric set forth in that provision. As DiRossi testified, he was instructed not to focus on Section 6(B)'s requirements when drawing the map. Dep. Stip., Ex. Vol. 3 at DEPO_00610:1-17; Suppl. Vol. 2 at 325 (R. DiRossi Tr.).

There is no doubt as to what happened here. The partisan data was on their computer screens. They imported the election data. It was reported to the legislative leaders. And they nonetheless proceeded to draw partisan maps.

D. Respondents' Refusal to Explain their Compliance with Section 6(B) Demonstrated the Willfulness of their Violation of that Provision.

On September 9, 2021, after DiRossi first publicly introduced Huffman's plan, Senator Sykes specifically asked DiRossi how Huffman's plan "satisf[ied] the new requirement in Section 6(B) of the Constitution." Comm. Stip., Ex. Vol. 1 at STIP_0173-0174; Suppl. Vol. 1 at 65-66 (9/9 AM Hrg. Tr.). But the Republican map-drawers ultimately ignored the Democratic Respondents' specific request for analysis of whether their plan complied with the Section 6 requirements. During the hearing, DiRossi responded that President Huffman's staff had "not complete[d]" an "analysis of the election data contemplated by the Constitution," but represented that analysis was "ongoing." Comm. Stip., Ex. Vol. 1 at STIP_0174; Suppl. Vol. 1 at 66 (9/9 AM

Hrg. Tr.). DiRossi has since admitted that analysis never was completed. Instead, DiRossi shifted his focus to issues that arose in the negotiations, rather than completing the requested Section 6(B) analysis. Dep. Stip., Ex. Vol. 3 at DEPO_00589:7-20; Suppl. Vol. 2 at 324 (R. DiRossi Tr.); *see also* Dep. Stip., Ex. Vol. 7 at DEPO_01734:8-01735:7; Suppl. Vol. 2 at 391-392 (M. Huffman Tr.). Section 6(B) compliance would not be addressed until the night of September 15, 2021, when Respondents issued their Section 8(C)(2) Statement.

III. Proposition of Law 3: Respondents Violated Section 6(A) of Article XI.

Section 6 also mandates that the Commission must attempt to draw a plan that satisfies the following criteria: "[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party." Ohio Constitution, Article XI, § 6(A).

The constitutional amendment leaves to the Court to determine whether the plan was drawn "primarily to favor or disfavor" one party. In so doing, the Court can look to a variety of evidence. First, the Court could consider indicia of *purpose* to primarily favor one party—for example, an unduly partisan process, the Commission's own 8(C)(2) Statement providing only an irrational explanation of compliance with Section 6, and abundant party admissions. Second, the Court could consider objective evidence of partisan *effect* showing that the maps were primarily drawn to favor one party, such as extreme partisan bias metrics.

A. The Evidence Demonstrates that the Maps Were Drawn Purposefully to Favor the Republican Party.

The first part of the inquiry for Section 6(A) is whether direct and circumstantial evidence of intent exists. In assessing gerrymandering claims, courts have frequently looked to the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), to guide their assessment of "circumstantial and direct evidence" of "a jurisdiction's motivation in enacting voting changes." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S.

471, 488-89 (1997) (discussing use of *Arlington Heights* intent evidence in racial gerrymandering cases brought under the Voting Rights Act); *Miller v. Johnson*, 515 U.S. 900, 913-16 (1995) (citing *Arlington Heights* and discussing intent in racial gerrymandering cases brought under the Equal Protection Clause); *see also In re Duiguid's Estate*, 24 Ohio St.2d 137, 141, 265 N.E.2d 287, 289 (1970) ("Subsequent acts of the parties may reflect, as circumstantial evidence, on the question of intent."); *State v. Huffman*, 131 Ohio St. 27, 38, 1 N.E.2d 313, 318 (1936) ("intent may be made to appear from circumstantial as well as from direct evidence") (citation omitted).

In *Ohio A. Philip Randolph Institute v. Householder*, the Southern District of Ohio concluded that "evidence of the timeline and logistics of the map-drawing process," "contemporaneous statements made by the map drawers about their efforts," "the characteristics of the map itself," and "the outlier partisan effects that the map has produced since its enactment" told "a cohesive story of a map-drawing process dominated by partisan intent—the invidious desire to disadvantage Democratic voters and advantage Republican voters to achieve a map that was nearly certain consistently to elect twelve Republican Representatives and four Democratic Representatives"—and "paint[ed] a convincing picture that partisan intent predominated in the creation of the 2012 congressional map." 373 F.Supp.3d at 1099.[12] The same factors are present here, and this Court should likewise find that Respondents' plan is unlawful.

1. The Partisan Process Demonstrates Respondents' Partisan Intent.

The unduly partisan process is a strong indicator that the plan was drawn primarily to favor Republicans. In assessing whether Ohio's 2011 plan was a partisan gerrymander, Judge Moore explained that "'[d]epartures from the normal procedural sequence' may serve as proof 'that

[12] Courts have long found that state actors compromise the integrity of the democratic process when they manipulate the electoral marketplace to award a legislative "monopoly" to their preferred party. *Williams v. Rhodes*, 393 U.S. 23, 32, 89 S.Ct. 5, 21 L.E.2d 24 (1968).

improper purposes are playing a role' in the map drawers' work." *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d at 1099 (quoting *Village of Arlington Heights*, 429 U.S. at 267).[13]

The 2021 state redistricting process was just as flawed and as infected with partisan bias as the 2011 redistricting process. In some ways, the departure from the normal procedural sequence was even more apparent than in 2011: this time, despite the constitutional mandate that any general assembly district plan must be adopted—including with support from at least two Democratic commissioners—by September 1, 2021, Ohio Constitution, Article XI, §§ 1(B)(3), 1(C), the Republicans failed to even present a plan until eight days after the constitutional deadline. *See* Comm. Stip., Ex. Vol. 1 at STIP_0170; Suppl. Vol. 1 at 62 (9/9 AM Hrg. Tr.).

Although the terms of Article XI provide that the Commission as a whole was to propose a plan, there was never one plan drawn by the Commission, nor did the Commission as a whole ever engage a map-drawer or consultant to analyze potential maps. Instead, just as in the process surrounding the 2011 congressional plan, all deliberations prior to the presentation of the Republicans' plan happened behind closed doors, and the process was controlled by one party. *See Ohio A. Philip Randolph Inst.*, 373 F.Supp.3d at 1093 (considering whether "there is one-party control of redistricting" and "the party in control party is favored by the map").

When the Republican Legislative Leaders introduced their proposed maps on September 9, 2021, multiple commissioners were immediately able to identify that Huffman's proposed maps were insufficient to satisfy Section 6 or reach a bipartisan ten-year plan. Dep. Stip., Ex. Vol. 1 at DEPO_00028:2-18; Suppl. Vol. 2 at 284 (F. LaRose Tr.); *see also* Dep. Stip., Ex. Vol. 7 at DEPO_01606:20-01607:5; Suppl. Vol. 2 at 398-399 (R. Cupp Tr.); *see also* Dep. Stip., Ex. Vol. 4

[13] That court ultimately "conclude[d] that the map-drawing process was rife with procedural irregularities and suspect behavior on the part of the map drawers, all of which support[ed] an inference of predominant partisan intent" in creating the 2011 maps. *Ohio A. Philip Randolph Inst.*, 373 F.Supp.3d at 1099.

at DEPO_00932:20-23; Suppl. Vol. 2 at 274 (V. Sykes Tr.). But, within hours, the Commission embraced the Republican Legislative Leaders' proposed plan as the Commission's official proposed plan—despite the objection of its Democratic members, the lack of any meaningful opportunity for the public to review the maps, and the total absence of input in the drafting process from anyone other than the two Republican Legislative Leaders and their staff. *See* Comm. Stip., Ex. Vol. 1 at STIP_0169-0198; Suppl. Vol. 1 at 61-90 (9/9 AM Hrg. Tr.); *see also* Comm. Stip., Ex. Vol. 1 at STIP_0199-0227; Suppl. Vol. 1 at 119 (9/9 PM Hrg. Tr.); *see also* Dep. Stip., Ex. Vol. 2 at DEPO_00361:3-11, 00376:19-00377:8, 00385:14-22, 00390:19-00391:18, 00398:12-21; Suppl. Vol. 2 at 329, 338-339, 344, 347-348, 353 (E. Sykes Tr.); *see also* Dep. Stip., Ex. Vol. 4 at DEPO_00850:16-22, 00937:20-00938:24; Suppl. Vol. 2 at 257, 276-277 (V. Sykes Tr.); *see also* Dep. Stip., Ex. 1 Vol. 1 at DEPO_00016:23-24, 00019:2-9; Suppl. Vol. 2 at 282-283 (F. LaRose Tr.); *see also* Dep. Stip., Ex. 1 Vol. 5 at DEPO_00997:12-14; Suppl. Vol. 1 at 363 (K. Faber Tr.).

In the days that followed the introduction of the Republican Legislative Leaders' proposed plan, Democratic members of the Commission engaged in a good-faith effort to negotiate a ten-year bipartisan plan, and circulated two revised versions of the Republican Legislative Leaders' map—first on September 13, 2021, and again on September 15, 2021. *See supra*, Section A.4 of Statement of Facts.

Nevertheless, on the evening of September 15, 2021, the Commission passed Respondent Huffman's amendment to his proposed plan along party lines within ten minutes of Respondent Huffman's introduction of the amendment. This plan, despite including minor changes to some districts, continued to entrench a Republican veto-proof supermajority that did not reflect the preferences of Ohio voters. Compls. and Answs., Ex. Vol. 1 at COMP_ANSW_0034 ¶¶ 1-3; Suppl. Vol. 1 at 151 (V. Sykes Ans.); *see also* Ohio Constitution, Article II, § 16 (requiring three-

fifths, or 60%, of each chamber of the General Assembly to override the Governor's veto); Comm. Stip., Ex. Vol. 2 at STIP_0418-0419; Suppl. Vol. 1 at 50-51 (Section 8(C)(2) Stmt.) ("the final general assembly district plan . . . contains 85 districts (64.4%) favoring Republican candidates"). And it was drawn without any input or participation from the majority of the members of the Commission. Statewide Elected Officials' Resp. at 6; Compls. and Answs., Ex. Vol. 1 at COMP_ANSW_0039 ¶ 44, COMP_ANSW_0041 ¶ 67; Suppl. Vol. 1 at 156, 158 (V. Sykes Ans.).

However, just after midnight on September 16, 2021—and within an hour of Respondent Huffman's introduction of the amendment—the Commission voted along party lines to adopt Respondent Huffman's amended maps as the general assembly plan for the next four years. The procedural irregularities and suspect behavior that took place in 2021 warrant the same conclusion afforded that behavior in 2011: that such conduct "support[s] an inference of predominant partisan intent." *Ohio A. Philip Randolph Inst.*, 373 F.Supp.3d at 1099.

2. Respondents' Approval of the Plan, with Full Knowledge of Its Partisan Skew, Demonstrates Their Partisan Intent.

As discussed in detail above, Respondents' Maptitude software calculated the partisan scoring of every district during the map-drawing process. Thus, Respondents had all the specifics of the partisan leanings of individual districts at their fingertips (and on their computer screens). Yet they willfully plowed ahead and enacted a plan that grossly favored their own political party.

Moreover, Respondents admitted that, by no later than September 9, 2021, they were aware of the map's partisan skew. *See* Dep. Stip., Ex. Vol. 7 at DEPO_01599:5-24, 01600:3-13; Suppl. Vol. 1 at 396-397 (R. Cupp Tr.) (testifying he was "surprised" because "the number of Republican leaning districts was more than I had anticipated it was going to be," and "concerned" the skew "would not be acceptable to the Democrat members"); s*ee also* Dep. Stip., Ex. 1 Vol. 1 at DEPO_00028:9-14; Suppl. Vol. 2 at 284 (F. LaRose Tr.) (expressing "concern[,]" because even

without seeing any "partisan data breakdown," he could tell "by looking at the map . . . that perhaps, you know, the way that it had been drawn would not be acceptable to our minority counterparts").

In the end, Respondents voted to enact the Republican Legislative Leaders' plan despite, or because of, the available partisan scoring data. They voted for it with full awareness of the partisan skew of the plan as a whole. These facts alone demonstrate their partisan intent.

3. Dr. Imai's Localized Analysis Demonstrates Respondents' Partisan Intent.

Dr. Imai has also conducted more localized analysis of districts in the enacted plan. This analysis confirms that those districts were drawn primarily to favor the Republican party. *See* Imai Rep. at ¶¶ 56-71; Suppl. Vol. 1 at 21-29. Franklin County provides an illustrative example as regards the House districts:

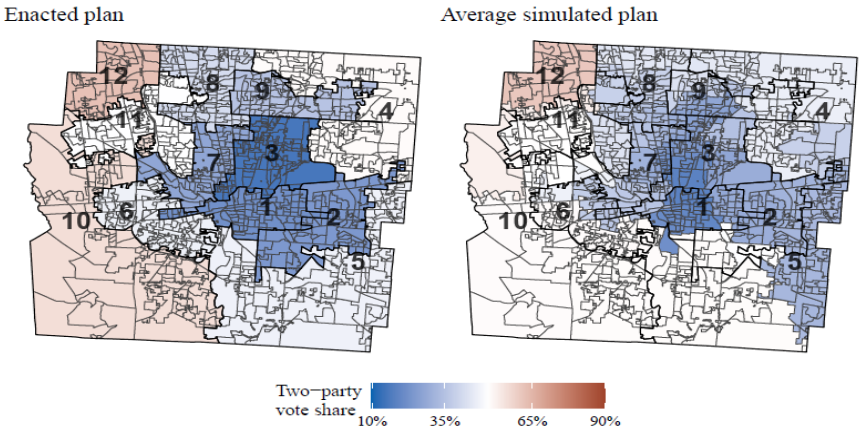

Figure 15: House districts in Franklin county. The left and right maps show the average two-party vote share for each district under the enacted and average simulated plan, respectively. The enacted plan packs Democratic voters into districts 1, 2, 3, and 7, turning districts 10 and 12 into Republican seats. In contrast, under the average simulated plan, more voters live in competitive districts.

In the enacted plan, Democratic voters are packed into Districts 1, 2, 3, and 7, allowing the Commission to carve out Republican seats in Districts 10 and 12, and create a slight Republican advantage in District 4. Imai Rep. ¶ 63, Fig. 15; Suppl. Vol. 1 at 25-26. In Dr. Imai's plans, however, these voters are often drawn into districts with neighboring communities that are less

densely Democratic, unpacking their votes and creating more competitive districts. Imai Rep. ¶¶ 3-64; Suppl. Vol. 1 at 25. This packing of Democratic voters allow the enacted plan to draw 3.4 districts that favor Republicans in Franklin County, more than in any of Dr. Imai's 5,000 plans. Imai Rep. ¶ 65; Suppl. Vol. 1 at 25-26.

This bias extends to Senate seats. Hamilton County provides an illustrative example. Under Section 4(A) of Article XI, each Senate district must be "composed of three contiguous house of representatives districts." In the enacted plan, Hamilton County contains seven House districts, and adjacent Warren County contains two House districts. The enacted plan combines the nine House districts to create three Senate districts between the two counties. Dr. Imai has demonstrated there are six possible ways to combine those nine House districts into three Senate districts while meeting the requirements of Article XI. *See* Imai Rep. ¶ 61; Suppl. Vol. 1 at 23.

From those six allowable combinations, the enacted plan unsurprisingly adopts the combination that packs the largest number of Democratic voters possible into one district, creating two safe Republican seats. Imai Rep. ¶ 62; Suppl. Vol. 1 at 23-24.

And this trend is not limited to Hamilton and Warren counties. In Franklin and Union Counties, there are 153 allowable combinations of Senate districts, but the enacted plan again packs Democratic voters together to create as many districts as possible where Republicans have a chance of winning. Imai Rep. ¶ 67; Suppl. Vol. 1 at 26-27. In other words, "among all possible compliant plans in this county cluster, the enacted plan is the most favorable to the Republican party." *Id.* In Cuyahoga, Summit, and Geauga Counties, there are 27 allowable Senate district combinations, and the enacted plan again adopts the most pro-Republican possible combination from this set. Imai Rep. ¶ 71; Suppl. Vol. 1 at 28-29.

This consistent preference for the most pro-Republican districts possible was not a

coincidence. It reflects conscious decisions made by the Republican operatives who drew the plan, and the legislative leaders who supervised that process.

4. The Objective Partisan Skew of the Plan Constitutes Circumstantial Evidence of Partisan Intent.

The extremity of the skew of the plan itself illustrates that Republican commissioners sought to ensure that the enacted plan would favor their party and that they made no attempt to comply with the directives set forth in Section 6(A). Section II.B, *supra*; *see also Washington v. Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from the totality of the relevant facts"). "[S]tatistical evidence that demonstrates 'a clear pattern' of partisan bias that would be unlikely to occur without partisan intent or evidence that the supporters of one political party were consistently treated differently than the supporters of another" constitutes evidence of a partisan purpose. *Ohio A. Philip Randolph Inst.*, 373 F.Supp.3d at 1096.

B. The Objective Evidence of the Plan's Partisan Skew Demonstrates that It Will Have Its Intended Effect and Primarily Favor the Republican Party.

The record evidence makes clear that the enacted plan was drawn primarily to favor the Republican Party in violation of Section 6(A), and that Respondents made no attempt to avoid this outcome. The objective facts concerning the partisan leanings of the districts in the plan demonstrates this point. This plan will lead Democrats to receive 12-15% fewer seats in the House and Senate than votes, *see* Compl. Citations, Ex. Vol. 1 at COMP_0009, 0028-0029; Suppl. Vol. 1 at 186, 205-206 (Warshaw Expert Aff.), and creates more Republican-favoring districts than any of the 5,000 representative plans generated by Dr. Imai. Imai Rep. ¶¶ 40, 43, 51, 54; Suppl. Vol. 1 at 13-14, 15-16, 19-20; *see generally supra* Section II.B. Not only is the plan an outlier on just these partisan metrics—it is also a consistent outlier across other partisan bias metrics widely used by political scientists. Imai Rep. ¶¶ 32, 45; Suppl. Vol. 1 at 11, 16. These other standard metrics confirm the extreme partisan skew of the enacted plan.

1. Dr. Warshaw's Analysis Demonstrates that the Enacted Plan Was Drawn Primarily to Favor the Republican Party.

As set forth in Dr. Warshaw's affidavit, well-established partisan bias metrics consistently demonstrate that the enacted plan has a substantial partisan skew. Experts routinely use these metrics to evaluate partisan bias in redistricting plans. Here, these metrics all point to the same conclusion: the enacted plan is starkly partisan. The metrics that he used to measure the partisan skew of the plan include:

- The *efficiency gap* measures the difference between the parties' respective "wasted votes," divided by the total number of votes cast in the election. When a party wins an election, the wasted votes are those above the 50%+1 needed to win. Compl. Citations, Ex. Vol. 1 at COMP_0012-0014; Suppl. Vol. 1 at 189-191 (Warshaw Expert Aff.).

- The *mean-median gap* measures the difference between a party's vote share in the median district and their average vote share across all districts. For example, if the Republican party wins more votes in the median district than in the average district, then the mean-median gap indicates that the plan gives the Republican party an advantage in the translation of votes to seats. Compl. Citations, Ex. Vol. 1 at COMP_0014-15; Suppl. Vol. 1 at 191-192 (Warshaw Expert Aff.).

- *Partisan symmetry* measures whether each party would receive the same share of seats under the plan assuming they had identical shares of votes. For example, if the Democratic party would win 51% of the seats if it received 55% of the votes, but the Republican party would win 66% of the seats if it received 55% of the votes, then the partisan symmetry metric indicates that the plan favors the Republican party. Compl. Citations, Ex. Vol. 1 at COMP_0016-18; Suppl. Vol. 1 at 193-198 (Warshaw Expert Aff.).

- *Declination* measures the asymmetry in the distribution of votes across districts. For example, declination suggests that, if the Democratic party's average vote share in districts it won (65%) is significantly higher than the Republican party's average vote share in districts that it won (52%), the former party's districts were packed. Compl. Citations, Ex. Vol. 1 at COMP_0018; Suppl. Vol. 1 at 195 (Warshaw Expert Aff.).

Using a database of all state legislative elections from 1972 to 2020, Dr. Warshaw compared the past decade under the 2011 plan to the prior forty years of district plans in Ohio, then compared the 2011 plan to the enacted plan according to each of these partisan metrics. *See* Compl. Citations, Ex. Vol. 1 at COMP_0022-0031; Suppl. Vol. 1 at 199-208 (Warshaw Expert Aff.); *cf. Ohio A. Philip Randolph Inst.*, 373 F.Supp.3d at 1093 (considering whether "the partisan-

bias metrics all point in the same direction and point toward an advantage for the party that controlled the redistricting" and the "plan is an historical outlier in its partisan effects").[14]

Dr. Warshaw uses two methods for his partisan bias estimates: a composite metric, and a more sophisticated estimate from PlanScore that adjusted for future predicted trends. Under the first method, analyzing the Ohio Senate map, Dr. Warshaw calculates that when "average[d] across all four metrics, the plan is more extreme than 77% of previous plans and more pro-Republican than 86% of previous plans," leading him to conclude that "Ohio's enacted plan has a substantial pro-Republican bias." Compl. Citations, Ex. Vol. 1 at COMP_0029; Suppl. Vol. 1 at 206 (Warshaw Expert Aff.). The House Plan is similarly "more extreme than 75% of previous plans and more pro-Republican than 87% of previous plans." *Id*. Using his second, more sophisticated method, Dr. Warshaw finds that "the enacted state Senate plan favors Republicans in 99% of PlanScore's scenarios" and "is more extreme than 80% of previous plans and more pro-Republican than 91% of previous plans." Compl. Citations, Ex. Vol. 1 at COMP_0030-0031; Suppl. Vol. 1 at 207 (Warshaw Expert Aff.). For the Ohio House plan, this second method finds that the "plan favors Republicans in 98% of the scenarios estimated by PlanScore [and] . . . it is more extreme than 75% of previous plans and more pro-Republican than 90% of previous plans." Compl. Citations, Ex. Vol. 1 at COMP_0031; Suppl. Vol. 1 at 208 (Warshaw Expert Aff.).

In other words, despite the intervening adoption of a constitutional amendment to end Ohio's history of gerrymandering, "Ohio's enacted plan would have historically extreme levels of pro-Republican bias." Compl. Citations, Ex. Vol. 1 at COMP_0009; Suppl. Vol. 1 at 186

[14] In *Ohio A. Philip Randolph Institute*, 373 F.Supp.3d at 1105, the Southern District of Ohio found that "the inference of partisan intent" was "well supported by Dr. Warshaw's analysis demonstrating the 2012 map's extreme levels of partisan bias across multiple metrics and data sets and when compared to a large array of historical elections," because "such strong and consistent pro-Republican partisan bias would be highly unlikely to occur without intentional manipulation of the district lines to achieve that result."

(Warshaw Expert Aff.). This result is clearly incompatible with Section 6(A), and demonstrates that the enacted plan was "drawn primarily to favor or disfavor a political party." *See id.* ("Overall, this analysis indicates that the enacted plan appears to be drawn to favor one political party based on a variety of metrics.").

2. Dr. Imai's Analysis Demonstrates that the Enacted Plan Was Drawn Primarily to Favor the Republican Party.

The enacted plan is also an outlier on these same partisan bias metrics compared to the representative set of plans that Dr. Imai has generated. *See* Imai Rep. ¶¶ 3, 19-23, 32-36, 38, 47, 49; Suppl. Vol. 1 at 3-4, 7-9, 11-13, 17, 18-19. In his report, Dr. Imai analyzes these metrics under the Commission's assumptions (based on nine statewide elections), as well as the "benefit of the doubt" assumptions (based on 13 statewide elections). In both cases, the conclusion is the same: the enacted plan is a statistical outlier on these widely accepted partisan bias metrics. *See id.*

Figure 1 of Dr. Imai's affidavit compares the enacted House map to Dr. Imai's set of representative plans under the Commission's assumptions. As set forth in Dr. Imai's affidavit, a higher score (in this figure, a score further to the right) indicates a higher bias in favor of the Republican party, *see* Imai Rep. ¶¶ 32-36 & Fig. 1; Suppl. Vol. 1 at 11-12:

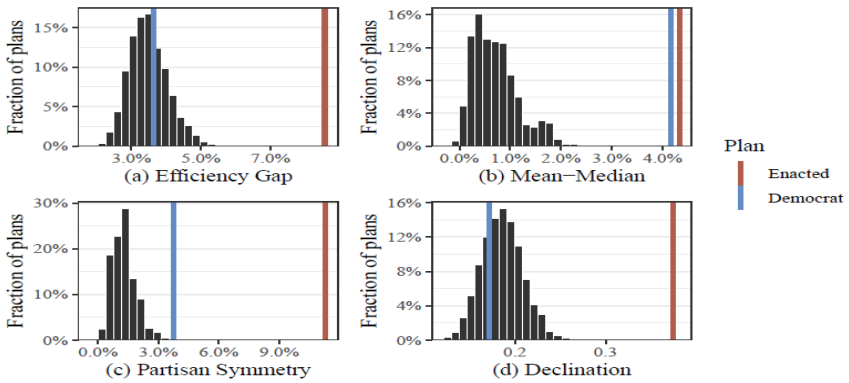

Figure 1: Four partisan bias measures calculated for the 5,000 simulated House redistricting plans computed by averaging across the 9 statewide elections from 2016 to 2020. Overlaid are the values for the enacted plan (red) and the Democratic caucus plan (blue). For each measure, larger values (towards the right) correspond to more Republican-favoring plans.

The enacted Senate plan is also an outlier compared to Dr. Imai's plans under the Commission's assumptions, as shown in Figure 2 below. *See* Imai Rep. ¶ 38; Suppl. Vol. 1 at 12-13. Again, a higher score (further to the right) indicates a higher pro-Republican partisan bias:

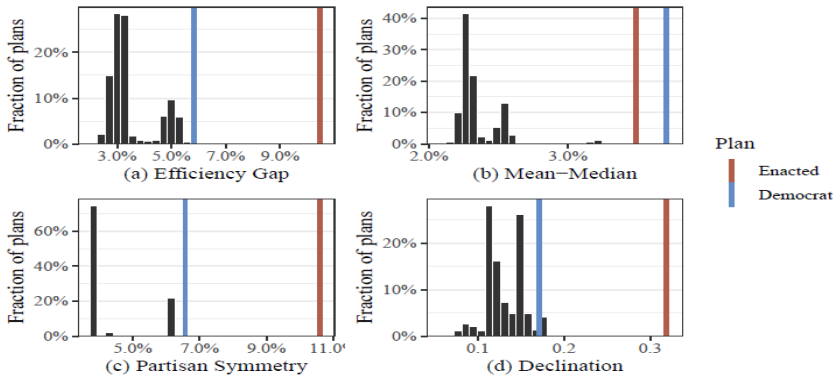

Figure 2: Four partisan bias measures calculated for the 5,000 simulated Senate redistricting plans computed by averaging across the 9 statewide elections from 2016 to 2020. Overlaid are the values for the enacted plan (red) and the Democratic caucus plan (blue). For each measure, larger values (towards the right) correspond to more Republican-favoring plans.

The enacted House and Senate maps are also significant outliers for all four partisan bias metrics under Dr. Imai's "benefit of the doubt" analysis. Imai Rep. ¶¶ 45-47, 49, & Figs. 7-8; Suppl. Vol. 1 at 16-19. Thus, under both sets of assumptions, the enacted plan provides a materially more partisan skew in favor of the Republicans than do the other 5,000 maps.

IV. Proposition of Law 4: Respondents Did Not Attempt to Comply with Section 6.

A. The Section 8(C)(2) Statement Demonstrates that the Commission Disregarded the Requirements of Section 6(B).

Because the Republicans' amended plan did not receive the support of two members of the minority party, the Commission was required under Article XI, Section 8(C)(2) to adopt a "statement explaining what the commission determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party corresponds closely to those preferences."

Section 6(B) requires consideration of the voter preferences in the statewide elections over

the preceding ten years. In that context, the Commission's 8(C)(2) Statement made the following remarkable contention: it stated that "the Commission determined that Republican candidates won thirteen out of sixteen of those elections resulting in a statewide proportion of voters favoring statewide Republican candidates of 81% and a statewide proportion of voters favoring statewide Democratic candidates of 19%." Comm. Stip., Ex. Vol. 2 at STIP_0418-0419; Suppl. Vol. 1 at 50-51 (Section 8(C)(2) Stmt.). The Commission's suggestion, however, that it could somehow comply with Section 6(B) by counting up the number of elections in which Republican candidates were victorious finds no support in the language of Section 6(B).

To suggest that one should merely count up the number of elections that Republicans won to determine the statewide preferences of the voters effectively means that all of the votes cast for a Democrat in an election count for nothing, and any partisan bias in the previous plan carries over to the enacted plan despite the new constitutional mandate. Under the Commission's methodology, if the Republicans won 100% of the elections, each by 51% of the vote, then instead of constituting 51% of the statewide voter preferences, the Republicans would supposedly command 100% of the statewide voter preferences. Accordingly, under the Commission's approach, the Republicans would be entitled to 100% of the seats in the General Assembly rather than 51%. Such a methodology tortures Section 6(B) beyond any reasonable construction. *See also* Compl. Citations, Ex. Vol. 1 at COMP_0012; Suppl. Vol. 1 at 189 (Warshaw Expert Aff.) (noting that, under the Commission's explanation: "[I]f Republicans had won each statewide election with 50.1% of the vote, the statewide proportion of voters favoring Republican candidates is 100%. Thus, Republicans would be entitled to win 100% of the legislative seats. Based on the academic literature, it makes much more sense to read the requirements that the proportion of districts correspond to the statewide preferences of voters to imply that Republicans are entitled to

50.1% of the legislative seats if they win 50.1% of the votes.").

It is hardly surprising that a majority of the Commissioners have disavowed the 8(C)(2) Statement that the Commission issued on September 16, 2021.[15] Its content demonstrates that the Commission wholly disregarded the standards set forth in Section 6. There was no semblance of an "attempt" at compliance.

B. The Map-Drawers Were Instructed Not to "Focus" on Compliance with Section 6.

In his deposition, Mr. DiRossi admitted that President Huffman had told him not to focus on compliance with Section 6. Dep. Stip., Ex. Vol. 3 at DEPO_00610:1-17; Suppl. Vol. 2 at 325 (R. DiRossi Tr.). There was no need for him to do so. For from the time that the "map drawing began," Dep. Stip., Ex. Vol. 7 at DEPO_01635:24-01636:6; Suppl. Vol. 2 at 403-404 (R. Cupp Tr.), Huffman and Cupp had already settled on the rationale for Section 6 compliance that other commissioners would later deem "asinine," *see* Dep. Stip., Ex. Vol. 1 at DEPO_00158; Suppl. Vol. 2 at 298 (F. LaRose Dep. Ex. 2)—that Section 6 would permit the Commission to enact a plan in which Republicans were expected to win as many as 81% of the seats. The decision to embrace this clearly flawed metric from the start to justify Republicans' ability to obtain up to 81% of the seats demonstrates that Huffman and Cupp had the partisan intent to unduly benefit Republicans and harm Democrats.

The partisan data for each district was on their computer screens. *See* Section II.C, *supra*. They were fully capable of complying with Section 6. They affirmatively chose not to do so.

[15] *See* Written Disc. Aff., Ex. Vol. 1 at RESP_0009; Suppl. Vol. 2 at 431 (DeWine Resp. to RFA No. 23); *see also* Written Disc. Aff., Ex. Vol. 1 at RESP_0020-0021; Suppl. Vol. 2 at 442-443 (LaRose Resp. to RFA No. 23); *see also* Written Disc. Aff., Ex. Vol. 1 at RESP_0031 (Faber Resp. to RFA No. 15); Suppl. Vol. 2 at 418; *see also* Comm. Stip., Ex. Vol. 2 at STIP_0420-0426; Suppl. Vol. 1 at 138-144 (Dem. Section 8(C)(2) Stmt.).

C. Respondents' Contemporaneous Statements Themselves Demonstrate a Failure to Attempt to Comply with Section 6.

Respondents affirmatively admitted that the enacted plan falls short. Respondents' contemporaneous statements that their plan would not stand up to scrutiny under Article XI of the Ohio Constitution confirm that the Commissioners were well-aware that the plan has an unduly partisan effect, but they voted for it anyway.

These admissions took place even more vividly in private communications. Secretary LaRose's texts indicate that he was voting for the enacted plan, not because he thought it was sound—on the contrary, he thought the vote would be "asinine"—but only to prevent the citation of a "no" vote against the Republicans in Court. This constitutes a triumph of partisanship over any consideration of the merits, pure and simple. His language on the record was less unvarnished, but he similarly lamented at the final meeting that the enacted "***map has many shortcomings***." Comm. Stip., Ex. Vol. 2 at STIP_0398; Suppl. Vol. 1 at 126 (9/15 Hrg. Tr.) (emphasis added).

Governor DeWine expressed regret and doubt about of the legality of the final maps at the Commission's final hearing, stating he was "sure" the Commission could have reached an outcome "that was much more clearly, clearly constitutional." *Id.* In a separate statement after the vote, Governor DeWine likewise said that the Commission's "job is to make [the redistricting plan] as constitutional as we can, and ***I thought we could have done better.***" Compl. Citations, Ex. Vol. 2 at COMP_0308-0312; Suppl. Vol. 1 at 175-179 (emphasis added). Auditor Faber acknowledged that the Commission's plan was "***not that good."*** Comm. Stip., Ex. Vol. 2 at STIP_0400; Suppl. Vol. 1 at 128 (9/15 Hrg. Tr.) (emphasis added).

These expressions of regret demonstrate the Statewide Elected Officials' guilty conscience about approving a plan that was primarily drawn to favor the Republican Party. When the Statewide Elected Officials admitted that the plan was "not that good" and that the plan had "many

shortcomings," they were clearly talking about the partisan bias embedded in the plan. They were aware of the partisan skew, and although they "could have done better," they did nothing to fix it—instead, they voted to engrain the partisan bias in Ohio's maps for the next four years.

D. Respondents' Confessed Abandonment of Their Obligation to Understand the Basis for the Enacted Maps Demonstrates that They Did Not Attempt to Comply with Section 6.

Respondents have taken positions in their briefing that further undermine any contention that they even "attempted" to meet the requirements of Section 6. The Statewide Elected Officials have conceded that they voted for the plan without any clue as to whether there was an "attempt" to comply with Section 6(A). In their Response to the Request for Expedited Discovery and Motion to Compel, the Statewide Elected Officials remarkably disclaimed *any* knowledge of how the plan was drawn. 10/6 Statewide Elected Officials' Resp. to Rels.' Mot. to Compel at 6. They justified their ignorance as follows:

> Neither the Governor, the Secretary of State nor the Auditor of State drew the map or participated in any way in its creation. Nor are any of them singularly responsible for its passage – and they don't have to be. In accordance with Article XI of the Ohio Constitution the map must be approved by a majority vote of the Ohio Redistricting Commission.

Id.; *see also* Dep. Stip., Ex. 1 Vol. 1 at DEPO_00053:15-19; Suppl. Vol. 2 at 287 (F. LaRose Tr.) ("I was provided no information about what data or considerations were going into proportionality considerations related to the mapmaking work" for the Republican Legislative Leaders' maps).

This concession is consistent with their contemporaneous statements, in which, just prior to voting for the plan, Secretary LaRose disclaimed any knowledge of how it complied with Section 6(B), apart from Huffman's representations in the 8(C)(2) Statement introduced that same evening. Comm. Stip., Ex. Vol. 2 at STIP_0402-0403; Suppl. Vol. 1 at 130-131 (9/15 Hrg. Tr.).

V. Proposition of Law 5: The Violation of Section 6 Was Not Justified by the Need to Comply with Other Provisions of Article XI.

It is perfectly possible to comply with the technical rules of Article XI and perform materially better under Section 6. Dr. Imai was able to generate thousands of examples of maps that do exactly this. Imai Rep. ¶¶ 3, 14-15; Suppl. Vol. 1 at 3-4, 6; *see also* Sections II.B.2 & III.A.3, *supra*.

To provide a visual depiction of one of these plans, Dr. Imai has shown in graphic form the maps that happen to fall at the median value of his set when evaluated under the proportionality measure of Section 6(B). Imai Rep. ¶¶ 25-26; Suppl. Vol. 1 at 9. The House map appears in Figure 21, Imai Rep. Fig. 21; Suppl. Vol. 1 at 40; and the Senate map appears at Figure 22, Imai Rep. Fig. 22; Suppl. Vol. 1 at 41.

As Dr. Imai's affidavit reflects, these demonstration maps are fully compliant with all of the requirements of Article XI. Imai Rep. ¶¶ 3, 14-15 & Appx. A-D; Suppl. Vol. 1 at 3-4, 6, 30-42. Accordingly, any suggestion that the enacted map's partisan skew was necessitated by political geography or compliance with the other provisions of Article XI is not credible.

CONCLUSION

Accordingly, Relators respectfully request that this Court:

1. Declare that the maps that Respondents adopted are invalid for failure to comply with Article XI of the Ohio Constitution; and

2. Order the Commission to adopt a new general assembly district plan or, at a minimum, to amend the maps that Respondents adopted to correct the violations, as contemplated in Article XI, Section 9(B).

Respectfully submitted,

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APPENDIX

Constitution Articles and Key Cited Legal Authorities

ITEM	**DESCRIPTION**
1	OH Constitution Article II, Section 16
2	OH Constitution Article XI, Section 1
3	OH Constitution Article XI, Section 4
4	OH Constitution Article XI, Section 6
5	OH Constitution Article XI, Section 8
6	OH Constitution Article XI, Section 9
7	*Ohio A. Philip Randolph Institute v. Householder*, 375 F.Supp.3d 978 (2019)
8	*Rucho v. Common Cause*, 139 S.Ct. 2484 (2019)
9	*State ex. rel. Herbert v. Bricker*, 139 Ohio St. 499 (1942)
10	*State v. White*, 103 Ohio St.3d 580 (2004)
11	*Village of Arlington Heights v. Metropolitan Housing*, 429 U.S. 252 (1977)
12	*Wilson v. Kasich*, 134 Ohio St.3d 221 (2012)

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article II. Legislative (Refs & Annos)

OH Const. Art. II, § 16

O Const II Sec. 16 Governor to sign approved acts; veto; overriding veto

Currentness

If the governor approves an act, he shall sign it, it becomes law and he shall file it with the secretary of state.

If he does not approve it, he shall return it with his objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to the house of origin vote to repass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to the second house vote to repass it, it becomes law notwithstanding the objections of the governor, and the presiding officer of the second house shall file it with the secretary of state. In no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. In all cases of reconsideration the vote of each house shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal.

If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to him, it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after such adjournment, it is filed by him, with his objections in writing, in the office of the secretary of state. The governor shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.

The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, unless repassed in the manner prescribed by this section for the repassage of a bill.

CREDIT(S)

(1973 HJR 5, am. eff. 5-8-1973; 1912 constitutional convention, am. eff. 1-1-1913; 95 v 962, am. eff. 11-3-1903; 1851 constitutional convention, adopted eff. 9-1-1851)

Notes of Decisions (49)

Const. Art. II, § 16, OH CONST Art. II, § 16
Current through File 48 of the 134th General Assembly (2021-2022).

End of Document

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article XI. Apportionment (Refs & Annos)

OH Const. Art. XI, § 1

O Const XI Sec. 1 Ohio redistricting commission

Currentness

(A) The Ohio redistricting commission shall be responsible for the redistricting of this state for the general assembly. The commission shall consist of the following seven members:

(1) The governor;

(2) The auditor of state;

(3) The secretary of state;

(4) One person appointed by the speaker of the house of representatives;

(5) One person appointed by the legislative leader of the largest political party in the house of representatives of which the speaker of the house of representatives is not a member;

(6) One person appointed by the president of the senate; and

(7) One person appointed by the legislative leader of the largest political party in the senate of which the president of the senate is not a member.

No appointed member of the commission shall be a current member of congress.

The legislative leaders in the senate and the house of representatives of each of the two largest political parties represented in the general assembly, acting jointly by political party, shall appoint a member of the commission to serve as a co-chairperson of the commission.

(B)(1) Unless otherwise specified in this article or in Article XIX of this constitution, a simple majority of the commission members shall be required for any action by the commission.

(2)(a) Except as otherwise provided in division (B)(2)(b) of this section, a majority vote of the members of the commission, including at least one member of the commission who is a member of each of the two largest political parties represented in the general assembly, shall be required to do any of the following:

(i) Adopt rules of the commission;

(ii) Hire staff for the commission;

(iii) Expend funds.

(b) If the commission is unable to agree, by the vote required under division (B)(2)(a) of this section, on the manner in which funds should be expended, each co-chairperson of the commission shall have the authority to expend one-half of the funds that have been appropriated to the commission.

(3) The affirmative vote of four members of the commission, including at least two members of the commission who represent each of the two largest political parties represented in the general assembly shall be required to adopt any general assembly district plan. For the purposes of this division and of Section 1 of Article XIX of this constitution, a member of the commission shall be considered to represent a political party if the member was appointed to the commission by a member of that political party or if, in the case of the governor, the auditor of state, or the secretary of state, the member is a member of that political party.

(C) At the first meeting of the commission, which the governor shall convene only in a year ending in the numeral one, except as provided in Sections 8 and 9 of this article and in Sections 1 and 3 of Article XIX of this constitution, the commission shall set a schedule for the adoption of procedural rules for the operation of the commission.

The commission shall release to the public a proposed general assembly district plan for the boundaries for each of the ninety-nine house of representatives districts and the thirty-three senate districts. The commission shall draft the proposed plan in the manner prescribed in this article. Before adopting, but after introducing, a proposed plan, the commission shall conduct a minimum of three public hearings across the state to present the proposed plan and shall seek public input regarding the proposed plan. All meetings of the commission shall be open to the public. Meetings shall be broadcast by electronic means of transmission using a medium readily accessible by the general public.

The commission shall adopt a final general assembly district plan not later than the first day of September of a year ending in the numeral one. After the commission adopts a final plan, the commission shall promptly file the plan with the secretary of state. Upon filing with the secretary of state, the plan shall become effective.

Four weeks after the adoption of a general assembly district plan or a congressional district plan, whichever is later, the commission shall be automatically dissolved.

(D) The general assembly shall be responsible for making the appropriations it determines necessary in order for the commission to perform its duties under this article and Article XIX of this constitution.

CREDIT(S)

(2018 SJR 5, am. eff. 1-1-21; 2014 HJR 12, adopted eff. 1-1-21)

Const. Art. XI, § 1, OH CONST Art. XI, § 1

3

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Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article XI. Apportionment (Refs & Annos)

OH Const. Art. XI, § 4

O Const XI Sec. 4 Composition and numbering of senate districts

Currentness

(A) Senate districts shall be composed of three contiguous house of representatives districts.

(B)(1) A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district.

(2) Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation, shall be part of only one senate district.

(3) If it is not possible for the commission to draw representative districts that comply with all of the requirements of this article and that make it possible for the commission to comply with all of the requirements of divisions (B)(1) and (2) of this section, the commission shall draw senate districts so as to commit the fewest possible violations of those divisions. If the commission complies with this division in drawing senate districts, the commission shall not be considered to have violated division (B)(1) or (2) of this section, as applicable, in drawing those districts, for the purpose of an analysis under division (D) of Section 9 of this article.

(C) The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under division (A) of Section 3 of this article.

(D) Senate districts shall be numbered from one through thirty-three and as provided in Section 5 of this article.

CREDIT(S)

(2014 HJR 12, adopted eff. 1-1-21)

Const. Art. XI, § 4, OH CONST Art. XI, § 4
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Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article XI. Apportionment (Refs & Annos)

OH Const. Art. XI, § 6

O Const XI Sec. 6 Standards for Ohio redistricting commission in drawing general assembly district plan

Currentness

The Ohio redistricting commission shall attempt to draw a general assembly district plan that meets all of the following standards:

(A) No general assembly district plan shall be drawn primarily to favor or disfavor a political party.

(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.

(C) General assembly districts shall be compact.

Nothing in this section permits the commission to violate the district standards described in Section 2, 3, 4, 5, or 7 of this article.

CREDIT(S)

(2014 HJR 12, adopted eff. 1-1-21)

Const. Art. XI, § 6, OH CONST Art. XI, § 6
Current through File 48 of the 134th General Assembly (2021-2022).

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Constitution of the State of Ohio
Article XI. Apportionment (Refs & Annos)

OH Const. Art. XI, § 8

O Const XI Sec. 8 Proceedings when Ohio redistricting commission fails to timely adopt final general assembly district plan under Art. XI, § 1

Currentness

(A)(1) If the Ohio redistricting commission fails to adopt a final general assembly district plan not later than the first day of September of a year ending in the numeral one, in accordance with Section 1 of this article, the commission shall introduce a proposed general assembly district plan by a simple majority vote of the commission.

(2) After introducing a proposed general assembly district plan under division (A)(1) of this section, the commission shall hold a public hearing concerning the proposed plan, at which the public may offer testimony and at which the commission may adopt amendments to the proposed plan. Members of the commission should attend the hearing; however, only a quorum of the members of the commission is required to conduct the hearing.

(3) After the hearing described in division (A)(2) of this section is held, and not later than the fifteenth day of September of a year ending in the numeral one, the commission shall adopt a final general assembly district plan, either by the vote required to adopt a plan under division (B)(3) of Section 1 of this article or by a simple majority vote of the commission.

(B) If the commission adopts a final general assembly district plan in accordance with division (A)(3) of this section by the vote required to adopt a plan under division (B)(3) of Section 1 of this article, the plan shall take effect upon filing with the secretary of state and shall remain effective until the next year ending in the numeral one, except as provided in Section 9 of this article.

(C)(1)(a) Except as otherwise provided in division (C)(1)(b) of this section, if the commission adopts a final general assembly district plan in accordance with division (A)(3) of this section by a simple majority vote of the commission, and not by the vote required to adopt a plan under division (B)(3) of Section 1 of this article, the plan shall take effect upon filing with the secretary of state and shall remain effective until two general elections for the house of representatives have occurred under the plan.

(b) If the commission adopts a final general assembly district plan in accordance with division (A)(3) of this section by a simple majority vote of the commission, and not by the vote required to adopt a plan under division (B) of Section 1 of this article, and that plan is adopted to replace a plan that ceased to be effective under division (C)(1)(a) of this section before a year ending in the numeral one, the plan adopted under this division shall take effect upon filing with the secretary of state and shall remain effective until a year ending in the numeral one, except as provided in Section 9 of this article.

(2) A final general assembly district plan adopted under division (C)(1)(a) or (b) of this section shall include a statement explaining what the commission determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party corresponds closely to those preferences, as described in division (B) of

Section 6 of this article. At the time the plan is adopted, a member of the commission who does not vote in favor of the plan may submit a declaration of the member's opinion concerning the statement included with the plan.

(D) After a general assembly district plan adopted under division (C)(1)(a) of this section ceases to be effective, and not earlier than the first day of July of the year following the year in which the plan ceased to be effective, the commission shall be reconstituted as provided in Section 1 of this article, convene, and adopt a new general assembly district plan in accordance with this article, to be used until the next time for redistricting under this article. The commission shall draw the new general assembly district plan using the same population and county, municipal corporation, and township boundary data as were used to draw the previous plan adopted under division (C) of this section.

CREDIT(S)

(2014 HJR 12, adopted eff. 1-1-21)

Const. Art. XI, § 8, OH CONST Art. XI, § 8
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Article XI. Apportionment (Refs & Annos)

OH Const. Art. XI, § 9

O Const XI Sec. 9 Jurisdiction; proceedings upon determination of invalidity by unappealed, final court order

Currentness

(A) The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this article.

(B) In the event that any section of this constitution relating to redistricting, any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid by an unappealed final order of a court of competent jurisdiction then, notwithstanding any other provisions of this constitution, the commission shall be reconstituted as provided in Section 1 of this article, convene, and ascertain and determine a general assembly district plan in conformity with such provisions of this constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next time for redistricting under this article in conformity with such provisions of this constitution as are then valid.

(C) Notwithstanding any provision of this constitution or any law regarding the residence of senators and representatives, a general assembly district plan made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

(D)(1) No court shall order, in any circumstance, the implementation or enforcement of any general assembly district plan that has not been approved by the commission in the manner prescribed by this article.

(2) No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.

(3) If the supreme court of Ohio determines that a general assembly district plan adopted by the commission does not comply with the requirements of Section 2, 3, 4, 5, or 7 of this article, the available remedies shall be as follows:

(a) If the court finds that the plan contains one or more isolated violations of those requirements, the court shall order the commission to amend the plan to correct the violation.

(b) If the court finds that it is necessary to amend not fewer than six house of representatives districts to correct violations of those requirements, to amend not fewer than two senate districts to correct violations of those requirements, or both, the court shall declare the plan invalid and shall order the commission to adopt a new general assembly district plan in accordance with this article.

(c) If, in considering a plan adopted under division (C) of Section 8 of this article, the court determines that both of the following are true, the court shall order the commission to adopt a new general assembly district plan in accordance with this article:

(i) The plan significantly violates those requirements in a manner that materially affects the ability of the plan to contain districts whose voters favor political parties in an overall proportion that corresponds closely to the statewide political party preferences of the voters of Ohio, as described in division (B) of Section 6 of this article.

(ii) The statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party does not correspond closely to the statewide preferences of the voters of Ohio.

CREDIT(S)

(2014 HJR 12, adopted eff. 1-1-21)

Const. Art. XI, § 9, OH CONST Art. XI, § 9
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373 F.Supp.3d 978
United States District Court,
S.D. Ohio, Western Division.

OHIO A. PHILIP RANDOLPH INSTITUTE et al., Plaintiffs,
v.
Larry HOUSEHOLDER et al., Defendants.

No. 1:18-cv-357
|
Signed May 3, 2019

Synopsis

Background: Voters, non-partisan pro-democracy organizations, and party-aligned organizations brought action against state officials challenging constitutionality of state's congressional redistricting map. Plaintiffs moved for declaratory and injunctive relief.

Holdings: Following bench trial, the District Court, Karen Nelson Moore, Circuit Judge, and Timothy S. Black and Michael H. Watson, JJ., held that:

individual voters had standing to maintain action;

nonpartisan and partisan organizations had standing to maintain action;

partisan gerrymandering claims were justiciable;

redistricting map violated voters' equal protection rights;

map violated voters' First Amendment rights;

map violated Elections Clause; and

doctrine of laches did not bar action.

Motions for declaratory and injunctive relief granted.

Procedural Posture(s): Motion for Declaratory Judgment; Motion for Permanent Injunction.

Attorneys and Law Firms

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Before: Moore, Circuit Judge; Black and Watson, District Judges.

OPINION AND ORDER

HONORABLE KAREN NELSON MOORE, United States Circuit Judge, HONORABLE TIMOTHY S. BLACK, United States District Judge, HONORABLE MICHAEL H. WATSON, United States District Judge

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Plaintiffs have brought this action alleging that H.B. 369, the redistricting plan enacted by the Ohio General Assembly and signed into law by the Governor in 2011, constitutes an unconstitutional partisan gerrymander under the First and Fourteenth Amendments and exceeds the powers ***993** granted to the states under Article I, § 4 of the United States Constitution. As to the First and Fourteenth Amendment district-specific claims, we find that Districts 1–16 were intended to burden Plaintiffs' constitutional rights, had that effect, and the effect is not explained by other legitimate justifications. Moreover, we find that that the plan as a whole burdens Plaintiffs' associational rights and that burden is not outweighed by any other legitimate justification. Finally, we find that the plan exceeds the State's powers under Article I. Therefore, H.B. 369 is an unconstitutional partisan gerrymander. This opinion constitutes our findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1).

Due to the length of this opinion, we provide the reader with the following, more concise summary:

"Partisan gerrymandering" occurs when the dominant party in government draws district lines to entrench itself in power and to disadvantage the disfavored party's voters. Plaintiffs in this action are individual Democratic voters from each of Ohio's sixteen congressional districts, two non-partisan pro-democracy organizations, and three Democratic-aligned organizations. They challenge the constitutionality of Ohio's 2012 redistricting map. Defendants are Ohio officials, and Intervenors are Ohio Republican Congressmen; Defendants and Intervenors both argue that the Plaintiffs' claims are not properly before this Court and defend the map's constitutionality on the merits.

In 2011, when Ohio's redistricting process began, Republican dominance in the Ohio State government meant that Republican state legislators could push through a remarkably pro-Republican redistricting bill without meaningful input from their Democratic colleagues. Ohio Republicans took advantage of that opportunity, and invidious partisan intent —the intent to disadvantage Democratic voters and entrench Republican representatives in power—dominated the map-drawing process. They designed the 2012 map using software that allowed them to predict the partisan outcomes that would result from the lines they drew based on various partisan indices that they created from historical Ohio election data. The Ohio map drawers did not work alone, but rather national Republican operatives located in Washington, D.C. collaborated with them throughout the process. These national Republicans generated some of the key strategic ideas for the map, maximizing its likely pro-Republican performance, and had the authority to approve changes to the map before their Ohio counterparts implemented them.

Throughout the process, the Ohio and national map drawers made decisions based on their likely partisan effects.

The map drawers focused on several key areas of the Ohio map where careful map design could eke out additional safe Republican seats. They split Hamilton County and the City of Cincinnati in a strange, squiggly, curving shape, dividing its Democratic voters and preventing them from forming a coherent voting bloc, which ensured the election of Republican representatives in Districts 1 and 2. They drew a new District 3 in Franklin County, efficiently concentrating Democratic voters together in an area sometimes referred to as the "Franklin County Sinkhole." This strategy allowed them to secure healthy Republican majorities in neighboring Districts 12 and 15. They paired Democratic incumbent Representatives Kaptur and Kucinich to create the infamous "Snake on the Lake"—a bizarre, elongated sliver of a district that severed numerous counties. They drew a District 11 that departed from its traditional territory to snatch up additional African-American Democratic ***994** voters in Summit County, allowing for the creation of a new District 16 in which a Republican incumbent representative could defeat a Democratic incumbent representative. They designed these districts with one overarching goal in mind—the creation of an Ohio congressional map that would reliably elect twelve Republican representatives and four Democratic representatives.

Ohio Republican legislators enacted the first iteration of the 2012 map, H.B. 319, in September 2011. Ohio voters then challenged the map, seeking to subject it to a voter referendum, but their efforts failed. As a result, Ohio Republicans passed a slightly different version of the map, H.B. 369, in December 2011. The changes they made did not materially alter the strong pro-Republican partisan leaning of the map's first iteration. Four cycles of congressional elections have occurred under the map embodied in H.B. 369. Each resulted in the election of twelve Republican representatives and four Democratic representatives. No district has been represented by representatives from different parties during the life of the map.

During a two-week trial, experts testified to the extremity of the gerrymander. They demonstrated that levels of voter support for Democrats can and have changed, but the map's partisan output remains stubbornly undisturbed. The experts used various metrics and methodologies to measure their findings, but several takeaways were universal: (1) the Ohio map sacrifices respect for traditional districting principles in order to maximize pro-Republican partisan advantage, (2) the Ohio map's pro-Republican partisan bias is extreme, compared both to historical plans across the United States and to other possible configurations that could have been adopted in Ohio, and (3) the Ohio map minimizes responsiveness and competition, rendering one consistent result no matter the particularities of the election cycle.

We join the other federal courts that have held partisan gerrymandering unconstitutional and developed substantially similar standards for adjudicating such claims. We are convinced by the evidence that this partisan gerrymander was intentional and effective and that no legitimate justification accounts for its extremity. Performing our analysis district by district, we conclude that the 2012 map dilutes the votes of Democratic voters by packing and cracking them into districts that are so skewed toward one party that the electoral outcome is predetermined. We conclude that the map unconstitutionally burdens associational rights by making it more difficult for voters and certain organizations to advance their aims, be they pro-Democratic or pro-democracy. We conclude that by creating such a map, the State exceeded its powers under Article I of the Constitution. Accordingly, we declare Ohio's 2012 map an unconstitutional partisan gerrymander, enjoin its use in the 2020 election, and order the enactment of a constitutionally viable replacement.

I. BACKGROUND

A. General Overview of the Facts

1. The redistricting process begins

Every ten years, the United States government conducts a census. The census results dictate the size of each state's delegation to the United States House of Representatives because House seats are based on population. Following the release of the census results, state legislatures redraw their United States congressional districts in order to reflect population changes. In Ohio, the 2010 census revealed that the State's comparative population stagnation required reducing the State's previous congressional delegation from ***995** eighteen to sixteen.[1] In that same year, Ohioans elected a Republican Governor, elected a Republican majority in the State Senate, and flipped the Ohio House of Representatives to be majority Republican as well.[2] In the State of Ohio, the Ohio General Assembly is responsible for

enacting legislation that delineates the federal congressional districts.[3] Both the State Senate and the State House of Representatives must pass such a bill by a simple majority and the Governor must then sign the bill into law.[4] Therefore, when map-drawing activities commenced in 2011, the Republican Party had effective control of all bodies necessary to pass a redistricting bill.

1 Trial Ex. P090 (Cooper Decl. at 10).

2 OHIO SEC'Y OF STATE, 2010 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2010-elections-results/. The Court takes judicial notice of all the 2010 election results. FED. R. EVID. 201.

3 Dkt. 234 (Final Pretrial Order at App. A., 1) (Joint Uncontroverted Facts).

4 *Id.*

In Ohio, redistricting is facilitated by the Joint Legislative Task Force on Redistricting, Reapportionment, and Demographic Research ("Task Force"). The Task Force is a six-person bipartisan committee.[5] The Task Force does not actually draw the maps. Rather "it is the entity to which the state legislature appropriates money" so that the Task Force can then contract with other entities and individuals to assist in the redistricting process.[6] Prior to the 2011 redistricting, the Task Force requisitioned from Cleveland State University ("CSU") a dataset containing demographic and political data that map drawers of both parties could use in the redistricting process.[7] The practice of the Ohio General Assembly has been to allow the Task Force to allocate separate funds in equal amounts to the Ohio Democratic Caucus and the Ohio Republican Caucus and to allow the parties to conduct much of their redistricting work separately.[8] This is precisely what occurred during the 2011 map-drawing process.[9] Eventually, maps are produced that are then sent for the General Assembly to enact in a bill, which is then sent to the Governor. The Ohio Senate and House of Representatives also established committees on redistricting, chaired by Republicans State Senator Keith Faber and Representative Matthew Huffman, respectively.

5 *Id.* at App. A., 1–2.

6 Dkt. 243 (DiRossi Trial Test. at 147–49).

7 Dkt. 230-14 (Glassburn Dep. at 37); Dkt. 230-5 (Mann Dep. at 94–95, 103, 105).

8 Dkt. 243 (DiRossi Trial Test. at 148–50).

9 *Id.* at 149–50.

2. Logistics of the Republican map drawing

Republican map-drawing planning occurred at both the State and federal levels, and the two levels worked together, collaborated, and consulted one another throughout the process.[10] At the State level, Ray DiRossi and Heather Mann[11] served as the principal on-the-ground map drawers.[12] DiRossi had previously been employed as a staffer for Republican members of the General Assembly and as a fundraiser for the Ohio Republican Senate ***996** Campaign Committee.[13] He was also deeply involved in the 2001 redistricting process following the 2000 census.[14] Mann had been working for the Ohio House Republican Caucus since 2004, most recently as Deputy Legal Counsel and Redistricting Director, reporting to Speaker of the Ohio House of Representatives William Batchelder ("Speaker Batchelder").[15] It was decided that both DiRossi and Mann should formally cease their employment with the Ohio House Republican Caucus and instead conduct their map-drawing work as independent consultants.[16] As a consultant, Mann reported to Speaker Batchelder,[17] and DiRossi reported to State Senate President Tom Niehaus.[18] Troy Judy, Chief of Staff for Speaker Batchelder, was also deeply involved in the map drawing.[19]

10 Dkt. 230–28 (Kincaid Dep. at 313).

11 Heather Mann is now Heather Blessing, but this opinion refers to her by the last name "Mann" because that was her name at the relevant time and to be consistent with how her name appears in documents and emails.

12 Dkt. 230-5 (Mann Dep. at 48).

13 Dkt. 243 (DiRossi Trial Test. at 206–07).

14 *Id.* at 147.

15 Dkt. 230-5 (Mann Dep. at 27–28).

16 Dkt 243 (DiRossi Trial Test. at 207–10); Dkt. 230-5 (Mann Dep. at 28).

17 Dkt. 230-5 (Mann Dep. at 35, 39, 41, 53, 56).

18 *Id.* at 53; Dkt. 230–12 (DiRossi Dep. at 136, 138).

19 Dkt. 230-5 (Mann Dep. at 48).

DiRossi secured a room at the DoubleTree Hotel in Columbus beginning in July 2011 to serve as the base for the map-drawing operations. [20] DiRossi had the hotel move the usual furnishings out of the hotel room and instead had desks and three computers installed. [21] Various Republican legislators, staff members, and operatives visited the DoubleTree room during the map-drawing process. They included Mann, DiRossi, Judy, Speaker Batchelder, [22] President of the Ohio Senate Tom Niehaus, Representative Matt Huffman, State Senator Keith Faber, Chief of Staff in the Ohio State Senate Mike Schuler, Chief Legal Counsel to the majority in the Ohio House of Representatives Mike Lenzo, [23] map-drawing expert John Morgan, [24] head of Team Boehner Tom Whatman, and legal counsel Mark Braden. No Democratic legislator or staffer ever visited. [25]

20 Trial Ex. P109 (DoubleTree Invoice at LWVOH_00018254); Dkt. 230-12 (DiRossi Dep. at 144–45).

21 Dkt. 243 (DiRossi Trial Test. at 212–13).

22 Dkt. 230-5 (Mann Dep. at 63).

23 *Id.* at 33.

24 John Morgan instructed Mann, in person in Columbus, on how to use Maptitude. *Id.* at 42, 58.

25 Dkt. 230-12 (DiRossi Dep. at 149).

Mann, DiRossi, and Judy each used a computer equipped with a software package called "Maptitude." [26] Various types of demographic data as well as historical election data and compilations of that data can be uploaded into Maptitude. The software then allows map drawers to draw district lines over a map of a state. Map drawers can view and work on maps in very fine detail—down to the census block unit. [27] As the map drawer draws or alters lines, the program will calculate, recalculate, and display the corresponding demographic and historical election data for the newly drawn districts in real time. [28] Map drawers can save their draft maps both as visual depictions and as data files that contain the assignments of each geographical unit ***997** to a particular district. [29] Maptitude will also export into Excel spreadsheets the political data that corresponds to the draft maps.

26 Dkt. 230-5 (Mann Dep. at 41).

27 *Id.* at 45–46.

28 *Id.* at 42–45.

29 A block equivalency or block assignment file "is a data set that shows which census blocks are assigned to which districts in a redistricting plan" and is "generated by Maptitude." *Id.* at 64. A shape file is another file that Maptitude generates. *Id.* at 64–65.

As mentioned above, much of the data that the map drawers used had been furnished to them through a contract that the Ohio General Assembly entered into with CSU. CSU created and provided the Task Force with the Ohio Common Unified Redistricting Database ("Database" or "OCURD"). [30] The Database included many types of geographic, demographic, and historical partisan election data for the State of Ohio, broken down to the split census block level. [31] The Task Force provided this information to both the Democratic and Republican Caucuses. [32] Mark Braden, who was retained by the Ohio Attorney General to represent and advise the General Assembly during the 2011 redistricting process, [33] hired Clark Bensen from the company Polidata to do some additional work with the data sets to make the data more workable and to provide additional historical election data for the Republican map drawers. [34]

30 *Id.* at 46.

31 Dkt. 230-14 (Glassburn Dep. at 71–73).

32 *Id.* at 22–24, 38.

33 Dkt. 230-7 (Braden Dep. at 17).

34 Dkt. 230-5 (Mann Dep. at 46, 139–41).

Mann, DiRossi, and Judy were tasked by the Republican Caucuses with drawing maps that were favorable to Republicans. Many Republican leaders indicated their preference for a 12-4 map. [35] In order to gauge whether their

draft maps would achieve this goal, they used partisan indices, created by compiling the historical partisan voting data from certain chosen elections. The indices were then uploaded into Maptitude so that the map drawers could predict how their draft districts would likely perform politically in future elections.

35 Dkt. 230-3 (Batchelder Dep. at 71) (commenting that "Mann would ... be looking at past election results" because it was "her assignment, to try to come to districts that were friendly"); *id.* at 130–31 (agreeing that "a map that would have given the Democrats a shot at five districts wasn't under consideration"); *see also* Dkt. 230-46 (Stiver Dep. at 33) (discussing a "12 to 4 redistricting scenario that [Husted] said we would like"); Trial Ex. P551 (Mar. 22, 2011 email at STIVERS_004042); Trial Ex. P407 (Sept. 9, 2011 email chain at LWVOH_00524131) (email from Whatman to President Niehaus stating that the Republicans were "trying to lock down 12 Republican seats"). Defendants object to the admissibility of Trial Ex. P407 on hearsay grounds. This objection is overruled. The Court finds that this statement falls under the hearsay exception for then-existing mental state because it is a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan)." *See* FED. R. EVID. 803(3).

Various indices were used because individuals involved in the map-drawing process preferred different indices. At times they used an index that they created and termed the "Unified Index."[36] The Unified Index averaged the results of five races, overall reflecting a partisan landscape more favorable to the Democratic Party than an index that would have included a fuller set of elections from the decade preceding the redistricting.[37] The map drawers also used the " '08 McCain Index," which also reflected a strong Democratic ***998** performance.[38] The map drawers used Maptitude to create spreadsheets by "output[ting] the numbers to show what various indexes, as well as other data, were for all the districts."[39] They sometimes created comparison spreadsheets to allow them to compare the political index scores of different draft maps to one another. Individuals involved in the map-drawing process also used the Partisan Voter Index ("PVI"), which is used in the well-known Cook Political Report. PVI scores classify districts as either Republican leaning (R+) or Democratic leaning (D+). These classifications are accompanied by a score quantifying the strength of such a leaning.

36 Dkt. 230-5 (Mann Dep. at 44, 75, 88, 91, 119); Dkt. 230-12 (DiRossi Dep. at 113).

37 Dkt. 247 (Hood Trial Test. at 222–24).

38 Trial Ex. P127 (Sept. 12, 2011 email at LWVOH_00018320) (relating partisan scores using the "08 Pres" index); Dkt. 230-12 (DiRossi Dep. at 243).

39 Dkt. 230-5 (Mann Dep. at 122).

Individuals not involved in the day-to-day map drawing were sometimes shown the draft districts' predicted partisan proclivities as assessed with various indices.[40] The map drawers would also print out spreadsheets that contained the draft districts' predicted partisan leanings using various indices and share them with Republican Party leaders at redistricting meetings.[41] Judy regularly checked in on DiRossi and Mann as they worked, received updates, reviewed draft maps, and relayed information between Batchelder, DiRossi, and Mann.[42] DiRossi and Mann regularly reported developments to and received feedback from Speaker Batchelder and President Niehaus. They also kept Senator Faber and Republican Chief of Staff in the Ohio State Senate Matt Schuler informed as changes were made.

40 Dkt. 230-3 (Batchelder Dep. at 22–25).

41 Dkt. 230-5 (Mann Dep. at 84) ("We created a lot of spreadsheets with different data like set on population deviations, on absolute population, on indexes, on racial data, on voting data."); *id.* at 85 (stating that the map drawers' principals "wanted to know what the districts look like. They wanted to know how they changed from the prior redistricting.").

42 *Id.* at 49–51 (stating that Mann was in regular contact with Judy about the maps and that she knew that Judy communicated her updates to Speaker Batchelder).

3. National Republican involvement

National Republican operatives supported the State-level map drawers in their work from beginning to end. This collaboration started prior to the map drawing itself, when Ohio Republican staffers such as DiRossi, Mann, Judy, Schuler, and Chief Legal Counsel for the Ohio House Republican Caucus Michael Lenzo, as well as Representative Huffman attended a redistricting conference hosted by the National Conference of State Legislatures ("NCSL") in Washington, D.C. [43] Lenzo had also attended a Redistricting and Election Law Seminar hosted by the Republican National Committee ("RNC") in Washington, D.C., in Spring 2010. At these meetings, the Ohio Republican staffers made contact with national Republican operatives such as Mark Braden, Tom Hofeller, and John Morgan, who later advised them and collaborated with them during the map-drawing process.

43 *Id.* at 155–56.

At the Spring 2010 seminar, Morgan gave a presentation on map drawing, advising map drawers to keep the process secret and to score the maps to determine the likely partisan outcome. [44] In 2011, Morgan conducted a follow-up visit to Ohio, where he presented on map-drawing ***999** tactics to DiRossi, Mann, and Judy. [45] Speaker Batchelder and President Niehaus also attended a redistricting meeting in Washington, D.C. in the spring of 2011 with Whatman and Republican members of the U.S. congressional delegation. [46]

44 Dkt. 230-34 (Morgan Dep. at 132); Trial Ex. P346 (Morgan 2010 Presentation at LENZO_0002550–75); Dkt. 230-29 (Lenzo Dep. at 99–106).

45 Dkt. 230-29 (Lenzo Dep. at 73, 76, 99).

46 Dkt. 230-52 (Whatman Dep. at 41–42).

At the time of the census and redistricting, Congressman John Boehner of Ohio was the Speaker of the United States House of Representatives. Ohio Republicans understood that Speaker Boehner would have considerable input in the 2012 map and were committed to enacting a map that he supported. [47] Batchelder spoke with Boehner about once each month during the creation of the 2012 map and met with Boehner twice. [48] Boehner employed Tom Whatman as the head of his "Team Boehner." Boehner tasked Whatman with liaising between Republican members of the congressional delegation and the Ohio map drawers; [49] Whatman began working on the redistricting process at the federal level in December 2010 or January 2011. [50]

47 Dkt. 230-12 (DiRossi Dep. at 271); Dkt. 230-52 (Whatman Dep. at 131); Trial Ex. P584 (Sept. 11, 2011 "Redistricting 'tweaks' " email at LWVOH_00018297) (President Niehaus stating that he was "still committed to ending up with a map that Speaker Boehner fully supports, with or without votes from two members of leadership").

48 Dkt. 230-3 (Batchelder Dep. at 27, 46–47).

49 Dkt. 230–52 (Whatman Dep. at 29–30).

50 *Id.* at 31.

Whatman employed Adam Kincaid, the Redistricting Coordinator of the National Republican Congressional Committee ("NRCC"), to assist in the redistricting efforts. Kincaid drafted proposed maps and district lines that incorporated Whatman's requests and sent them to DiRossi and Mann and, on occasion, Braden. [51] Kincaid also met repeatedly with members of Ohio's congressional delegation throughout the redistricting process to hear their concerns and keep them abreast of developments. [52] As the districts were drawn, Kincaid updated Whatman and the Republican congressmen about the political leanings of their new districts based on the historical election data, producing spreadsheets with partisan index information for the various draft districts. [53] In the final days of the drafting, state and national Republicans tweaked the map, mindful of the partisan consequences of very minor tweaks. [54] In ***1000** some cases, it was clear that national Republican operatives had the authority to "sign off" on changes before they were implemented by the State-level team. [55]

51 *Id.* at 30–31; Trial Ex. P128 (Sept. 12, 2011 email at LWVOH_00018322) (Kincaid sending last-minute changes in the map design to DiRossi, Mann, and Whatman); Dkt. 230-28 (Kincaid Dep. at 276–77).

52 Dkt. 230-28 (Kincaid Dep. at 273–74) ("As the redistricting coordinator in 2010 and 2011, my job was to facilitate the development of proposed maps with members of Congress, specifically in Ohio, so that they would have a proposal that they could bring back to the state legislators for their

consideration."); Dkt. 230-27 (Kincaid Dep. at 89–92, 94–97, 103–05).

53 Dkt. 230-52 (Whatman Dep. at 55–56).

54 *See* Trial Ex. P124 (Sept. 10, 2011 email at LWVOH_00018310) (DiRossi implementing a last-minute change requested by Senator Faber, including its impact on partisan index scores, and stating that "DC is increasingly pushing to put the lid on this"); Trial Ex. P125 (Sept. 11, 2011 email at LWVOH_0001829) (Whatman apologizing to DiRossi for having to deal with a last-minute "tweak" request from Senators Faber and Widener); Trial Ex. P581 (Sept. 11, 2011 email at LWVOH_00018311) (DiRossi informing Whatman of the partisan index impact of accommodating Senator Widener's requested changes to the map and Whatman asking DiRossi if there was "some other change you guys wanted to run by me" because he "[g]ot that impression from [M]att's [voicemail]"); Trial Ex. P126 (Sept. 12, 2011 emails at LWVOH_00018298–301) (updating various map drawers of the impact that changes to the map had on the partisan index score of Representative Latta's district and noting that "a good part of Lucas [County] he is picking up is [R]epublican territory"); Trial Ex. P127 (Sept. 12, 2011 email at LWVOH_00018320) (DiRossi updating Whatman on the partisan impact of a map change on Representative Stivers's district as measured by two different partisan indices); Trial Ex. P128 (Sept. 12, 2011 email at LWVOH_00018322) (Kincaid sending last-minute changes in the map design to DiRossi, Mann, and Whatman); Dkt. 243 (DiRossi Trial Test. at 260).

55 Trial Ex. P126 (Sept. 12, 2011 email at LWVOH_00018298) (Senate President Niehaus asking DiRossi: "Did Whatman sign off?" after changes were proposed and DiRossi confirming that Whatman signed off on them). Heather Mann testified that Whatman "never needed to approve of any maps" that she had drawn because "[h]e wasn't [her] principal." Dkt. 230-5 (Mann Dep. at 59). However, the email correspondence between the Ohio map drawers reveals that although Mann may not have technically been required to secure Whatman's approval of changes to the map, such approval and input was regularly sought, particularly when such changes involved hot spots on the map that were especially important to the map's partisan outcome. *See also* Trial Ex. P581 (Sept. 11, 2011 email at LWVOH_00018311) (Whatman asking DiRossi if there was "some other change you guys wanted to run by me").

4. Major features of H.B. 319

Because of the stagnation in Ohio's population compared to other states, two districts had to be eliminated. This meant that if all incumbents were to run for office, at least two sets of incumbents would have to be paired. The Republicans decided to pair two Republican representatives and two Democratic representatives. [56] Whatman made the decision to pair Republican Congressmen Turner and Austria; Speaker Boehner approved the pairing. [57] Whatman also spoke to both Austria and Turner about the decision. [58] Speaker Batchelder was not involved in the decision to pair those two Republican congressmen. [59]

56 Speaker Batchelder testified that that decision was made "early on as we negotiated between the two caucuses." Dkt. 246 (Batchelder Trial Test. at 47).

57 Dkt. 230-52 (Whatman Dep. at 35, 37–39).

58 *Id.* at 35–36.

59 Dkt. 246 (Batchelder Trial Test. at 48–49).

As for the Democratic pairing, the map drawers paired Representative Marcy Kaptur of former District 9 and Representative Dennis Kucinich of former District 10; Kaptur won the Democratic primary that ensued. Kaptur testified that she did not want to be paired with Kucinich, [60] but she was not consulted by the Republican ***1001** map drawers on the matter. [61] She saw the map embodied in H.B. 319 for the first time in media reports around the time of the bill's introduction. Kaptur was "astonish[ed]," upset, and offended by the map, which she understood to break up communities of interest and involve unnatural groupings of communities with diverging interests. [62]

60 Dkt. 249 (Kaptur Trial Test. at 76). DiRossi testified that Representatives Kucinich and Kaptur were paired because "[t]here was a lot of—a lot of conversations that were happening, but it was very

clear that the Democrats wanted Dennis Kucinich to be the one that was out ... I was getting feedback from a number of mechanisms, a number of people that were having conversations with the Democrats or with other party leaders.... I was talking to a number of people. I was talking to Bob Bennett, the former chairman of the Ohio Republican Party, who had been the chairman twice and had some incredible relationships with former Democratic chairs and also some of the county chairs and individual members." Dkt. 243 (DiRossi Trial Test. at 159–60). DiRossi stated that Bob Bennett "then discuss[ed] these things with [him] personally" and "Bennett's conversations that he was relaying to [DiRossi] impact[ed] how [DiRossi] drew the lines." *Id.* at 160. Plaintiffs object to DiRossi's testimony regarding out-of-court statements, but the Court considers those statements only for the effect DiRossi claims they had on his map-drawing decisions and not for the purported truth of the assertions (i.e., which incumbents Democrats actually wanted paired).

61 Dkt. 249 (Kaptur Trial Test. at 69–70). Kincaid, however, testified that "Ms. Kaptur and Mr. Kucinich who had been drawn together in a district were interested in the makeup of their parts of those districts, specifically the DMA's which are the designated market areas of Toledo and Cleveland and how much of each was inside their districts—their district." Dkt. 230-27 (Kincaid Dep. at 99). He testified that this information came from Congressman LaTourette's communications with Democratic representatives during the map-drawing process. *Id.* at 98. Again, the Court considers Kincaid's testimony only for the effect that Congresswoman Kaptur's and Congressman Kucinich's out-of-court statements had on the map drawers and not for the purported truth of the assertions.

62 Dkt. 249 (Kaptur Trial Test. at 70–71).

The map drawers also paired Republican Representative Jim Renacci of the former District 16 and Democratic Representative Betty Sutton of the former District 13 to run against each other in the new District 16. DiRossi testified that the third pairing was necessitated by: drawing District 11 to include portions of Akron, population loss in Northeast Ohio, "two congresspeople who were living very close together," and the creation of the new District 3 in Franklin County. [63]

63 Dkt. 243 (DiRossi Trial Test. at 176–77).

The map drawers drew District 11 to include some portions of the City of Cleveland in Cuyahoga County and a thin strip dropping southward into Summit County where it incorporated sections of the City of Akron. Representative Marcia Fudge, who had represented District 11 under the previous map prior to the 2011 redistricting, was not consulted by Republican map drawers and did not learn of District 11's new boundaries until around the time that H.B. 319 was introduced in the legislature. [64] She was displeased with the new shape of the district, particularly the extension of the district into Summit County and Akron, areas with which she was not familiar and that she had not previously represented. [65] District 11 had historically been a majority-minority district that elected African-American congressional representatives by large margins. Some map drawers expressed that it "was a consideration for us in a proposed map to make sure it remained a majority-minority district." [66]

64 Dkt. 239 (Fudge Trial Test. at 83) (testifying that she "didn't have a role" in the 2011 redistricting). Kincaid testified, however, that "I know Congresswoman Fudge was interested in the precincts and communities that were included in her district .... Ms. Fudge wanted a district that ran from Cleveland to Akron." Dkt. 230-27 (Kincaid Dep. at 99). Kincaid testified that his "understanding [was] that [Fudge's desire for such a district] was communicated multiple ways through multiple avenues" both "to the state legislature as well as to Mr. LaTourette." *Id.* at 100. He went on: "I recall that she probably stated she was thrilled by the district that was passed out of the Ohio legislature. She may not have used the word thrilled but that she was pleased with the district that she was drawn into." *Id.* at 100–01. Plaintiffs object to this testimony of the ground that it is inadmissible hearsay. Defendants contend that it is only being offered as evidence of Kincaid's understanding and belief. The Court sustains Plaintiffs' objection and finds that this testimony is being offered for the truth—to prove that Congresswoman Fudge was pleased with the

district—and therefore is inadmissible hearsay. *See* FED. R. EVID. 801(c)(2).

65 Dkt. 239 (Fudge Trial Test. at 84–85).

66 Dkt. 230-52 (Whatman Dep. at 62); *see also* Trial Ex. P394 (discussing BVAP goals for District 11).

***1002** The map drawers created a new district, District 3, in Franklin County, where the City of Columbus is located. Columbus had been experiencing population growth while metropolitan areas in northern Ohio had been losing population. [67] It is an urban center that is the home of The Ohio State University, and it contains many Democratic voters. Whatman and Kincaid had the idea to create the new District 3 in Columbus that would concentrate many of Columbus's Democratic voters into one district. [68] One spreadsheet sent among those involved in the map-drawing process referred to the new District 3 as the "Franklin County Sinkhole," but it is unclear who exactly included that term. [69] The draft map creating the new District 3 allowed for safe quantities of Columbus's Democratic voter bloc to be absorbed by the neighboring Districts 12 and 15 such that those districts could maintain or achieve safe Republican majorities. [70]

67 Trial Ex. P090 (Cooper Decl. at 7, fig. 2).

68 Dkt. 230-52 (Whatman Dep. at 51); Dkt. 230-28 (Kincaid Dep. at 333–37).

69 Dkt. 230-28 (Kincaid Dep. at 121–22); *id.* at 420; Trial Ex. P077 (Ohio Changes Spreadsheet at BRADEN001387) (bearing the legend "Franklin County Sinkhole"). Defendants object to the admissibility of Trial Ex. P077 on authentication, foundation, and hearsay grounds. Each objection is overruled. First, the exhibit was produced by Braden in response to Plaintiffs' document subpoena, so it is presumptively authentic. Second, Plaintiffs have properly demonstrated foundation as Kincaid testified that he was the author of the spreadsheet and explained the spreadsheet in detail. Dkt. 230-27 (Kincaid Dep. at 153); *see also* Dkt. 230-28 (Kincaid Dep. at 363) (testifying that he "would have created the original version" of the spreadsheet, but he was unsure whether he had written the header reading "Franklin County Sinkhole"). Metadata further confirms that Kincaid was the last person to modify Trial Ex. P077. Third, the Court finds that Plaintiffs cite this document to demonstrate the map drawers' partisan intent, not for the truth that Franklin County was a "sinkhole." *See* FED. R. EVID. 801(c)(2).

Kincaid sent the spreadsheet to DiRossi, Mann, and Whatman on September 2, 2011. Dkt. 230-28 (Kincaid Dep. at 366–67); Trial Ex. P119 (at LWVOH_00018302). Mann forwarded the spreadsheet to Braden and Bensen on September 3, 2011. Trial Ex. P119 (at LWVOH_00018308). On September 6, 2011, Braden sent the spreadsheet to Hofeller in an email that stated: "please keep this secret but would like your and Dale's views." Trial Ex. P393 at REV_00023176–79. Dale Oldham worked as the redistricting counsel for the RNC. Dkt. 230-27 (Kincaid Dep. at 55).

Kincaid testified that he had a memory of the term "Franklin County Sinkhole" "being used in a conversation with Mr. Whatman" prior to the introduction of H.B. 319, but he did not recall who was present or who used the phrase. Dkt. 230-28 (Kincaid Dep. at 370–71).

70 Trial Ex. P499 (Ohio Changes Spreadsheet at REV_00023431) (reflecting a changed PVI score in District 12 from D+1 to R+8); Dkt. 230-28 (Kincaid Dep. at 353–54).

State-level and national Republican operatives emailed back and forth sharing and consulting on plans for this new district. Kincaid created a proposed map that included such a district, which scored as D+15 using his PVI metric, and shared the draft map with DiRossi and Mann. [71] Braden asked Hofeller to consult on one draft of the map created by Kincaid, including the new district. Hofeller approved it after removing from District 15 some territory that Kincaid had allocated to it. Hofeller noted that this " 'downtown' area" was " 'dog meat' voting territory" and "awful" in explaining why it should not be included in the Republican-assigned District ***1003** 15. [72] Kincaid followed up with minor tweaks of the Columbus area division, but the general contours, as tweaked by Hofeller, remained the same. The 2012 map, which placed downtown Columbus in District 3, uses irregular lines to divide Franklin County and Columbus into three districts—3, 12, and 15. In every election under the 2012 map, the Democratic candidate has won District 3 while Districts 12 and 15 have elected Republican representatives. [73]

71 Trial Ex. P313 (Ohio Changes Spreadsheet at NRCC000012) (listing the newly created district termed "10-open" with a PVI of D+15); Dkt. 230-27 (Kincaid Dep. at 135–36); *id.* at 145; Trial Ex. P119 (Sept. 3, 2011 email at LWOV_00018302).

72 Trial Ex. P394 (Sept. 8, 2011 email at REV_00023234). Defendants object to Trial Ex. P394 as containing inadmissible hearsay. This objection is overruled. The Court finds that Plaintiffs have offered this document to show the map drawers' state of mind and partisan intent, not for the truth that these territories were "dog meat." *See* FED. R. EVID. 801(c)(2).

73 OHIO SEC'Y OF STATE, 2012 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2012-elections-results/ (Democratic Representative Beatty winning District 3 with 68.29% of the vote and Republican Representatives Tiberi and Stivers winning Districts 12 and 15 with 63.47% and 61.56% of the vote, respectively); OHIO SEC'Y OF STATE, 2014 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2014-elections-results/ (Democratic Representative Beatty winning District 3 with 64.06% of the vote and Republican Representatives Tiberi and Stivers winning Districts 12 and 15 with 68.11% and 66.02% of the vote, respectively); OHIO SEC'Y OF STATE, 2016 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2016-official-elections-results/ (Democratic Representative Beatty winning District 3 with 68.57% of the vote and Republican Representatives Tiberi and Stivers winning Districts 12 and 15 with 66.55% and 66.16% of the vote, respectively); OHIO SEC'Y OF STATE, 2018 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2018-official-elections-results/ (Democratic Representative Beatty winning District 3 with 73.61% of the vote and Republican Representatives Balderson and Stivers winning Districts 12 and 15 with 51.42% and 58.33% of the vote, respectively). The Court takes judicial notice of all the 2012-2018 election results. FED. R. EVID. 201.

For a time, the Republicans considered drawing a map that would include "13 'safe' seats" for their party rather than twelve. [74] In order to accomplish this, Franklin County and the City of Columbus would be split into four different districts rather than the three they were split into under the 2012 map. [75] Kincaid developed such a map and calculated the PVI scores of the resulting districts. Although such a map could have secured the election of thirteen Republican representatives, the map drawers believed that the margins of victory would have been tighter, as evidenced by lower R+ PVI scores. [76] The Republicans eventually opted for the map ***1004** that promised one less Republican seat, but in which those twelve Republican seats were safer.

74 Trial Ex. P385 (Congressional Redistricting Talking Points at LWVOH_0052438) ("Given the fact that the overall index for the State of Ohio is 49.5% on a measure of five recent races, it is a tall order to draw 13 'safe' seats. Speaker's [sic] Boehner's team worked on several concepts but this map is the one they felt put the most number of seats in the safety zone.").

75 Dkt. 230-28 (Kincaid Dep. at 421).

76 Trial Ex. P078 (PVI Scores for the "4-Way Split as of September 6" map at OHCF0001438). Defendants object to the admissibility of Trial Ex. P078 on authentication, foundation, and hearsay grounds. Each objection is overruled. First, the exhibit was produced by Braden in response to Plaintiffs' document subpoena, so it is presumptively authentic. Second, Plaintiffs have properly demonstrated foundation as Kincaid testified that he likely authored the spreadsheet and explained the spreadsheet, including the meaning of "4-Way Split[,]" in detail. Dkt. 230-28 (Kincaid Dep. at 381–82). Third, the Court finds that to the extent this evidence is offered to prove the intent and beliefs of the map drawers, it is not offered for the truth of the PVI scores. *See* FED. R. EVID. 801(c)(2). To the extent that it is offered to prove the truth of the partisan leanings of the contemplated districts created by the four-way split, it is admissible as the admission of the agent

of a party-opponent. *See* FED. R. EVID. 801(d)(2)(D).

The map drawers sometimes rejected specific requests from Republican members of the Ohio General Assembly, instead prioritizing maintaining the partisan balance of the draft map. For example, State Senator Christopher Widener requested that the map keep Clark County whole.[77] DiRossi and the other map drawers rejected Widener's request in part because unifying Clark County would have negative consequences for the partisan scores of District 15—making the Republican seat there less secure.[78]

77 Dkt. 243 (DiRossi Trial Test. at 246); Trial Ex. P581 (Sept. 11, 2011 email at LWVOH_00018311) (discussing the partisan consequences of Senator Widener's request); Dkt. 243 (DiRossi Trial Test. at 244–45).

78 Trial Ex. P581 (Sept. 11, 2011 email at LWVOH_00018311); Dkt. 243 (DiRossi Trial Test. at 247–48).

The resulting map featured twelve districts likely to elect a Republican representative (Districts 1, 2, 4, 5, 6, 7, 8, 10, 12, 14, 15, and 16) and four districts likely to elect a Democratic Representative (Districts 3, 9, 11, and 13).

5. Secrecy surrounding the map

The Republican map drawers did not share plans for the map with either the public or Democratic legislators or staffers prior to introducing it in the Ohio House of Representatives.[79] Although the State Senate's and State House's committees on redistricting, chaired by Senator Faber and Representative Huffman, respectively, held five public hearings in different locations across Ohio in July and August of 2011 while the maps were being drafted, their members did not share drafts of the maps or political indices at the hearings.[80] The Republican map drawers shared the map with Representative Armond Budish, the Democratic Minority Leader in the Ohio State House of Representatives, only just immediately before the bill was introduced.[81] The map drawers even declined to share information with other Republican members of the Ohio General Assembly prior to the formal introduction of the bill. For example, State Senator Faber saw the map just shortly before its introduction as a bill.[82]

79 Kincaid, however, testified that Republican Congressman LaTourette "would meet with Democrat members of the Ohio [congressional] delegation and get their input on the Ohio congressional map and would communicate information back to them as well." Dkt. 230-27 (Kincaid Dep. at 98). Kincaid's testimony is unclear as to when Congressman LaTourette's discussions with Democratic members of Congress occurred. Congresswoman Fudge testified that she spoke to Congressman LaTourette about the shape of her district after the introduction of H.B. 319 in the General Assembly. Dkt. 239 (Fudge Trial Test. at 100). Moreover, to the extent it is offered for the truth of what any particular Democrat wanted in the redistricting, it is based on hearsay.

80 Dkt. 230-19 (Huffman Dep. at 33–34, 45–46); Dkt. 230-5 (Mann Dep. at 159–60).

81 Dkt. 230-3 (Batchelder Dep. at 57); Dkt. 230-5 (Mann Dep. at 57).

82 Dkt. 230-13 (Faber Dep. at 57–58) (recalling seeing "the map for the first time at the same time that everyone else did" and "right before the weekend before we were going to vote it on the floor"); *id.* at 175 ("We were given at the last minute a map that we were being asked to support ... You know, we haven't had any input in this process per se.").

6. Passage of H.B. 319

The Ohio Republicans first introduced a 2012 redistricting map in the form of H.B. 319 on September 13, 2011 in the House State Government and Elections Committee. The Committee referred the bill to the House, and it was debated on the floor of ***1005** the House on September 15, 2011.[83] Representative Huffman, the sponsor of the bill, spoke on the House floor about the map-drawing process and the factors that the map drawers had considered in drawing the new district lines.[84] Democratic Minority Leader Budish spoke on the floor of the House, criticizing the secrecy of the map-drawing process and the Republicans' failure to take outside input into account.[85] House Democrats also complained that the bill was being rushed through the General Assembly

and that the accelerated timeframe for its passage prevented serious scrutiny and critique. [86] The bill passed in the House of Representatives that same day by a vote of fifty-six to thirty-six. [87]

83 Dkt. 234 (Final Pretrial Order at App. A., 2) (Joint Uncontroverted Facts).

84 *See* Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 13–23) (statement of Rep. Huffman); Dkt. 230-5 (Mann Dep. at 160–61).

85 Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 67–68) (statement of Rep. Budish).

86 *Id.* at 38–39 (statement of Rep. Gerberry); *id.* at 46 (statement of Rep. Letson).

87 Trial Ex. J07 (Ohio House of Representatives Journal, Sept. 15, 2011 at 12–13).

On September 19, 2011, H.B. 319 was introduced in the Ohio State Senate. The Senate Committee on Government Oversight and Reform, chaired by Senator Faber, then held hearings on the bill. [88] The Committee amended the bill to include a $ 2.75 million appropriation for local boards of elections in an attempt to make the bill immediately effective and shield it from a voter referendum. [89] The Committee referred the amended bill to the Ohio Senate. [90] On the floor of the Senate, some Democratic State Senators, including Senator Nina Turner, a member of the Black Caucus, opposed the bill and argued that it "lays out 12 Republican districts and four Democratic districts." [91] The bill passed in the Senate by a vote of twenty-four to seven on the same day it was referred. The amended H.B. 319 then returned to the House of Representatives where it passed by a vote of sixty to thirty-five. [92] It was signed into law on September 26, 2011, by Republican Governor John Kasich.

88 Trial Ex. J28 (Senate Government Oversight and Reform Committee File at 1, 4).

89 Trial Ex. J28 (Senate Government Oversight and Reform Committee File at 2); Trial Ex. J03 (Ohio Senate Session, Sept. 21, 2011 at 30–31) (statement of Sen. Faber).

90 Dkt. 234 (Final Pretrial Order at App. A., 2) (Joint Uncontroverted Facts).

91 Trial Ex. J03 (Ohio Senate Session, Sept. 21, 2011 at 32–33) (statement of Sen. Brown); *id.* at 53 (statement of Sen. Turner); Dkt. 240 (Turner Trial Test. at 9, 16–17).

92 Dkt. 234 (Final Pretrial Order at App. A., 2) (Joint Uncontroverted Facts).

7. Referendum and negotiations

Despite the appropriation amendment intended to insulate the map from a voter referendum, Ohio voters sought to mount such a referendum. A group of Ohio voters filed a petition for a writ of mandamus with the Supreme Court of Ohio. They sought an order declaring that H.B. 319 could indeed be subjected to a voter referendum. *State ex rel. Ohioans for Fair Dists. v. Husted*, 130 Ohio St.3d 240, 957 N.E.2d 277 (2011). The Ohio Supreme Court granted the writ of mandamus on October 14, 2011; voters could seek a referendum and the bill could not immediately go into effect. *Id.* In order to put the referendum on the ballot, Ohio voters would have to gather the signatures of 6% of state electors in slightly over two ***1006** months. [93]

93 Dkt. 234 (Final Pretrial Order at App. A., 3) (Joint Uncontroverted Facts).

This also meant that H.B. 319 would not take effect until December 25, 2011, after the December 7, 2011 candidate filing deadline set for the March 2012 primaries. [94] In response, Republican legislators passed H.B. 318, which split the Ohio primaries. The local, state, and U.S. Senate primaries would still occur in March 2012, but the U.S. presidential and U.S. House of Representatives primaries were pushed back to June 2012. [95] This split primary would cost the State of Ohio $ 15 million. [96]

94 *See* OHIO REV. CODE § 3513.05; Trial Ex. J03 (Ohio Senate Session, Sept. 21, 2011 at 15–16) (statement of Sen. Faber).

95 Dkt. 246 (Judy Trial Test. at 72–73); Trial Ex. J06 (Ohio House Session, Dec. 14, 2011 at 5) (statement of Rep. Huffman); Trial Ex. J05 (Ohio Senate Session, Dec. 14, 2011 at 7).

96 Trial Ex. J04 (Ohio House Session, Nov. 3, 2011 at 9–10) (statement of Rep. Huffman); Trial Ex. J22 (Rep. Huffman Sponsor Test. at 001).

In the shadow of the possible referendum and split primaries, Ohio Republican and Democratic legislators attempted to negotiate some alterations to H.B. 319 that could be enacted as a new bill—H.B. 369.[97] This openness to feedback from the Democrats had not been present in the drawing of H.B. 319.[98] Some Republican map drawers testified that Bob Bennett, the chairman of the Ohio Republican Party and a member of the RNC,[99] served as a go-between for the Republicans and Democrats during this period, communicating Democratic requests to the Republican map drawers.[100] The Republicans, although making small concessions and alterations to their original map to cater to Democratic desires,[101] refused to make changes that would alter the likely partisan outcome of the map.[102] Speaker Batchelder commented that the Democratic legislators' "theory was somehow or another that they could overcome a majority of people who were in the other party, and I don't know how that would have happened."[103]

97 Dkt. 230-3 (Batchelder Dep. at 120–21) (acknowledging that "negotiations began around mid to late October" and that "the referendum might have played some role in the negotiation about the second map"); Dkt. 246 (Judy Trial Test. at 78, 82) ("There were negotiations leading up to 369. This is after 319 was passed, and, due to the referendum, the confusion ... and the chaos and pressure that came out of the signature collections, negotiations began."); Dkt. 230-31 (McCarthy Dep. at 74) ("[T]here was a threat of a citizen's referendum on 319 and that—that was the primary reason [for H.B. 369]."); *id.* at 75–77.

98 Dkt. 230-12 (DiRossi Dep. at 185) (stating that the Democratic feedback was "inherent in 369" because "the legislative Democrats approached the leadership and said this is what it's going to take for us to provide votes to approve this map, and so that was all post 319 and 369").

99 Dkt. 230-52 (Whatman Dep. at 40) (identifying Bob Bennett's roles).

100 Dkt. 230-12 (DiRossi Dep. at 184). DiRossi testified that he himself did not "have conversations directly with anyone who could be termed a Democrat" during that period. *Id.* Rather, he "was getting that information from other people." *Id.* He further stated that Bob Bennett "was an intermediary to Democrats and Republicans all over the state." *Id.* at 189.

101 Dkt. 246 (Judy Trial Test. at 78–79) (stating that Democratic members of the Ohio House of Representatives had "a small list of changes that they wanted to see" that were "given to the staffer or consultants that we hired on our side to incorporate in").

102 Dkt. 230-3 (Batchelder Dep. at 130–31); Dkt. 230-14 (Glassburn Dep. at 203–04); Dkt. 230-41 (Routt Dep. at 193–95).

103 Dkt. 230-3 (Batchelder Dep. at 115–16).

***1007** DiRossi, Mann, and Judy worked with Maptitude at their office at the Ohio House of Representatives to draw minor changes into the redistricting map in the period between the passage of H.B. 319 and H.B. 369.[104] For example, DiRossi testified that he made changes based on his belief that Representative Kaptur and others had requested that additional territory in Lucas County and Toledo be added and territory in Cleveland be removed from District 9 so that Kaptur would have a better chance of defeating Kucinich.[105] The changes also included the unification of Clark County.[106]

104 Dkt. 230-5 (Mann Dep. at 48–49, 92).

105 Dkt. 243 (DiRossi Trial Test. at 162). DiRossi testified that Bennett (who has since died), Niehaus, and Batchelder all informed him that such changes had to be made between the two iterations of the map. *Id.* at 162–63.

106 Dkt. 243 (DiRossi Trial Test. at 246). Even though Clark County was unified in the new map, the map drawers believed that they were able to do so while maintaining District 15's strong pro-Republican lean. Kincaid believed H.B. 369's PVI to be R+6. Trial Ex. P498 (H.B. 369 Partisan Data Spreadsheet at REV_00023430). He believed H.B.

319's PVI to be R+7. Trial Ex. P590 (Ohio Changes Spreadsheet).

On November 3, 2011 Representative Huffman introduced the new Republican redistricting bill, H.B. 369, in the House Rules and Reference Committee; he gave sponsor testimony in the committee on November 9. H.B. 369 would eliminate the newly split primary. [107] Republican State Representative Lou Blessing sought to push H.B. 369 through the General Assembly by suspending the normal rules mandating that bills be considered by each legislative house on three separate days. [108] Representative Blessing did not have sufficient votes to achieve this result. [109] Around this time it became clear that the Ohio voter referendum challenging H.B. 319 would not be successful; the required votes would not be collected in time. This meant that Democrats had a weaker bargaining position in their efforts to convince Republicans to make further changes to H.B. 369.

107 Dkt. 234 (Final Pretrial Order at App. A., 3) (Joint Uncontroverted Facts).

108 Trial Ex. J04 (Ohio House Session, Nov. 3, 2011 at 9) (statement of Rep. Blessing).

109 *Id.*

8. Passage of H.B. 369

On December 14, 2011, both the Ohio House of Representatives and the Ohio Senate passed an amended version of H.B. 369, over vigorous opposition from some Democrats. [110] The bill passed in the House by a margin of seventy-seven to seventeen (including twenty-one Democratic votes in favor) and in the Senate by a margin of twenty-seven to six (including four Democratic votes in favor). [111] Not only was the amended H.B. 369 nearly identical in terms of partisan leanings to H.B. 369 as it was first introduced, [112] but it was also highly similar to H.B. 319, the first redistricting ***1008** plan that the General Assembly had passed. [113] It was signed into law by Governor Kasich the following day. Because the partisan metrics of the map did not change, the new congressional districting map passed as H.B. 369 was just as likely as H.B. 319 to result in the election of twelve Republican representatives and four Democratic representatives.

110 *See, e.g.*, Trial Ex. J06 (Ohio House Session, Dec. 14, 2011 at 22–24) (statement of Rep. Ramos); *id.* at 28–29 (statement of Rep. Foley); *id.* at 33–35 (statement of Rep. Lundy); *id.* at 36–38 (statement of Rep. O'Brien).

111 Dkt. 234 (Final Pretrial Order at App. A., 3) (Joint Uncontroverted Facts).

112 Trial Ex. P042 (Comparison Spreadsheet); Dkt. 230-5 (Mann Dep. at 91–92); Dkt. 246 (Judy Trial Test. at 83) (stating that the H.B. 369 as introduced and as passed "look substantially similar"). Representative Huffman stated: "This House Bill 369 retains the map that was presented to the Rules Committee six weeks ago, with one very minor change." Trial Ex. J06 (Ohio House Session, Dec. 14, 2011 at 5) (statement of Rep. Huffman). The "very minor change" appears to have been the accommodation of a request from the Democratic leadership in the Ohio House to draw former Democratic Representative Mary Jo Kilroy out of District 3 while not decreasing the African-American voting population of that district. Dkt. 230-5 (Mann Dep. at 171–72).

113 Dkt. 230-26 (Judy Dep. at 178).

Following the passage of H.B. 369, Kincaid created a spreadsheet that documented his analysis of the partisan outcomes of the newly enacted map. [114] The spreadsheet featured four D+ districts, with their numerical scores ranging from D+12 to D+29. It also featured twelve R+ districts, with all but one of their numerical scores ranging from R+2 to R +9, and the outlier measuring at R+14. [115] Kincaid prepared a presentation in which he showed how the redistricting efforts had shored up Republican support in three previously competitive districts—Districts 1, 12, and 15, rendering them safe for Republican Representatives Chabot, Tiberi, and Stivers, thereby taking them "out of play." [116] By Kincaid's calculations, District 1 had moved seven PVI points in favor of Republicans by including Warren County and removing portions of Democratic Hamilton County. District 12 had moved nine PVI points in favor of Republicans because portions of Democratic Columbus had been removed from the district and into District 3. Similarly, District 15 had moved seven PVI points in favor of Republicans, as the new District 3 now also contained many of District 15's former Democratic constituents. Kincaid's presentation also noted that Districts 6 and 16 were "Competitive R Seats Improved" because their

PVI scores had become more pronouncedly pro-Republican as a result of the redistricting, District 6 by three points and District 16 by one point. [117] Kincaid continued to praise the results of his map-drawing collaboration with the Ohio Republicans, representing that the "new [Ohio] map should be a 12-4 map," that it "eliminat[ed] Ms. Sutton's seat," and that it "created a new Democrat seat in Franklin County." [118] He stated elsewhere that the Ohio "Republican map shored up multiple seats for the decade." [119]

114 Trial Ex. P498 (H.B. 369 Partisan Data Spreadsheet); Dkt. 230-28 (Kincaid Dep. at 468–69). Defendants object to the admissibility of Trial Ex. P498 as containing inadmissible hearsay. This objection is overruled. The Court finds that the document is offered to demonstrate the intent, mindset, and belief of the map drawers and not being offered for the truth of the matter asserted—that these changes in PVI had occurred or that the districts were actually taken "out of play."

115 Trial Ex. P498 (H.B. 369 Partisan Data Spreadsheet).

116 Trial Ex. P310 (NRCC Presentation at 5); Dkt. 230-27 (Kincaid Dep. at 115–16). Defendants object to the admission of Trial Ex. P310 on hearsay grounds. This objection is overruled. The Court finds that the document is admissible to prove Kincaid's intent, belief, and state of mind, not for the truth of the matter asserted—that the districts had actually been taken out of play. *See* FED. R. EVID. 801(c)(2).

117 Trial Ex. P310 (NRCC Presentation at 6).

118 Trial Ex. P414 (State-by-State Redistricting Summary at REV_00000001); Dkt. 230-28 (Kincaid Dep. at 519). Defendants object to the admission of Trial Ex. P414 on hearsay grounds. This objection is overruled. The Court finds that the document is admissible to prove Kincaid's intent and state of mind. *See* FED. R. EVID. 801(c)(2).

119 Dkt. 230-28 (Kincaid Dep. at 512–13).

U.S. Representative Stivers's communications with his staff reflected his similar ***1009** belief that various previously competitive districts had been made solidly Republican as a result of the redistricting. For example, he stated that "[t]he redistricting in Ohio did shore up some of the toss-up districts" based on the changes in the PVI scores for Districts 1, 6, and 15. [120] He acknowledged that U.S. Representative Chabot of District 1 "probably won't have a close race for the next decade" based on the changes the redistricting wrought on that district's PVI score and the fact that his district contained many more Republican voters following the redistricting. [121]

120 Trial Ex. P556 (Stivers Email at STIVERS_007519); Dkt. 230-46 (Stivers Dep. at 77–78).

121 Trial Ex. P556 (Stivers Email at STIVERS_007519–20).

9. Congressional elections under the 2012 Map

As predicted by Kincaid, the same four Ohio congressional districts (Districts 3, 9, 11, and 13) have elected Democratic representatives, and the same twelve districts (Districts 1, 2, 4, 5, 6, 7, 8, 10, 12, 14, 15, and 16) have elected Republican representatives in every election since the enactment of the 2012 map.

B. Procedural History

Plaintiffs include seventeen individual Ohio residents, who collectively reside and vote in each of Ohio's sixteen congressional districts, and five organizations based in Ohio. The individual Plaintiffs are: Linda Goldenhar, Douglas Burks, Sarah Inskeep, Cynthia Libster, Kathryn Deitsch, LuAnn Boothe, Mark John Griffiths, Lawrence Nadler, Chitra Walker, Tristan Rader, Ria Megnin, Andrew Harris, Aaron Dagres, Elizabeth Myer, Beth Hutton, Teresa Thobaben, and Constance Rubin. The organizational Plaintiffs, which include nonpartisan groups as well as groups affiliated with the Democratic Party, are: the Ohio A. Philip Randolph Institute ("APRI"), the League of Women Voters of Ohio ("The League"), The Ohio State University College Democrats ("OSU College Democrats"), the Northeast Ohio Young Black Democrats ("NEOYBD"), and the Hamilton County Young Democrats ("HCYD").

Defendants are State Representative Larry Householder, Speaker of the Ohio House of Representatives; State Senator Larry Obhof, President of the Ohio State Senate; and Ohio's

Secretary of State, Frank LaRose. All Defendants are sued in their official capacities.

Plaintiffs filed this lawsuit on May 23, 2018. Dkt. 1 (First Compl.). This three-judge panel was then convened pursuant to 28 U.S.C. § 2284. *See* Dkt. 28. Plaintiffs twice amended their complaint and, as relevant here, filed their second amended complaint on July 11, 2018, seeking declaratory and injunctive relief and the enactment of a new congressional districting plan. *See* Dkt. 37 (Second Am. Compl. at 50–52). On August 15, 2018, we denied Defendants' motion to dismiss. *See Ohio A. Philip Randolph Inst. v. Smith*, 335 F.Supp.3d 988 (S.D. Ohio 2018). After that, we granted the Intervenors' motion to intervene, and they joined the litigation. *See* Dkt. 64. [122]

122 The Intervenors are the Republican Congressmen from Ohio, the Republican Party of Cuyahoga County, the Franklin County Republican Party, and four individuals. The four individuals are Robert Bodi, Roy Palmer III, Charles Drake, and Nathan Aichele, who live in District 16, District 9, District 11, and District 3, respectively. None of the Intervenors testified live at trial. Only Representatives Chabot, Johnson, Jordan, and Stivers testified via deposition. *See* Dkt. 234 (Final Pretrial Order at App. P.). For the purposes of this opinion, we generally refer to Defendants and Intervenors collectively as "Defendants," reflecting their collaborative efforts in litigating the case.

The case then proceeded through discovery, and on January 8, 2019, Defendants moved for summary judgment. *See* Dkt. ***1010** 136 (Mot. for Summ. J.); Dkt. 140, 140-1 (Intervenors' Suppl. Mot. for Summ. J. & Mem.). After a round of briefing, we denied the motion for summary judgment. *See Ohio A. Philip Randolph Inst. v. Householder*, 367 F.Supp.3d 697, 2019 WL 652980 (S.D. Ohio Feb. 15, 2019). [123] Trial commenced on March 4, 2019 and lasted eight days, concluding on March 13. [124]

123 Representative Householder became the Speaker of the Ohio House of Representatives on January 7, 2019, and Mr. LaRose became Ohio's Secretary of State on January 12, 2019. Householder was substituted for Ryan Smith as a Defendant, and LaRose was substituted for Jon Husted as a Defendant. *See* FED. R. CIV. P. 25(d); *see also* Dkt. 218.

124 The parties offer some of their witnesses' testimony via their depositions. *See* Dkt. 234 (Final Pretrial Order at 7, Apps. O. & P.).

Since the trial, the parties have filed post-trial briefs with proposed conclusions of law, and separately, proposed findings of fact. The parties have also finalized their objections to the other side's evidence, responded to each other's objections, and submitted additional briefs on those objections. [125] This briefing schedule concluded on April 7, 2019.

125 The parties raised hundreds of objections to evidence in this case. The Court has considered objections lodged against any piece of evidence ultimately cited in this opinion. To the extent the Court relies on any piece of evidence, objections against the same are **OVERRULED**. The Court offers a more detailed explanation for several particular evidentiary rulings throughout the opinion.

II. SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

A. Plaintiffs' Fact Witnesses

1. Individual Plaintiffs

Individual Plaintiffs Douglas Burks, Mark Griffiths, Aaron Dagres, and Elizabeth Myer testified at trial. They live in District 2, District 7, District 12, and District 13, respectively. The remainder of the individual Plaintiffs, who reside in the rest of the congressional districts, testified via deposition. All individual Plaintiffs testified to their affiliation with the Democratic Party and/or that they consistently vote for Democratic candidates. *See infra* Sections III.A.1.–16. In addition to being Democratic voters, the individual Plaintiffs are politically active in supporting, volunteering for, and working for Democratic candidates and causes. [126] Collectively, they have engaged in a variety of activities, including door-to-door canvassing, calling other voters to support candidates, writing campaign postcards, fundraising for and donating to candidates, writing letters to representatives and opinion pieces, and protesting. Several of the Plaintiffs have also worked on Democratic campaigns and served on boards of groups or political committees

affiliated with the Democratic Party. Finally, the individual Plaintiffs testified, based on their direct lay experiences ***1011** of engaging in political activity, to the burdens that they themselves have experienced in translating their Party's political efforts in the electorate into political power in the U.S. House of Representatives. [127] The individual Plaintiffs testified that their efforts included candidate recruitment, fundraising, and get-out-the-vote activities.

126 Plaintiffs collect the trial and deposition testimony to this effect in their Proposed Findings of Fact ("PFOF"). In many instances, Defendants at least acknowledge that the individual Plaintiffs are politically active in support of the Democratic Party. *See generally* Dkt. 251 (Pls.' PFOF at ¶¶ 313–14, 324–27, 334–37, 350, 363, 373, 389–97, 419–20, 432–46, 459–66, 478, 489–90, 512–15, 529–30, 546–48. 550, 556–57, 570–72); Dkt. 253 (Defs.' & Intervenors' PFOF at ¶¶ 1139, 1149, 1152–53, 1170, 1174, 1230–37, 1267, 1289, 1292, 1302, 1305–08, 1329, 1380, 1382). To the extent that Defendants contest the veracity of Plaintiffs' support of the Democratic Party and Democratic candidates, we find Plaintiffs' testimony credible and that the overwhelming weight of the evidence shows that the individual Plaintiffs consistently vote for and politically support the Democratic Party.

127 *See* Dkt. 230-15 (Goldenhar Dep. at 26–27); Dkt. 239 (Burks Trial Test. at 231–32, 235); Dkt. 230-21 (Inskeep Dep. at 88–89); Dkt. 230-30 (Libster Dep. at 39, 60, 62–63, 75–76); Dkt. 230-11 (Deitsch Dep. at 48, 90–91); Dkt. 230-6 (Boothe Dep. at 51–52, 88); Dkt. 240 (Griffiths Trial Test. at 51–53); Dkt. 230-36 (Nadler Dep. at 27–28, 91); Dkt. 230-40 (Rader Dep. at 121–23); Dkt. 230-50 (Walker Dep. at 45, 87, 91); Dkt. 230-32 (Megnin Dep. at, 88–89, 106); Dkt. 240 (Dagres Trial Test. at 97–98); Dkt. 240 (Myer Trial Test. at 119–21); Dkt. 230-20 (Hutton Dep. at 46–47); Dkt. 230-48 (Thobaben Dep. at 46–47); Dkt. 230-42 (Rubin Dep. at 40–41, 78).
To clarify, nothing about H.B. 369 categorically prohibits Plaintiffs from engaging in these activities. The point is simply that Plaintiffs are, in fact, politically engaged individuals who support the Democratic Party in its effort to elect candidates.

2. Organizational Plaintiffs

APRI, the League, and HCYD each testified at trial through a representative, and some additional members of the organizations supplemented the testimony. Several themes ran throughout this testimony. First, the organizations actively engage in politics by encouraging citizens to vote, registering and educating voters, and in the case of HCYD, advocating on behalf of Democratic candidates. Second, in their experience, voter outreach and engagement work was made more difficult by continuously encountering significant voter apathy. They heard voters state their beliefs that their votes did not matter; voters believed that the outcome of any given election was preordained and that the same Republican or Democrat would be elected regardless of whether they voted. Third, the organizational plaintiffs encountered voter confusion—voters did not know to which district they belonged, who represented them, or who was running for office in their districts. Fourth, the organizational plaintiffs testified that they were forced to divert resources from their other work to address this voter apathy and confusion. Individual members of the organizations testified about their involvement with their organizations and their own political work supporting the elections of Democratic candidates. They testified that in their experience, they found their Republican congressional representatives unresponsive to them and not engaged in their communities. They also explained how their communities had been split into different districts under the 2012 map.

Andre Washington, the president of APRI, testified at trial on the organization's behalf. [128] Washington is a Democrat who votes regularly and resides in District 12. [129] Under Plaintiffs' Proposed Remedial Plan, Washington would reside in the reconfigured District 12. [130] APRI is a nonpartisan organization but supports civil rights and labor issues. [131] Its activities center around voter education, registration, and outreach. [132] APRI has eight chapters across Ohio, seven of which are currently active, and has between 150 and 200 members spread throughout nearly every congressional district in Ohio. [133] It is a volunteer-run ***1012** organization, funded by membership dues. [134]

128 Dkt. 239 (Washington Trial Test. at 44).

129 *Id.* at 55–56.

130 *Id.* at 54; Trial Ex. P090 (Cooper Decl.).

131 Dkt. 239 (Washington Trial Test. at 45).

132 *Id.* at 46, 52.

133 *Id.* at 48–50.

134 *Id.* at 48, 52.

Washington testified that he has personally witnessed voter apathy—people feeling like their vote does not matter—while attempting to engage voters in his own district. [135] He testified that because of the way the lines are drawn, voters do not know where to vote or who is running in their district. [136] Washington testified that APRI must deploy some of its limited resources to combat voter apathy and confusion rather than spending these resources on its other work. [137]

135 *Id.* at 61–62.

136 *Id.* at 52.

137 *Id.* at 52–53.

Stephanie White, the vice president of APRI's Toledo chapter, also testified at trial. [138] White is a Democrat who votes regularly and resides in District 5. [139] White believes that District 5 "is not part of the Lucas County community," but rather that "it's part of the Fulton County, Defiance, Williams County area, which is predominantly Republican." [140] She is represented by Republican Congressman Bob Latta. [141] White testified that she has spent time in her political work with ARPI addressing Toledo voters' confusion about their assigned congressional districts. [142] She also conducts partisan political activities such as door-to-door canvassing, phone banking, voter registration drives, and get-out-the-vote ("GOTV") work to help elect Democratic candidates such as James Neu and John Galbraith, who ran for Congress against Representative Latta in the 2016 and 2018 elections, respectively. [143]

138 Dkt. 239 (White Trial Test. at 111).

139 *Id.* at 109–10.

140 *Id.* at 115.

141 *Id.* at 112.

142 *Id.* at 119.

143 *Id.* at 116, 118

Jennifer Miller, the Executive Director of the League testified at trial on the organization's behalf. [144] The League is a nonpartisan organization that hosts candidate forums, publishes voter education materials, registers voters, and participates in GOTV activities. [145] It has around 2,800 members across Ohio, living in all of Ohio's congressional districts. [146] The League has a long history of attempting to reform the districting process and Ohio's district lines. [147] For example, it commissioned and published a report criticizing the process through which the 2012 map was drawn, and in 2011 it hosted a competition in which members of the public could submit redistricting map drafts that comported with non-partisan traditional redistricting principles. [148]

144 Dkt 239 (Miller Trial Test. at 129).

145 *Id.* at 130–31.

146 *Id.* at 133–34.

147 *Id.* at 138.

148 *Id.* at 154–55, 156–57.

Miller testified that the League spends resources combating voter apathy and confusion due to the 2012 map that it then cannot spend on its other initiatives such as voter registration and education. [149] For example, during the 2018 special election in District 12, the League had to divert significant resources to fielding voters' calls inquiring about their assigned congressional districts. Miller has also observed political candidates' unresponsiveness ***1013** to the League's attempts to plan candidate forums, particularly in Republican-dominated areas. She testified that Congressmen Jordan, Stivers, and Joyce have all been unresponsive to the League's requests that they participate in candidate forums. [150] The League cannot hold a candidate forum in which only one party is represented, and therefore must cancel the planned forums if the candidate from one party declines to participate. [151]

149 *Id.* at 144.

150 *Id.* at 148.

151 *Id.* at 147–49.

John Fitzpatrick, a member of the League and a voter in District 14 also testified at trial. [152] Fitzpatrick lives

in Stow, Ohio, which is a northern suburb located about ten minutes from downtown Akron.[153] Under Plaintiffs' Proposed Remedial Plan, Fitzpatrick would live in the new District 16.[154] He is a Democrat who votes regularly, has informal conversations with friends to encourage them to vote and vote for particular candidates, has contributed financially to Democratic candidate Betsy Rader's congressional campaign, and has canvassed and phone banked in other elections.[155] Fitzpatrick is currently represented by Republican Congressman David Joyce.[156] Fitzpatrick considers himself a part of the Akron community because he and his wife spend most of their time, recreate, and are involved in the community there.[157] He has been involved in League activities such as planning candidate nights, voter education, and anti-gerrymandering activities such as working to get Ballot Initiative 1 on the Ohio ballot.[158] Fitzpatrick stated that in the year and a half prior to the passage of Initiative 1, 80% of his work with the League was dedicated to anti-gerrymandering work.[159]

152 Dkt. 239 (Fitzpatrick Trial Test. at 196–97).

153 *Id.* at 197.

154 Trial Ex. P090 (Cooper Decl.).

155 Dkt. 239 (Fitzpatrick Trial Test. at 201–03).

156 *Id.* at 197.

157 *Id.* at 198–99.

158 *Id.* at 200–01, 206–07.

159 *Id.* at 207.

Fitzpatrick also testified about voters in the Akron area being confused about the district in which they live. He himself attempted to use a "congressional house finder" tool to determine his congressional district, but typing in his zip code produced two possible districts.[160] He stated that because Summit County encompasses four different congressional districts, "before [he] got super-involved in [his] district, there [were] more than a few times when [he] had to look it up because [he] had a hard time just remembering exactly which district [he] was in."[161]

160 *Id.* at 208.

161 *Id.* at 209.

Nathaniel Simon, the outgoing president of the HCYD, testified on the organization's behalf.[162] Simon lives and votes in District 2 and is represented by Republican Congressman Brad Wenstrup.[163] Under Plaintiffs' Proposed Remedial Plan, Simon would live in the new District 1.[164] HCYD is a volunteer organization that educates and registers voters and supports Democratic candidates by canvassing and ***1014** conducting GOTV efforts on their behalf.[165] HCYD has between 100 and 150 members who vote, identify as Democrats, and live in Districts 1 and 2.[166] Simon testified that HCYD has to expend additional resources fighting voter apathy and confusion.[167] He testified that he felt voters were apathetic because, while canvassing for Democratic candidates Aftab Pureval and Jill Schiller, he encountered voters who "refuse[d] to engage in politics because they felt like there was no point, just being that a Republican is always going to win with the way the lines are drawn."[168] Simon testified that the voter confusion in Hamilton County was due in large part to the current map, in particular the manner in which Districts 1 and 2 "wrap[ ] around each other" and the splitting of the City of Cincinnati itself into two districts.[169] For example, Simon testified that he worked at a polling place in Silverton and that:

> many people who came out of the polling booth asked why wasn't Aftab Pureval on my ballot ... I had to explain to them that they are in the 2nd Congressional District, but to the east and west of Silverton is the 1st Congressional District. Also, in my neighborhood, which is in the 2nd Congressional District, there were Aftab Pureval signs, and he is the candidate for the 1st district.[170]

Simon also testified that the district lines have made it more difficult for HCYD to attract and retain members.[171]

162 Dkt. 240 (Simon Trial Test. at 64).

163 *Id.* at 63, 67.

164 *Id.* at 63; Trial Ex. P090 (Cooper Decl.).

165 Dkt. 240 (Simon Trial Test. at 64–66).

166 *Id.* at 65, 67.

167 *Id.* at 68, 73.

168 *Id.* at 68.

169 *Id.* at 63, 68, 69–70.

170 *Id.* at 69–70.

171 *Id.* at 69–70.

NEOYBD and OSU College Democrats' testimony was introduced through designated depositions. NEOYBD is a Democratic group that "looks to mentor, empower and recruit the next generation of young people of color who want to be involved in the political process." [172] It has around sixty Democratic members who vote regularly and live in Districts 9, 11, 13, and 14. [173] Gabrielle Jackson, the president of the organization, was its Rule 30(b)(6) representative. [174] The organization canvasses, runs phone banks, educates people on "why [their] vote matters, why [they] should be voting," and "concrete issues that are on the ballot," and advocates on behalf of the candidates that the organization supports. [175] Jackson testified that her group fundraises both for candidates and for itself. [176] She stated that "it's been challenging based on the way this map is currently drawn, because folks have been feeling like, you know, [their] voices aren't being heard. So it's causing us to use more of our resources, when we have a hard time bringing in resources." [177] Jackson testified that while canvassing and phone-banking with her organization, she spoke with people who expressed apathy about voting and said that they did not believe that their votes mattered. [178]

172 Dkt. 230-22 (Jackson Dep. at 8, 14).

173 *Id.* at 26, 40, 41.

174 *Id.* at 7.

175 *Id.* at 9, 13, 15–16, 18.

176 *Id.* at 23.

177 *Id.* at 23.

178 *Id.* at 69.

Alexis Oberdorf is the President of the OSU College Democrats and was the ***1015** group's Rule 30(b)(6) representative. [179] The OSU College Democrats "advocate, educate, and engage people at OSU in alignment with the Democratic Party's platform." [180] The organization has around 55 members who regularly attend meetings but hosts events throughout the year that around 100 people attend. [181] OSU College Democrats canvasses and runs phone banks in support of Democratic candidates and has held fundraisers for Democratic candidates such as Danny O'Connor. [182] Oberdorf testified that OSU students who live near campus reside in Districts 3, 12, and 15 and that the organization must therefore "spread[ ] [its] capital among three different areas on campus." [183] The majority of OSU College Democrats vote "on campus in their district." [184] She testified that she worked a poll in District 12 during an election and witnessed students coming to vote in the incorrect district "because they assumed seeing that they're ... in this campus area, they are all going to vote in the same area. So that creates confusion. And part of what we do as a club is aim to educate people." [185] She also testified that her organization has "done coordinated call campaigns for bills that [it] oppose[s]" to representatives from those districts and has found "it challenging especially to contact or get ... a response from those individuals." [186]

179 Dkt. 230-38 (Oberdorf Dep. at 7, 9).

180 *Id.* at 13.

181 *Id.* at 42.

182 *Id.* at 78–80, 87–89, 113–14.

183 *Id.* at 62.

184 *Id.* at 66.

185 *Id.* at 63–64, 69.

186 *Id.* at 103.

3. Congresswoman Marcia Fudge

Congresswoman Marcia Fudge, representative to the United States House of Representatives from Ohio's Congressional District 11, testified for Plaintiffs at trial. [187] She testified that District 11 has been represented by three different representatives in Congress: Lou Stokes, Stephanie Tubbs Jones, and herself. [188]

187 Dkt. 239 (Fudge Trial Test. at 79).

188 *Id.* at 80.

Congresswoman Fudge described the historical contours of District 11. When Congresswoman Fudge took office in 2008, District 11 "was primarily a little better than two-thirds of the city of Cleveland and most of the southeast suburbs." [189] The district was entirely contained within Cuyahoga County. [190] When Stephanie Tubbs Jones took office in 1999, District 11 included "most of the city of Cleveland, the lower west side all the way to the east and the southeast suburbs of Cuyahoga County," and was again entirely within Cuyahoga County. [191] The district that Congressman Stokes represented was "pretty much the same," again, entirely within Cuyahoga County. [192] Congresswoman Fudge contrasted that historical District 11 with the version of District 11 that she currently represents: "[T]he first major difference is that [her district] go[es] from Cuyahoga down to Summit County" via a "narrow ***1016** strip." [193]

189 *Id.*

190 *Id.*

191 *Id.* at 81; *see also* Pls.' Demonstrative Ex. 19.

192 Dkt. 239 (Fudge Trial Test. at 81). For part of his time as a congressman, the district that Stokes represented was called District 21. *Id.* at 88.

193 *Id.* at 82.

Congresswoman Fudge unequivocally stated that she "didn't have any role" in the drawing of the new congressional map in 2011. [194] She first learned that the new District 11 would extend into Summit County and include parts of Akron "around the time that the map was made public." [195] Armond Budish, the Democratic minority leader of the Ohio House of Representatives, was the one to first show her the map "pretty much so [she] wouldn't get caught off guard." [196] She stated that she was "surprise[d], obviously" by the new District 11 and had "no idea that [she] would ever go down into Summit County." [197] She was not "pleased" by the new design, she "would not have chosen it," and she "was not happy about it." [198] Congresswoman Fudge stated that she "didn't know anything about Summit County" at the time and that her lack of familiarity with the new area made it "an uncomfortable place to be." [199] She stated that due to Ohio's losing two congressional seats and the inevitable changes that that would necessitate, she thought that the new District 11 would most likely include the entire City of Cleveland and its southeast suburbs. [200]

194 *Id.* at 83.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.* at 84. On cross-examination, Congresswoman Fudge admitted that in 2011 she was publicly quoted as saying that she was "not upset about how [her] district had been drawn." *Id.* at 98. She explained that as an elected official, she would "never insult the people that I'm going to represent by saying 'I don't want to represent you.' " She also stated that she believed that she had been misquoted. *Id.* at 98–99.

199 *Id.*

200 *Id.* at 85.

Congresswoman Fudge stated that after learning of the new map, the only complaint that she voiced was her belief that allocating "Summit County or that portion of Akron" to the new District 11 "would make it almost impossible" for Democratic Representative Sutton to win an election in the new District 16. [201] Congresswoman Fudge stated that she got together with Congresswoman Sutton and Congresswoman Kaptur to contact Armond Budish to "ask him was there any way to give Betty back Akron so she would have a fighting chance at keeping her seat." [202] She testified that she "may have" spoken with U.S. House of Representatives Speaker Boehner in 2011 about the redistricting "in passing" but recalls nothing about such a conversation. [203] She spoke to "[l]ots of people" about the shape of her district in 2011, including Republican Congressman Steve LaTourette, who she believed was "kind of the point person for John Boehner." [204] She also spoke to Representatives Sutton and Kucinich, first attempting "to see if we could get [the shape of the district] changed because we wanted to try to see if we could help protect Betty [Sutton].

We couldn't." [205] She then "made sure they knew [she] was not pleased." [206]

201 *Id.*

202 *Id.* at 85–86.

203 *Id.* at 99.

204 *Id.* at 100.

205 *Id.*

206 *Id.*

Congresswoman Fudge admitted that she did not tell any of the people that she ***1017** spoke with in 2011 about District 11 that she did not want District 11 to be a majority-minority district. [207] She did not advocate the drawing of District 11 with less than 50% BVAP ("Black Voting Age Population"). [208] She testified that in 2011 she did not view the new district as a violation of the Voting Rights Act ("VRA"). [209] Congresswoman Fudge stated that she was not concerned about being paired with another incumbent in the redistricting because she "felt if they were to pair me with somebody, I felt that I was strong enough to win." [210] She expressed no concern to anyone about being paired with Congressman Kucinich. [211] On cross-examination, Congresswoman Fudge stated that since Stokes's time as the congressman for the district, it has been a majority-minority district. [212]

207 *Id.* at 101.

208 *Id.* at 102.

209 *Id.* at 102–03.

210 *Id.*

211 *Id.* at 102.

212 *Id.* at 89.

4. State Senator Nina Turner

State Senator Nina Turner, a former Democratic member of the Ohio State Senate, testified for Plaintiffs as a fact witness. Senator Turner served Ohio's 25th State Senate District from 2008 to 2014. At the time of the 2011 redistricting, Senator Turner testified that the State Senate was comprised of ten Democratic Senators, five of whom were African American, and twenty-three Republican Senators. [213] As a result of being in the "deep minority," Senator Turner testified that she had no involvement in the drawing of the current map and that the Democratic Caucus as a whole "didn't have the power to draw the map" because "Republicans could hold business on the [Senate] floor without really having Democrats there." [214] When she first learned of the map presented in H.B. 319, Senator Turner testified that she was "outraged" and that her Caucus tried to "introduce a map that was a fairer reflection of the will of the people." [215] As to H.B. 319, Senator Turner stated that only two Democratic State Senators voted for the bill and that she voted no. [216] Senator Turner believed that the map presented in H.B. 319 would be a 12-4 map. [217]

213 Dkt. 240 (Turner Trial Test. at 7–8).

214 *Id.* at 8–9.

215 *See id.* at 9–10.

216 *Id.* at 10–11.

217 *See, e.g.*, *id.* at 16–17. Defendants object to Senator Turner's testimony as speculation that the Republicans "guaranteed" a 12-4 map. Plaintiffs contend that Senator Turner's testimony goes to the knowledge and belief of the Democratic members of Ohio's General Assembly regarding H.B. 319. Defendants' objection is overruled. This evidence is admissible to demonstrate Senator Turner's belief that it was a 12-4 map, which in turn supports why she voted against H.B. 319 and made a floor speech opposing the adoption of it.

Senator Turner also gave a floor speech against H.B. 319, in part addressing the justification that the District 11 was drawn to comply with the VRA. [218] At trial, Senator Turner explained her belief that the way District 11 was drawn harmed the voters the VRA sought to protect by "hurt[ing] the[ir] voting prowess" and decreasing their "influence that they would have through representative democracy by stripping or combining portions of the 11th ***1018** Congressional District in ways that representatives could not focus purely on Cleveland and/or Cuyahoga County." [219] Senator Turner also noted that Congresswoman Marcia Fudge and former Congressman Louis Stokes "never had a problem winning elections in that district." [220] She further testified

that the way District 11 was drawn harmed both the greater Cleveland and the greater Akron communities because she believed that the two communities have separate needs and "deserve to have a representation that can really focus in on their needs." [221]

218 *See generally* Trial Ex. J03 (Ohio Senate Session, Sept. 21, 2011 at 50–56) (statement of Sen. Turner).

219 Dkt. 240 (Turner Trial Test. at 13).

220 *Id.*

221 *Id.* at 14.

As recounted above, after H.B. 319 was enacted into law, Democratic state legislators sought a referendum to overturn the law, which required a certain number of signatures. [222] This referendum failed because not enough signatures were collected, and Republican state legislators then went forward with H.B. 369. [223] Senator Turner testified that she had no input on the map presented in H.B. 369, that she believed that the map was still 12-4 in favor of Republicans like H.B. 319, and that she and a majority of the Democratic Caucus in the State Senate (as well as a majority of the African-American State Senators) voted against H.B. 369. [224]

222 *Id.* at 17–18.

223 *Id.* at 18.

224 *Id.* at 18–19, 23.

Senator Turner spoke against H.B. 369 in a floor speech similar to the one she made against H.B. 319. In this floor speech, Senator Turner stated that "[t]o say that this map is bipartisan is laughable" because, as she stated at trial, she believed that "the mere fact that some Democrats, for whatever reason, decided to vote for the bill does not make it bipartisan." [225] At bottom, Senator Turner maintained her belief that H.B. 369 had a clear partisan effect. [226]

225 *Id.* at 20; *see also* Trial Ex. J05 (Ohio State Senate Session, Dec. 14, 2011 at 22–27) (statement of Sen. Turner).

226 Dkt. 240 (Turner Trial Test. at 20).

Finally, on cross-examination, Senator Turner admitted that she considered running against Congresswoman Fudge in the 2012 Democratic primary, but she dropped out because she believed that the redistricting process was manipulated to guarantee the reelection of incumbent politicians. [227] Senator Turner also acknowledged that it "might be possible" that she received proposals from Democratic map drawers that incorporated, among other things, a majority African-American district in northeast Ohio. [228] But such a district existed previously (with different boundaries, limited to the greater Cleveland area), and Senator Turner maintained that the enacted map did not contain any of the Democratic suggestions. [229]

227 *Id.* at 25–26, 34; Dkt. 253 (Defs.' & Intervenors' PFOF at ¶ 214).

228 Dkt. 240 (Turner Trial Test. at 27–33).

229 *See id.* Moreover, we observe again that a majority of the Democratic Caucus, including the African-American members, voted against H.B. 369.

5. Congresswoman Marcy Kaptur

Plaintiffs called Congresswoman Marcy Kaptur, a Democratic member of the U.S. House of Representatives, as a rebuttal witness. Representative Kaptur won election to Congress in 1982 and has served ***1019** Ohio's Congressional District 9 since 1983. She is the most senior member of Ohio's congressional delegation. [230] Representative Kaptur testified that she did not play any part in creating the map that was submitted with H.B. 319, the initial redistricting bill, and she first learned about the shape of the new District 9 in the newspaper after H.B. 319 became public. [231] Representative Kaptur testified that, after learning about the map presented in H.B. 319, she called then-Governor John Kasich's office to object to the fact that her church and the cemetery where her family is buried were cut out of District 9; [232] moreover, she had conversations with a Democratic state legislator after the release of H.B. 319 to "try[ ] to piece [Toledo] back together." [233] Representative Kaptur did not want to be paired with then-Congressman Kucinich, a Democratic colleague of Kaptur's, because he had "run for president" and she believed that the proposed District 9 was drawn to favor Representative Kucinich over her if they ran against each other. [234] On cross-examination, Representative Kaptur acknowledged that, due to population loss, her district's geography would have to expand, but she

stated that she "hop[ed] it would be in the economic region that [she] represented" such as Wood or Fulton Counties. [235]

230 *See* Dkt. 249 (Kaptur Trial Test. at 69).

231 *Id.* at 69–70. Representative Kaptur's office also had no documents related to the 2011 redistricting process. *Id.* at 81.

232 *Id.* at 73–74.

233 *Id.* at 81–82.

234 *Id.* at 76, 89.

235 *Id.* at 78–79.

B. Defendants' Fact Witnesses

1. Raymond DiRossi

Raymond DiRossi testified at trial for Defendants as a fact witness, and he was one of the principal map drawers during the 2011 redistricting process. He also played a role in the 2001 redistricting process. [236] Starting in 2001, DiRossi became involved with the Task Force and "was very involved in the creation of [the] legislative districts and also the congressional districts ...." [237] DiRossi testified that he worked out of the DoubleTree hotel in Columbus during both the 2001 and 2011 redistricting processes. [238]

236 Dkt. 243 (DiRossi Trial Test. at 146).

237 *Id.* at 147.

238 *Id.* at 152.

DiRossi testified that, in 2011, he was "very prominent" in the congressional redistricting process and that "basically, the process was the same" as in 2001. [239] According to DiRossi, the main issues in the 2011 redistricting process were that Ohio lost two congressional seats, the State had experienced population shifts, District 11 was majority-minority in the past and in 2011 "great care was ... taken to ... make sure that [District 11] was going to be created in a way that would be satisfactory," and he also understood that there was a "desire to make a new district in Franklin County that would have the ability to elect, for the first time ever," a minority candidate to Congress. [240]

239 *Id.* at 154.

240 *Id.* at 154–55.

To deal with the loss of two incumbents (because Ohio lost two congressional seats), DiRossi testified that "the decision was made to pair two Republicans together and two Democrats together. So we would have ended up with" twelve Republicans ***1020** and four Democrats. [241] In terms of how to handle which Democratic incumbents to pair, he stated that it was his belief that "nobody thought it was a good idea to pair" Representative Fudge with another incumbent because she represented a majority-minority district. [242] In the end, Representatives Kaptur and Kucinich were selected as the paired Democratic incumbents. DiRossi testified that he drew the current District 9 the way it is based on what various other Republican legislators and political officials had said various Democrats wanted (these other Republicans were purportedly in conversation with the Democrats). [243]

241 *Id.* at 156. Going into the redistricting, Republicans held a 13-5 majority in Ohio's congressional delegation. DiRossi, however, also maintained that he was not simply trying to draw twelve "Republican districts" in the map. *Id.* at 158.

242 *Id.* at 157. Plaintiffs object to this statement, and similar statements made by DiRossi, as hearsay. The statement is admissible, however, for the limited purpose to show the effect on DiRossi, i.e., that he did not pair Representative Fudge against another incumbent, but it cannot be used for the truth that various persons in fact thought it was a bad idea to pair Representative Fudge against another incumbent. *See Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 379 (6th Cir. 2009) ("A statement that is not offered to prove the truth of the matter asserted but to show its effect on the listener is not hearsay."); *see also United States v. Churn*, 800 F.3d 768, 776 (6th Cir. 2015) (citing *United States v. Pugh*, 273 F. App'x 449, 456 (6th Cir. 2008)) ("Such a statement may be admitted to show why the listener acted as she did."). Moreover, DiRossi's testimony on this point is unclear, specifically to whom he is referring when he uses the term "nobody."

243 *See generally id.* at 159–66. Plaintiffs again object to DiRossi's testimony as to what other political

officials said as hearsay. For the reasons explained in *supra* note 242, the statements are admissible for the limited purpose of showing why DiRossi drew the districts the way he did, but they cannot be used as evidence for what Democrats actually did or did not want or what Democrats said due to the multiple layers of hearsay. Again, this line of testimony from DiRossi was often extremely vague and unclear.

DiRossi also testified to changes to District 9 between H.B. 319 and 369—specifically that there "was much more Toledo in [H.B. 369 than in H.B. 319] and ... less Cleveland." *Id.* at 166. We observe that some portions of Lucas County were added to District 9 in H.B. 369, and the Cleveland side had small portions dropped and *added*. *See* Trial Ex. I-072 (Changes from H.B. 319 to H.B. 369 at 11–14) (yellow represents geography in both plans, green represents geography that was added in H.B. 369, and red represents geography that was dropped in H.B. 369); Dkt. 243 (DiRossi Trial Test. at 187). Ultimately, this testimony is inconsequential because there were no material geographic changes between H.B. 319 to H.B. 369, *see* Trial Ex. I-072; *see also* Dkt. 246 (Judy Trial Test. at 83), and any changes between H.B. 319 and H.B. 369 to the partisan makeup of District 9 (or any district) were not material whatsoever. The Court also notes that Plaintiffs object to the admissibility of Exhibit I-072 on the basis that DiRossi lacked foundation to testify about the exhibit because he did not create it. The Court summarily overrules that objection because DiRossi, as one of the primary map drawers, was intimately familiar with the changes from H.B. 319 to H.B. 369. DiRossi provided sufficient testimony to establish his personal knowledge of the changes and indicated that Exhibit I-072 was a fair and accurate rendering of the changes. *See e.g.*, Dkt 243 (DiRossi Trial Test. at 191). He does not need to create the exhibit in order to lay the foundation for its admittance. *See* FED. R. EVID. 602.

DiRossi further testified to changes made to various other districts, purportedly at the request of (occasionally unspecified) Democrats, and to the effects those changes had on the map as a whole.[244] ***1021** Negotiations between state legislative Democrats and state legislative Republicans began around the time of the attempted petition drive (after H.B. 319).[245] As to District 11, for example, DiRossi asserted that he "wanted to take great care to make sure the district was drawn the way that the incumbent [Representative Fudge] wanted it."[246] At trial, DiRossi did not mention any concerns about VRA compliance, but at his deposition, he stated that he was concerned about majority-minority districts, including District 11, because of the VRA.[247] At his deposition, he further stated that, in 2001, District 11 was drawn with more than a 50% BVAP, so in 2011, "one of the first things that [DiRossi] was looking at was ... was it possible to still draw a district that would be more than 50 percent non-Hispanic voting age African American population."[248] It was DiRossi's "understanding that the maps were going to make their way to Congresswoman Fudge," but he clarified that, "obviously, [he] was not present for that."[249]

244 *See generally* Dkt. 243 (DiRossi Trial Test. at 166–75, 177–79, 183–84). Plaintiffs' hearsay objections to this line of testimony are overruled in part for the same reasons already discussed. *See supra* note 242. In any event, for the reasons we explain later in the Opinion, we find, importantly, that, any changes did not alter the partisan makeup of the map, and the geographic changes were not very significant either. *See, e.g.*, Trial Ex. I-072 (Changes from H.B. 319 to H.B. 369). Furthermore, the overarching intent remained partisan in that no changes would be made that would put the 12-4 map in favor of Republicans at risk.

245 Dkt. 243 (DiRossi Trial Test. at 174–75).

246 *Id.* at 169; *see also supra* note 242.

247 Dkt. 230-12 (DiRossi Dep. at 193–94).

248 *Id.* at 194.

249 Dkt. 243 (DiRossi Trial Test. at 172).

With respect to District 3, DiRossi similarly testified that a "back and forth" occurred between Bob Bennett, Republican legislative leaders, "some other people," and Joyce Beatty and her husband Otto.[250] At that time, now-Congresswoman Beatty was not yet a Congresswoman and did not hold any position in government, though DiRossi testified that "a number of people, including myself who had worked with ... Joyce Beatty .. thought that she would be an ideal candidate" for the new District 3.[251]

250 *Id.* at 177–78. For the reasons explained previously, *supra* note 242, DiRossi's testimony is admissible only as evidence for why he drew District 3 a certain way. The statement is inadmissible for the truth that certain Republicans wanted to create a district for Joyce Beatty.

251 *Id.*

Some changes did, in fact, occur between H.B. 319 and H.B. 369. DiRossi testified to these changes and explained an exhibit that illustrates them.[252] And again, he asserted at trial that many of these changes were made in response to what he believed were requests of various Democrats.[253] For H.B. 319, he worked out of the DoubleTree Hotel and did not work with any Democrats; he also admitted that he received requests from Tom Whatman (from Team Boehner).[254] For H.B. 369, ***1022** DiRossi stated that he worked out of the State House, and, for that bill, he asserted that Republicans "were working with the Democrats ...."[255]

252 *See* Dkt. 243 (DiRossi Trial Test. at 187–98); Trial Ex. I-072 (Changes from H.B. 319 to H.B. 369). Again, in the exhibit, yellow represents geography that stayed the same in both plans, green represents geography that was added in H.B. 369, and red represents geography that was dropped in H.B. 369. Dkt, 243 (DiRossi Trial Test. at 187).

253 *See* Dkt. 243 (DiRossi Trial Test. at 188–93, 195) (referring mainly to District 3 and purported requests related to District 9). DiRossi further testified that no changes were made to District 11 between H.B. 319 and H.B. 369, and because there were no requests from legislative Democrats related to District 11, he "thought [the map drawers] got it right the first time." *Id.* at 195.

254 *See, e.g.*, Dkt. 243 (DiRossi Trial Test. at 184).

255 *Id.* at 219, 287.

As to the logistics of the actual map-drawing process, DiRossi testified to that he used Maptitude and the Unified Index that he created.[256] Along with the Unified Index that he created and additional political indices that others wanted him to use, his computer also displayed the population of each district, the African-American voting-age population, the non-Hispanic voting-age population, and the Hispanic voting-age population as he drew draft maps.[257] "[W]henever [he] would make a change on the ... screen, all of that would automatically change ...."[258] The other political indices included presidential election results, as well as the "D+1, D +2, R+1, R+2 system" (often referred to as the D+1, R+1, or PVI) from "the D.C. folks."[259]

256 *Id.* at 199.

257 *Id.* at 199–200

258 *Id.* at 200.

259 *Id.* at 199–200, 229.

DiRossi admitted that in 2011 he worked with Adam Kincaid, from the RNC, and that Kincaid "was one of a number of people that would send ideas or [DiRossi] could bounce ideas off."[260] In a September 10, 2011 email exchange between DiRossi and State Senator Faber, DiRossi wrote, "DC is increasingly pushing to put the lid on this [i.e., the map]."[261] DiRossi also admitted that the changes supposedly requested by now-Congresswoman Beatty (who, again, was not yet a Congresswoman) to draw a potential opponent out of District 3 affected a fairly trivial number of voters.[262] Finally, DiRossi admitted that he did not calculate compactness scores for the districts in either H.B. 319 or H.B. 369.[263]

260 *Id.* at 224. DiRossi further admitted that Kincaid made at least some changes to the maps, and DiRossi received the PVI from Kincaid. *See id.* at 265, 278.

261 Trial Ex. P124 (Sept. 10, 2011 email); *see* Dkt. 243 (DiRossi Trial Test. at 239). State Senator Niehaus also sent an email to DiRossi and Whatman on September 11, 2011, which stated that Senator Niehaus was "still committed to ending up with a map that Speaker Boehner fully supports, with or without votes from two members of leadership." Trial Ex. P125 (Sept. 11, 2011 email); Dkt. 243 (DiRossi Trial Test. at 240–43). One day later, Senator Niehaus asked DiRossi via email titled "Proposed map for LSC [Legislative Service Commission]": "Did Whatman sign off?" DiRossi confirmed that "Whatman signed off." Trial Ex. P126 (Sept. 12, 2011 emails); Dkt. 243 (DiRossi Trial Test. at 255). LSC puts the maps into final bill form. *See* Dkt. 243 (DiRossi Trial Test. at 220).

H.B. 319 ultimately went public on September 13, 2011. *Id.* at 260. The individuals on the email chains leading up to this time were using their personal (rather than State of Ohio) email addresses. *Id.* at 270–71. Lastly, several of the emails entered into evidence on cross-examination contained political data in the text of the email but none of the other demographic data that DiRossi mentioned he had in Maptitude.

262 Dkt. 243 (DiRossi Trial Test. at 284); *see also id.* at 285 (DiRossi further stating that "[i]t may have been slightly less than 800 people ....").

263 *Id.* at 284.

2. Speaker William Batchelder

Former Speaker of the Ohio House of Representatives William Batchelder testified for Defendants at trial, explaining how Districts 11 and 3 came to be. [264]

264 This summary discusses only Speaker Batchelder's trial testimony from his direct examination as well as the portions of the cross-examination that were within the scope of the direct examination. *See* FED. R. EVID. 611(b). The Court also relies on the properly designated sections of Speaker Batchelder's deposition.

1023** ***a. District 11

Speaker Batchelder testified that he knew George Forbes, the former president of the city council of Cleveland "very well" and would occasionally discuss "matters that were coming before the house" with Forbes. [265] Speaker Batchelder stated that District 11 "had changed in its nature, which we knew from the census, and [he and Forbes], therefore, were concerned about its continuance as an African-American district." [266] Therefore, Speaker Batchelder believed "[t]here would have to be a change in the district so that there would be a balance so that it would continue as an African-American district." [267] Speaker Batchelder testified that he had discussions with Forbes about District 11 "extending down into Summit County" because "we ... did not have the makings, under the census, of a district that would be African American" and "there were sufficient African-Americans in Summit County to undertake that alteration." [268] Speaker Batchelder testified that he "asked [Forbes] what he thought of that, and he was amenable." [269] Speaker Batchelder "ultimately approve[d] a District 11 that started in Cuyahoga County and went down into Summit County." [270] He agreed that he did this "in part, based on [his] understanding and belief of how Mr. Forbes felt about that." [271]

265 Dkt. 246 (Batchelder Trial Test. at 18–19).

266 *Id.* at 20. The Court considers this testimony as evidence that Speaker Batchelder was concerned about District 11's continuance as an African-American district. To the extent that the testimony is offered as evidence of Forbes's concern, it is inadmissible hearsay. The Court does not, therefore, consider the testimony for the truth of whether Forbes was concerned about District 11 but only for the ultimate purpose of showing what effect, if any, Forbes's statements had on Speaker Batchelder.

267 *Id.* Again, to the extent that Speaker Batchelder's belief is based on out-of-court statements by Forbes about Forbes's concern, those statements are considered for the effect they had on Speaker Batchelder and not for their truth.

268 *Id.* at 22–23.

269 *Id.* at 24. Plaintiffs again object to any testimony about what Mr. Forbes said as hearsay. For the reasons previously discussed, the Court will consider such testimony only for a limited purpose.

270 *Id.*

271 *Id.*

On cross-examination, Speaker Batchelder admitted that he "never personally had communications with Representative Fudge" about the composition of District 11. [272] Speaker Batchelder also stated that he and Representative Stokes "did communicate, but not on that issue." [273]

272 *Id.* at 50.

273 *Id.*

b. District 3

Speaker Batchelder testified about the creation of the new District 3 in the Columbus area. He stated that he "first had consulted with the chairman of the Republican Party there, and he indicated that there was not going to be a viable candidate for his party."[274] Speaker Batchelder went on to explain that he was close friends with Otto Beatty and had served in the Ohio House of Representatives with ***1024** his wife, Joyce Beatty.[275] Speaker Batchelder agreed that he "intend[ed] to draw a district that [Joyce Beatty] could potentially win."[276] Speaker Batchelder stated that he had never referred to the Franklin County district as a "sinkhole" nor had he referred to voters as "dog meat."[277]

274 *Id.* at 25. Again, the Court does not consider this out-of-court statement by the chairman for the truth of the matter asserted, but rather only for its effect on Speaker Batchelder.

275 *Id.*

276 *Id.*

277 *Id.*

3. Troy Judy

Troy Judy had a long history of working for the Ohio House of Representatives and served as the Chief of Staff to Speaker of the Ohio House of Representatives William Batchelder during the redistricting process.[278] He testified about the various people who played a role in the redistricting.[279] He also testified about the map-drawing process, both before and after the passage of H.B. 319, and offered reasons that certain congressional districts in the 2012 map were drawn as they are.[280]

278 Dkt. 246 (Judy Trial Test. at 67–68).

279 *Id.* at 81.

280 *Id.* at 70–79.

Judy testified that "[a]fter [H.B.] 319 was passed, the Democrats, of course, announced a referendum on the bill and began collecting signatures.... And with the overarching pressure of a referendum, it led us to begin conversations with members of the Democratic caucus."[281] Speaker Batchelder asked Judy and Representative Huffman "to begin very quiet conversations with the Democrats to see what changes they would like to see in a map in order to garner bipartisan support of a bill, a new bill."[282] Judy testified that in this context he conversed directly with three Democratic members of the Ohio House of Representatives who communicated to him "some of the changes [they] would like to see."[283] Some of these changes were incorporated into new map drafts and Judy and Keary McCarthy, the minority Democratic Chief of Staff exchanged map files including such changes.[284] Judy stated that in the back-and-forth between himself and McCarthy, McCarthy never proposed a District 11 or District 3 "that was materially different from the one proposed by the Republicans."[285] Judy testified that at this stage, the now-deceased Bob Bennett, "the outgoing chairman of the state Republican party," was involved in communications between the Republican map drawers and Democratic players.[286]

281 *Id.* at 72–73.

282 *Id.* at 73–74.

283 *Id.* at 74.

284 *Id.* at 75.

285 *Id.*

286 *Id.* at 74–75.

Judy testified that District 3 had been a "priorit[y]" of Speaker Batchelder's.[287] He testified that Speaker Batchelder's "relationship with Congresswoman Beatty and her husband Otto Beatty led him to have a priority to create a central district in Franklin County encompassing Columbus and having representation specifically for Congressman [sic] Beatty."[288] He also testified that population shifts toward Franklin County and Ohio's loss of ***1025** two congressional seats following the 2010 census were factors in the drawing of District 3.[289]

287 *Id.* at 70.

288 *Id.* at 71; *see also id.* at 72 (Judy confirming that it was his "understanding and belief that the reason for the shape and location of Congressional District 3 was based on Speaker Batchelder's relationships with and conversations with the Beattys").

289 *Id.* at 70. Plaintiffs object to this testimony for lack of foundation regarding demographic changes

> in Ohio and the effect of those changes on the map-drawing process. The Court overrules this objection and finds that Judy is providing his personal knowledge of factors that accounted for the drawing of District 3, including his understanding of demographic changes.

Judy testified that District 9 was drawn in response to the Democratic leadership's desire that Representative Marcy Kaptur and Representative Dennis Kucinich be the two Democratic incumbents paired.[290] Judy stated that Bob Bennett "was also in contact with a Democratic leader from the Toledo region, Jim Ruvolo,[291] who then communicated to us about what the shape of the Kaptur district should look like and what Democrats should be paired together, actually."[292] Judy stated that he was "not sure who else [Bennett] was speaking with."[293]

290 *Id.* at 77.

291 Judy later stated that he believed that Ruvolo was chairman of the Democratic Party. *Id.* at 77.

292 *Id.* at 74; *see also id.* at 77 (stating that the Republicans "configured the district ... at the behest of the Democratic leadership").

293 *Id.* at 77.

Judy also testified about the contours of District 11. He stated that Speaker Batchelder had relationships with members of the African-American community in Cleveland, including George Forbes, and has "consulted" for many years with these individuals "with respect to any issues that would affect the African-American community."[294] This was the only testimony that Judy related regarding the involvement of leaders of Northeast Ohio's African-American community in the redistricting of District 11.

294 *Id.* at 70.

Judy testified that when the Republican map drawers began negotiations with Democratic individuals in an effort to pass the second iteration of the map, Bob Bennett played a key role in these communications, serving as a "back channel to Congresswoman Fudge ... to communicate with us about the shape of [District 11]."[295] Judy testified that Bennett "communicated to [Judy] that he was in contact with Representative Fudge" and that Fudge "was pleased with the configuration [of District 11] that was in 369" after the Republican map drawers had "ma[d]e changes and incorporate[d] things that the Democrats wanted to see."[296]

295 *Id.* at 74.

296 *Id.* at 76.

On cross-examination, Judy admitted that despite changes that were made to H.B. 369 prior to its passage, it looked "substantially similar" to the initial version of H.B. 369 introduced by the Republicans members of the General Assembly.[297]

297 *Id.* at 83.

C. Plaintiffs' Expert Witnesses

1. Dr. Christopher Warshaw

Dr. Christopher Warshaw testified at trial for Plaintiffs as an expert witness. Dr. Warshaw is a tenure-track assistant professor of political science at the George Washington University, teaching courses on political science, elections, public opinion, statistical methodology, and political representation.[298] His research has been published extensively in prestigious peer-reviewed publications and he has published ***1026** specifically on the topic of partisan gerrymandering.[299] Dr. Warshaw has also served as an expert witness in two other partisan-gerrymandering cases; no court has ever failed to credit his testimony.[300] The Court qualified Dr. Warshaw as an expert in the fields of elections, partisan gerrymandering, polarization, and representation and found his testimony highly credible.[301]

298 Dkt. 240 (Warshaw Trial Test. at 180).

299 *Id.* at 184, 187.

300 *Id.* at 190.

301 *Id.* at 190–91.

a. Partisan-bias metrics

Dr. Warshaw testified at length about four[302] specific partisan-bias metrics that he used to evaluate the 2012 map. He defines partisan bias broadly as "the idea of trying to quantify whether one party or another has an advantage in the translation of votes to seats."[303] Successful partisan gerrymanders efficiently translate votes for the favored party

into seats for that same party. "In practice, this entails drawing districts in which the supporters of the advantaged party constitute either a slim majority ... or a small minority." [304] Map designers accomplish the former by cracking voters from the opposition party into different districts so that they are highly unlikely to break the 50% mark in a given district and are therefore unable to elect the candidate of their choice. They accomplish the latter by packing voters from the opposition party into districts such that they have an unnecessarily large margin of victory.

302 One of these metrics, partisan symmetry in the vote-seat curve, can be measured in two ways. *See* Trial Ex. P571 (Warshaw Rep. at 10–12).

303 Dkt. 240 (Warshaw Trial Test. at 195).

304 Trial Ex. P571 (Warshaw Rep. at 4).

The concept of "wasted" votes underlies both of these strategies. [305] In cracked districts, the votes of the losing disfavored party are all wasted because they were allocated to a race that the disfavored party did not win. The closer the margin of victory in cracked districts, the more disfavored party votes are wasted. In packed districts, many votes of the winning disfavored party are wasted because there are many excess votes beyond those needed for victory. A party designing a partisan gerrymander will attempt to waste few of its own supporters' votes and waste many of the opposing party's supporters' votes. Partisan bias, an asymmetry or advantage in the efficiency of vote-seat translation, results.

305 "Wasted" votes has a technical meaning in this context. Of course, individual votes are counted; thus, *individuals'* votes are not "wasted" in that sense. Rather, in partisan-gerrymandering cases, "wasted" votes capture *a party's* efficiency (or inefficiency) in translating the votes that it receives into legislative seats—because "the goal of a partisan gerrymander is to win as many *seats* as possible given a certain number of *votes*." Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 850 (2015). Accordingly, wasted or " 'inefficient' votes are those that do not directly contribute to victory." *Id.* at 850–51. That is, *the party*, not the individual voter, "wasted" the vote.

Dr. Warshaw used the efficiency gap, symmetry in the vote-seat curve, the mean-median difference, and the declination metric to measure partisan bias in the 2012 map. [306]

306 Dkt. 240 (Warshaw Trial Test. at 196–97).

i. Efficiency Gap

The efficiency gap compares the wasted votes for each party by calculating "the difference between the parties' respective wasted votes, divided by the total number ***1027** of votes cast in the election." [307] The efficiency gap reflects "the extra seats one party wins over and above what would be expected if neither party were advantaged in the translation of votes to seats (i.e., if they had the same number of wasted votes)." [308]

307 Trial Ex. P571 (Warshaw Rep. at 6) (quoting Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap, supra*). Dr. Warshaw used the version of the efficiency gap equation that accounts for unequal turnouts across districts. *See id.* at 7–8.

308 *Id.* at 8.

Dr. Warshaw surveyed historical efficiency gaps across the country and found that they were generally quite small. Around 75% were between -10% and 10%, and only around 4% had an efficiency gap of greater than 20% in either direction. [309] He demonstrated that Ohio's 2012 efficiency gap of -22.4% was a historical outlier—"more extreme than 98% of previous plans in states with more than six seats over the past 45 years, and ... more Republican-leaning than 99% of previous congressional redistricting plans." [310] It also reflected a major increase from Ohio's efficiency gap prior to the 2011 redistricting efforts. [311] Ohio's efficiency gaps in 2014 and 2016 were -9% and - 8.7%, respectively, "imply[ing] that Republicans in Ohio won 1-4 more seats in these elections than they would have won if Ohio had no partisan bias in its efficiency gap." [312] Ohio's efficiency gap in the 2018 election was -20%, more extreme than 96% and more pro-Republican than 98% of previous comparable plans. [313]

309 *Id.*

310 *Id.* at 8, 19–20, 23.

311 *Id.* at 23.

312 *Id.*

313 Trial Ex. P476 (Warshaw 2018 Update at 3).

ii. Partisan symmetry in the vote-seat curve

Symmetry in the vote-seat curve compares how both parties' seat shares change as their vote shares increase or decrease.[314] Dr. Warshaw explained that in an unbiased districting scheme, if Democratic candidates receive 52% of the votes and earn 60% of the seats, then when Republican candidates receive 52% of the votes, they should also earn 60% of the seats. One can measure symmetry by applying a counterfactual uniform swing in vote shares from 45% to 55% and measuring departures from parity in seat share between the parties.[315] One applies a uniform swing by increasing the vote share of a given party by a fixed percentage across all districts.[316] Symmetry can also be measured simply by comparing the seat share that each party achieves when it receives 50% of the vote. Applying uniform swings, the level of partisan asymmetry in Ohio's 2012 election was "more extreme than 96% of previous elections and more pro-Republican than 97% of previous U.S. congressional elections over the past 45 years."[317] The result was the same when the symmetry analysis was conducted using the method that compares seat shares when each party earns 50% of the vote.[318] With uniform swings, the 2018 elections were more asymmetric than 92% of previous elections ***1028** and more pro-Republican than 94% of the comparison group.[319]

314 Trial Ex. P571 (Warshaw Rep. at 10).

315 *Id.*

316 Dkt. 240 (Warshaw Trial Test. at 202).

317 Trial Ex. P571 (Warshaw Rep. at 27). Dr. Warshaw used the same elections data to conduct his symmetry analysis as he did with the other partisan-bias metrics. *See id.* at 6.

318 *Id.*

319 Trial Ex. P476 (Warshaw 2018 Update at 4).

iii. Mean-median gap

The mean-median gap reflects "the difference between a party's vote share in the median district and their average vote share across all districts. If the party wins more votes in the median district than in the average district, they have an advantage in the translation of votes to seats."[320] Dr. Warshaw found that Ohio's mean-median gap jumped from 1.7% in 2010 to 7.8% in 2012, following the redistricting.[321] He also found that the 2012 mean-median gap was more extreme than that in 83% of prior elections and more pro-Republican than that in 92% of prior elections.[322] The 2018 mean-median gap was 5%, more extreme than in 62% of previous elections and more pro-Republican than in 81% of previous elections.[323]

320 Trial Ex. P571 (Warshaw Rep. at 8) (citing Jonathan S. Krasno et al., *Can Gerrymanders be Detected? An Examination of Wisconsin's State Assembly*, AM. POLITICS RES. (2018); Robin E. Best et al., *Considering the Prospects for Establishing a Packing Gerrymandering Standard*, ELECTION L.J. (2017); Samuel Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263 (2016)) (footnote omitted).

321 *Id.* at 24.

322 *Id.* at 25.

323 Trial Ex. P476 (Warshaw 2018 Update at 3).

iv. Declination

Lastly, the declination metric involves graphically plotting the districts in a plan from least Democratic to most Democratic and then measuring and comparing the angles formed by best-fit lines for each party's seats measured from the 50% Democratic vote share line.[324] The calculations result in a score between -1 and 1, which indicates the size and direction of the partisan bias of the map.[325] Ohio's 2012 declination score of -0.77 was "more extreme than 99% of previous elections and more pro-Republican than any previous U.S. congressional election over the past 45 years."[326] Ohio's 2018 declination score of -0.69 "was more extreme than 98%

of previous elections and more pro-Republican than 99% of previous U.S. congressional elections."[327]

[324] *See* Trial Ex. 571 (Warshaw Rep. at 12–13) (explaining the exact method for calculating the declination metric of a given map).

[325] *Id.*

[326] Trial Ex. P571 (Warshaw Rep. at 26).

[327] Trial Ex. P476 (Warshaw 2018 Update at 3).

v. Strengths and weaknesses of the metrics

Dr. Warshaw highlighted some of the strengths and weaknesses of each partisan-bias metric. For example, a strength of the efficiency gap is that it "can be calculated directly from observed election returns even when the parties' statewide vote shares are not equal."[328] However, the efficiency gap can also be a more volatile metric than some of the others, and it is not recommended for use in smaller states with relatively few congressional districts.[329] A strength of the symmetry metric is that it is far less volatile over time and has been widely used and accepted in academic work on partisan gerrymandering. ***1029** [330] One weakness of both symmetry metrics is that they involve the calculation of counterfactual elections.[331] The mean-median gap is easy to apply, but it is "sensitive to the outcome in the median district."[332] For its part, the declination measure "is somewhat unstable when a party holds a very small number of seats in the legislature."[333] Dr. Warshaw explained that all these metrics are "closely related both theoretically and empirically, but nonetheless, there's small differences between them ... [and] looking at a suite of different metrics in concert gives us greater confidence in any conclusion that we ... draw."[334] Looking across all the metrics, Dr. Warshaw concluded that "Ohio's recent elections [under the 2012 plan] display a larger partisan bias in favor of Republicans than most previous plans in Ohio or in other states."[335]

[328] Trial Ex. P571 (Warshaw Rep. at 8).

[329] Dr. Warshaw therefore included in his analysis only states with more than six congressional seats. *Id.* at 19 n.22.

[330] *Id.* at 12.

[331] *See id.* at 11–12.

[332] *Id.* at 8–9.

[333] *Id.* at 13.

[334] Dkt. 240 (Warshaw Trial Test. at 197); *see also* Trial Ex. P571 (Warshaw Rep. at 14) (demonstrating high levels of correlation between measures of partisan bias in states where the Democratic vote share was 40-60%).

[335] Trial Ex. P571 (Warshaw Rep. at 4).

b. Requirements of a partisan gerrymander

Dr. Warshaw testified about how he determines in his academic work whether a redistricting plan is a partisan gerrymander. According to Dr. Warshaw, to qualify as a partisan gerrymander, a districting plan must satisfy four different elements. First, a single party must have controlled the redistricting process—meaning that in a state with a bicameral legislature, it must have had control of both houses and the governorship—and that same party must be favored by the map.[336] Under Dr. Warshaw's criteria, whether members of the disfavored party cast roll-call votes in support of the redistricting plan is meaningless in determining whether the plan was a gerrymander.[337] Second, all partisan-bias metrics that Dr. Warshaw employs (efficiency gap, symmetry in the vote-seat curve, mean-median gap, and declination) must "indicate [that] the same party that controlled the redistricting process was actually advantaged in the translation of votes to seats."[338] Third, the map must be an outlier in terms of its partisan-bias metrics when compared to historical elections across the country in the last forty-five years.[339] Fourth, all four partisan-bias metrics measuring a given map must point in the same direction.[340]

[336] Dkt. 240 (Warshaw Trial Test. at 191, 194). Warshaw discusses how partisan control of the redistricting process results in measurable changes in the efficiency gap in favor of the party in control, both in Ohio and elsewhere. Trial Ex. P571 (Warshaw Rep. at 17–18).

[337] Dkt. 240 (Warshaw Trial Test. at 194). Dr. Warshaw testified that his approach of not considering roll-

call votes cast by the non-controlling party is the accepted one in political science. *Id.*

338 *Id.* at 192.

339 *Id.* Dr. Warshaw examines the years since 1972 because all states were in compliance with the one-person, one-vote principle announced in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) at that point. *Id.* at 195, 198–99, 82 S.Ct. 691; Trial Ex. P571 (Warshaw Rep. at 6 n.3). This dataset encompasses over 500 elections. Dkt. 240 (Warshaw Trial Test. at 203).

340 Dkt. 240 (Warshaw Trial Test. at 192).

***1030** Dr. Warshaw found that under this rubric, the 2012 plan was a partisan gerrymander because: (1) the Republican Party controlled the redistricting process and the map favored the Republican Party; (2) all four of his partisan metrics indicated that the Republicans were actually advantaged in the translation of votes to seats; (3) the map was an outlier when compared to the dataset of hundreds of historical maps; and (4) all four partisan metrics pointed in the same direction —toward a pro-Republican bias.

c. Responsiveness, competitiveness, and durability

Dr. Warshaw also evaluated the responsiveness and competitiveness of the 2012 map. Responsiveness measures "how insulated a plan is from changes in voter preferences" or, conversely, "how likely the election results are to change due to changes in voter preferences."[341] A map is more responsive if it yields different seat shares when there are swings in voter preferences from year to year. Dr. Warshaw measures responsiveness in two ways: (1) determining how many districts with competitive seats exist and (2) applying a uniform swing of vote shares between 45% and 55% across all districts and measuring how the seat-share outcome changes.[342]

341 *Id.* at 201.

342 *Id.* at 202; Trial Ex. P571 (Warshaw Rep. at 15). Dr. Warshaw termed a district competitive in this context if the winning party received less than 55% of the two-party vote. Trial Ex. P571 (Warshaw Rep. at 15). He stated that "[i]n responsive systems, a 10% [change] in vote share from 45% to 55% will generally lead to a change in seat share of around 20%. In a[n] unresponsive system, there could be little or no change in seat share from a 10% change in vote share." *Id.* at 15.

Dr. Warshaw concluded that Ohio's present map "has led to historically uncompetitive elections."[343] First, in 2012, Ohio had only two competitive congressional seats.[344] In both 2014 and 2016, not a single congressional district in Ohio saw a competitive election.[345] In 2018, Ohio again had only two competitive seats.[346] The uniform swings also demonstrated that the 2012 map is highly unresponsive.[347] Applying uniform swings to the 2012 election results, he found that Democrats would win the same 25% of the congressional seats if they won anywhere from 30% to 52% of the statewide vote. To advance to holding 37.5% of seat-share, they had to win 55% of the statewide vote.[348] Dr. Warshaw determined that 2018 was a more responsive year than earlier years according to the uniform swing analysis. However, "most of this responsiveness occurs at the very upper end of the range of plausible statewide vote shares for democrats"; Republicans would still win "75% of the seats across most of the range of plausible election swings," even if 50% of the vote share was Democratic.[349]

343 *Id.* at 4.

344 *Id.* at 15.

345 *Id.* at 28.

346 Trial Ex. P476 (Warshaw 2018 Update at 11).

347 Trial Ex. P571 (Warshaw Rep. at 29).

348 *Id.* at 15.

349 Trial Ex. P476 (Warshaw 2018 Update at 12–13).

Dr. Warshaw also found that the effects of the 2012 map are durable throughout time.[350] Although the partisan-bias metrics generally became somewhat less extreme as time went on, the level of partisan bias ***1031** in 2012 under each metric was a "powerful and statistically significant predictor" of the same metric's level in 2016 and 2018.[351]

350 Trial Ex. P571 (Warshaw Rep. at 4).

351 *Id.* at 31; Trial Ex. P476 (Warshaw 2018 Update at 10).

d. Polarization, representation, and trust in representatives

Dr. Warshaw testified about political polarization and its impact on representation. He defined polarization as "the distance between the average preferences of members of the two parties."[352] He concluded that due to increased ideological polarization between Democratic and Republican members of Congress, Ohio Democratic voters who are disadvantaged by the districting scheme and represented by Republican congressmen are unlikely to have their views represented by their representatives in Congress; gerrymandering therefore negatively affects representation. He also found that "voters in gerrymandered states ... trust their representatives less than voters in non-gerrymandered states."[353]

352 Dkt. 240 (Warshaw Trial Test. at 203).

353 Trial Ex. P571 (Warshaw Rep. at 4–5, 33, 37).

e. Proposed Remedial Plan

Dr. Warshaw used the same data to analyze the Proposed Remedial Plan as he did with the 2012 map and found that the Proposed Remedial Plan had far lower levels of partisan bias and higher levels of responsiveness than the 2012 map; it "had no substantial partisan bias."[354]

354 *Id.* at 5, 32–33, 43; Trial Ex. P476 (Warshaw 2018 Update at 14–15).

2. Dr. Wendy K. Tam Cho

Dr. Wendy K. Tam Cho testified at trial for Plaintiffs as an expert witness. Dr. Cho is a full professor at the University of Illinois at Urbana-Champaign, and she holds appointments in several departments, including political science, statistics, and mathematics.[355] Dr. Cho is also a Senior Research Scientist at the National Center for Supercomputing Applications at the University of Illinois.[356] She has studied redistricting for thirty years and written extensively on the topic through the lens of multiple academic disciplines.[357] Dr. Cho previously testified as an expert in a partisan-gerrymandering case on behalf of defendants in Pennsylvania who were defending a map enacted by the Republican legislature in the Commonwealth; the court in that case qualified her as an expert.[358] This Court qualified Dr. Cho as an expert in political science, political geography and redistricting, statistics and applied statistics, statistical modeling and sampling from unknown distributions, and the design of algorithms.[359]

355 Trial Ex. P086 (Cho CV).

356 *Id.*

357 *See id.*; Dkt. 242 (Cho Trial Test. at 134–37).

358 Dkt. 242 (Cho Trial Test. at 138–39).

359 *Id.* at 140–41. We note that Dr. Cho's reports and testimony are subject to a *Daubert* motion, but Defendants have not objected to Dr. Cho's qualifications. *See* Dkt. 148, 148-1 (Intervenors' Mot. to Exclude Cho).

Dr. Cho testified about her analysis of the current map and its partisan characteristics as compared to a set of simulated maps that she generated. Dr. Cho used an Evolutionary Markov Chain Monte Carlo ("EMCMC") algorithm[360] to run a simulation ***1032** on a supercomputer, and the algorithm generated 3,037,645 simulated maps.[361] These maps incorporated only neutral redistricting criteria and no partisan data (she analyzed partisanship after generating the maps).[362] Through this analysis, Dr. Cho was "trying to understand what would be a typical map that would emerge from a non-partisan [map-drawing] process."[363] Specifically, her analysis sought to determine whether neutral factors, primarily political geography, could explain the 12-4 outcome of the current map.

360 The algorithm was written in the coding language C++. Dkt. 242 (Cho Trial Test. at 155). Importantly, the code is separate and distinct from the algorithm. The algorithm is important because it represents the idea behind Dr. Cho's analysis. The code implements the algorithm. *Id.* at 156. Dr. Cho has developed this algorithm and code over more than a decade. *Id.* at 156–57. Defendants raise various objections related to both the algorithm and code in this case.

The Court overrules any objections related to Dr. Cho's code. Although Intervenors complain that the code was not peer reviewed or tested for accuracy, Dr. Cho testified that it is not customary in the field of computer science to subject code itself, as opposed to algorithms, to peer review.

Dkt. 243 (Cho Trial Test. at 95–97, 99–100, 127). Intervenors provide no evidence to the contrary. Moreover, Dr. Cho made her code available to Defendants' and Intervenors' expert witnesses in read-only form—and offered to make her code available in native format—to allow them to verify the code. Dkt. 246 (Thornton Trial Test. at 137–41); Trial Ex. IM073 at 2. Intervenors apparently decided not to have their experts verify the entirety of the read-only code. Nor did Intervenors take advantage of Dr. Cho's offer to produce the native version of the code, and we therefore reject their complaint that the code was not tested for accuracy.

361 Trial Ex. P087 (Cho Rep. at 10).

362 *Id.* at 8–10.

363 Dkt. 242 (Cho Trial Test. at 144).

Dr. Cho's simulations can be analogized to a coin toss. For example, if you toss a coin 1,000 times, and the coin lands on heads 582 times, that is one datapoint. If you flip the coin another 1,000 times, and the coin lands on heads 602 times, that is another datapoint. Running through this process many times (e.g., 3 million) provides a fuller picture of the typical outcomes. With a fair coin, outcomes of around 500-heads and 500-tails would be typical; 950-heads or even 1,000-heads out of 1,000 flips are also theoretically possible, but such outcomes would be surprising if the coin tosses were done with a fair coin. In this redistricting context, Dr. Cho generated over 3-million simulated maps and then analyzed the seat share between the parties under each. This process allowed her to compare how typical a 12-4 seat share between Republicans and Democrats would be under a neutral map-drawing process and, thus, to analyze whether it is likely that the 12-4 seat share can be explained by factors such as Ohio's natural political geography. [364] In short, Dr. Cho's simulated maps are meant to provide a nonpartisan baseline against which to compare the current map.

364 *See generally id.* at 144–46.

Dr. Cho's methodology includes several key and related components. [365] Dr. ***1033** Cho's EMCMC algorithm, which she used to generate the simulated maps, is grounded in the Markov Chain Monte Carlo ("MCMC") theorem. [366] MCMC algorithms are a commonly used technique for sampling. [367] In the redistricting context, a Markov Chain randomly walks from one simulated map to another, different simulated map. [368] In Dr. Cho's EMCMC, each movement of the Markov Chain is guided by optimization heuristics, which improve the Markov Chain's "efficiency and effectiveness in the traversal of the search space." [369] The MCMC theorem, meanwhile, ensures a representative sample of the massive universe of possible maps. [370] Lastly, Dr. Cho ran the algorithm on the University of Illinois's Blue Waters supercomputer, which enabled the algorithm to output the sample of over 3-million simulated maps relatively quickly. [371] All these ***1034** components worked together to allow for the drawing of "a random and large sample of feasible electoral maps," out of the much larger universe of feasible alternative maps. [372]

365 Intervenors argue in their *Daubert* motion that Dr. Cho's methodology is flawed. They contend that her algorithm has not been adequately peer reviewed, her results have not been tested or verified, she fails to offer an error rate or confidence level for her results, and her methodology has not been generally accepted by the scientific community. The Court rejects these arguments.

First, the algorithm has been sufficiently peer reviewed. The algorithm was the subject of a paper titled "A Massively Parallel Evolutionary Markov Chain Monte Carlo Algorithm for Sampling Complicated Multimodal State Spaces," which was published as part of a peer-reviewed conference. Trial Ex. P086 (Cho CV at 2); Dkt.242 (Cho Trial Test. at 154); Dkt. 243 (Cho Trial Test. at 86–87). The idea behind the algorithm was peer-reviewed, which is the standard practice in computer science. Dkt. 243 (Cho Trial Test. at 86–88, 96–98, 126–27). Second, the lack of an error rate or confidence level is to be expected for an algorithm designed to draw a random sample from a complex, multimodal, unknown distribution. The entire point of the algorithm is to draw a sample from an unknown distribution, and if the distribution is unknown, logically, one cannot calculate an error rate or confidence level of the randomness of the sample. *See* Dkt. 243 (Cho Trial Test. at 93–94). The same answer applies to the argument that the algorithm is untested by other scientists in the community. It appears that the algorithm's accuracy could not be tested on unknown distributions (the very type of distributions from which it is meant to sample);

the point is that the theory behind the algorithm's ability to sample from such distributions has passed peer review. Nonetheless, Dr. Cho tested the algorithm on a non-trivial data set with a known distribution and confirmed that the algorithm uniformly sampled that space (although she did not provide the results of that test). *Id.* at 93–95, 101. She also testified that other computer scientists could write their own code to implement her algorithm to test it on a known distribution. *Id.* at 96–97. Defendants offered no evidence that any of their experts tested her algorithm against a known distribution and found it flawed. Finally, there is no evidence that the pertinent scientific community does not accept the use of algorithms to solve sampling problems. Indeed, Dr. Cho's innovative algorithm is meant to meld two established types of algorithms—MCMCs and evolutionary algorithms—to permit optimizations heuristics to guide the movements of the Markov chains, resulting in a more efficient draw of a random sample from a complex, multimodal, unknown distribution. *See id.* at 55, 88, 151–52; Trial Ex. P087 (Cho Rep. at 6).

Finally, the reliability of Dr. Cho's methodology is bolstered by the fact that she developed this algorithm independently of her work in this case. The fact that she developed the algorithm and submitted it for peer review before tailoring it to and running it in this case shows that she did not develop her methodology solely for litigation purposes. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) ("That the testimony proffered by an expert is based directly on legitimate, preexisting research unrelated to the litigation provides the most persuasive basis for concluding that the opinions [s]he expresses were 'derived by the scientific method.' "). Because Dr. Cho used the algorithm developed in the course of her work in reaching her opinions in this case, the Court is convinced that she "employ[ed] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

For the reasons above, the Court rejects Intervenors' general challenges to the methodology underlying Dr. Cho's analysis. The Court discusses *infra* their more specific objection that Dr. Cho's conclusions are entitled to no weight because she erred in setting the redistricting parameters for the algorithm in this particular case.

366 Trial Ex. P087 (Cho Rep. at 6).

367 Dkt. 242 (Cho Trial Test. at 152).

368 *Id.* at 153; Trial Ex. P087 (Cho Rep. at 6).

369 Trial Ex. P087 (Cho Rep. at 6–7).

370 Dkt. 242 (Cho Trial Test. at 152–53); Trial Ex. P087 (Cho Rep. at 6–7).

371 Trial Ex. P087 (Cho Rep. at 5–7); Dkt. 242 (Cho Trial Test. at 151, 155); Dkt. 243 (Cho Trial Test. at 69).

372 *See* Trial Ex. P087 (Cho Rep. at 7).

Dr. Cho built in several constraints when she produced her simulated maps, and those constraints are what define a map as "feasible" in her simulation. Dr. Cho testified that she arrived at the constraining criteria by "look[ing] at the legislative record to see what the legislature was applying."[373] Primarily, Dr. Cho looked at State Representative Huffman's statements in support of H.B. 319.[374] Representative Huffman explained that the map considered compliance with the VRA, equal population, and "several other traditional redistricting principles": "compactness, contiguity, preservation of political subdivisions, preservation of communities of interest, preservation of cores of prior districts, and protection of incumbents."[375] In regards to incumbent protection, Representative Huffman described that criterion as "a subservient one to the other ones that [he] listed"[376] and further explained that, "[n]obody has a district.... There's nobody that owns a piece of land in Congress. People elect them."[377] From this record, Dr. Cho decided to employ the following constraints: the creation of a minority district,[378] county and city preservation,[379] population equality,[380] and compactness. ***1035** Because she concluded from State Representative Huffman's statement that incumbent protection was not a goal of the legislature when drafting the enacted map, Dr. Cho did not include as a constraint the avoidance of pairing incumbents.[381]

373 Dkt. 242 (Cho Trial Test. at 158).

374 *Id.* at 160–61.

375 *See* Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 17–18) (statement of Rep. Huffman).

376 *Id.* at 19.

377 *Id.* at 21.

378 Dr. Cho drew a district with a Black Voting Age Population ("BVAP") of at least 45% in the Cleveland area. This constraint is based on the recommendation of Plaintiffs' expert Dr. Lisa Handley. *See* Trial Ex. P087 (Cho Rep. at 8). Intervenors lodge a variety of objections to and arguments against this 45% figure. We address these arguments in our discussion of Dr. Handley's report and testimony, *see infra* Section II.C.4., and in our analysis of the purported VRA justification for District 11, *see infra* Sections V.A.2.d.iii., V.C.2.b.ii. Dr. Cho did not include any "upper bound" on the maximum BVAP for the minority district. Dkt. 242 (Cho Trial Test. at 159–60).

379 The current map splits twenty-three counties and Dr. Cho's simulated maps split no more than twenty-three counties; the current map preserves 96.78% of cities, and Dr. Cho's simulated maps preserve cities at least at the same rate. *Id.* at 162; Trial Ex. P087 (Cho Rep. at 8–9). We also note that "communities of interest" may be an amorphous phrase, but one way to account for this factor is preserving municipalities and counties. *See, e.g.*, *Graham v. Thornburgh*, 207 F.Supp.2d 1280, 1294–95 (D. Kan. 2002).

380 Dr. Cho's simulated maps allow for a population deviation of up to 1%, or about 7,000 *people* (not voters). Dkt. 242 (Cho Trial Test. at 167); *see also* Dkt. 243 (Cho Trial Test. at 25). This deviation is different from the current map, which achieves perfect equality (plus or minus one person), because the simulated maps are constructed at the precinct level—the lowest level for which partisan data are available—to allow for a more accurate analysis of partisan effect. Trial Ex. P087 (Cho Rep. at 9). To achieve perfect equality, like the current map, would require splitting precincts, which, in turn, would hinder the partisan-effect analysis. Dkt. 242 (Cho Trial Test. at 165–66).
We find that Dr. Cho's use of a 1% population deviation does not undermine her analyses in any significant way, and we overrule the objections on this point. Dr. Cho aimed, in part, to measure partisan effects, and this assessment was best done with the 1% deviation. For the simulated maps to achieve perfect equality would require moving, at most, 3,500 people in any given district, not all of whom would be voters; and even if all 3,500 people were voters, all of them would need to vote for the same party in order to have any possibility of swinging an election. That is unlikely. Dkt. 242 (Cho Trial Test. at 167–68). Accordingly, we are not persuaded that the 1% deviation significantly undermines any of Dr. Cho's conclusions that the 12-4 split of the current map cannot be explained by the equal-population requirement.

381 Dkt. 242 (Cho Trial Test. at 171–77). Defendants argue that incumbent protection was one of the main pillars upon which the 2012 map was built. The Court, as factfinder, will address the extent to which the General Assembly considered incumbent protection, and how that conclusion impacts the weight given to Dr. Cho's analysis *infra* Section V.A.2.b. The Court will also assess the validity of various types of incumbent protection *infra* Sections V.A.2.d., V.C.2.b.i.

After generating the 3,037,645 simulated maps based on only neutral criteria, Dr. Cho engaged in two overarching analyses using partisan data. Again, this use of partisan data came into play only *after* the simulated maps were produced. First, she engaged in a Plaintiff-specific analysis. Second, she examined the partisan unfairness of the map as a whole by comparing its partisan characteristics to the partisan characteristics of the set of simulated maps.

a. Plaintiff-specific analysis

Dr. Cho was given the home addresses of each individual Plaintiff, which allowed her to determine where each Plaintiff would live in each simulated map and to compare each Plaintiff's current district with each Plaintiff's set of simulated districts. Dr. Cho "compute[d] the average Democratic vote share for the plaintiff's current district by calculating the average Democratic vote share in that district for congressional races from 2012 to 2016 ...." [382]

For the simulated maps, Dr. Cho "calculate[d] the average Democratic vote share for the plaintiff's [simulated] district ... with the 2008-2010 statewide election data."[383] These data included eight statewide races: the 2008 presidential race, the 2010 U.S. Senate race, the 2008 and 2010 Attorney General races, and the 2010 Governor, Auditor, Secretary of State, and Treasurer races.[384] Dr. Cho used statewide races to "avoid issues with district-specific factors and provide[ ] greater comparability across the state as a whole."[385] From there, Dr. Cho compared the likelihood of electing a Democratic candidate in each Plaintiff's simulated districts with the likelihood of electing a Democratic candidate in their current district.[386] We provide a fuller discussion of these findings in Section III.A., but we will provide two illustrative examples here. Some Plaintiffs, such as Plaintiff Goldenhar, live in allegedly cracked districts. Dr. Cho's analysis showed that "[a]mong the set of simulated maps, 95.68% of them would have placed Plaintiff Goldenhar in a district that would have provided a higher likelihood of electing a Democrat."[387] That, is 95.68% of the simulated maps placed Plaintiff Goldenhar in a district with a higher average Democratic ***1036** vote share. Other Plaintiffs, such as Plaintiff Inskeep, live in allegedly packed districts. Dr. Cho's analysis showed that "none of [the simulated maps] would have placed Plaintiff Inskeep in a district that would have provided a higher likelihood of electing a Democrat."[388] That is, 0% of the simulated maps placed Plaintiff Inskeep in a district with a higher average Democratic vote share.

382 Trial Ex. P087 (Cho Rep. at 11).

383 *Id.*

384 *Id.* We address objections to Dr. Cho's use of these data in our discussion of Dr. Thornton's rebuttal. *See infra* Section II.D.2.a.

385 Trial Ex. P087 (Cho Rep. at 11).

386 *See id.* at 13–30; *see also* Trial Ex. P426 (Cho Suppl. Rep. at 7, fig. 4) (providing updated analysis based on 2018 election data, as well as other election data).

387 Trial Ex. P087 (Cho Rep. at 13).

388 *Id.* at 15.

b. Partisan unfairness analysis

In addition to her Plaintiff-specific analysis, Dr. Cho examined the partisan outcomes of her simulated maps as compared to the current map, which allowed her to assess partisan effect. At a high-level, Dr. Cho assessed competitiveness[389] and partisan bias using multiple metrics.[390]

389 State Senator Keith Faber, a Republican, speaking in support of H.B. 319, stated that "competitiveness in and of itself is not an end-all be-all. It is not one of the requirements that we have to draw by. However, it is a factor." Trial Ex. J03 (Ohio Senate Session, Sept. 21, 2011 at 13) (statement of Sen. Faber).

390 Trial Ex. P087 (Cho Rep. at 31–32); Dkt. 242 (Cho Trial Test. at 186–87).

i. Competitiveness

Dr. Cho "consider[ed] a district to be competitive if the margin of victory, or the difference between the Republican two-party vote share and the Democratic two-party vote share, is 1) within 5 percentage points and 2) within 10 percentage points."[391] Dr. Cho concludes that "[a]t the 5% margin of victory, the simulated maps generally have between 2–6 competitive seats," and that "[f]or both parties, [winning] 1–3 seats with a margin of victory within 5% [is] not unusual."[392] Meanwhile, the current map produced three competitive elections within a 5% margin of victory, one in 2012 (District 16) and two in 2018 (Districts 1 and 12), and the Republican won each.[393] Additionally, one other election in 2012 (District 6) was competitive at the 10% margin of victory.[394] Under the simulated maps, "often, 9 of the seats are competitive at the 10% margin of victory"; the next most common result was 8 competitive seats.[395] Three or four of these competitive seats (at the 10% margin of victory) generally favor Republicans, and four to six generally favor Democrats.[396] In her supplemental report, Dr. Cho provides further analysis of competitiveness based on the 10% margin of victory. "For the 2012–2014 data, 2–3 of the competitive seats were commonly Republican while 3–5 of the competitive seats were commonly Democratic."[397] In 2018, that number remained the same for Republicans, but competitive seats that leaned Democratic decreased to three or four.[398]

391 Trial Ex. P087 (Cho Rep. at 33).

392 *Id.* at 34–35.

393 *See* Trial Ex. P426 (Cho Suppl. Rep. at 5, tbl. 4).

394 *Id.*

395 Trial Ex. P087 (Cho Rep. at 34).

396 *Id.* at 35.

397 Trial Ex. P426 (Cho Suppl. Rep. at 4).

398 *Id.*

Based on her analysis of competitiveness, Dr. Cho concludes that "[t]he Republican margins across the entire set of districts [in the current map] are large enough that they are sufficiently insulating to produce an enduring effect."[399] Moreover, she concludes that because of "the difference in the competitiveness, via several ***1037** different measures,[400] of the simulated maps versus the current map, it seems that competitiveness was almost a non-existent factor if one at all in the construction of the enacted map since the current districts lean so heavily toward one party."[401]

399 *Id.* at 6. She arrives at this conclusion, in part, after observing that in the two competitive 2018 elections, the Democratic challengers noticeably outspent their Republican-incumbent opponents. *Id.* at 5–6, tbl. 5.

400 Dr. Cho also captures the total number of competitive seats combined with how many of the competitive seats each party wins in a single metric, which has been presented in two of her publications. Dkt. 242 (Cho Trial Test. at 196–97); Trial Ex. P087 (Cho Rep. at 36). Dr. Cho employed this metric only after creating the maps, i.e., competitiveness was not a factor in how the simulated maps were drawn. Dkt. 242 (Cho Trial Test. at 196–98). Under this metric, competitiveness scores range from zero to one, and at zero, "competitiveness is maximized because 1) the number of Republican votes and the number of Democratic votes is the same and 2) the number of districts where Republicans dominate and the number of districts where the Democrats dominate is identical." Trial Ex. P087 (Cho Rep. at 36). Figure 23 in Dr. Cho's initial report shows that the current map is less competitive compared to the simulated maps; whereas most of the simulated maps score between 0.09 and 0.11, the current map scores 0.16 under this competitiveness metric. *See id.* at 37, fig. 23. We consider this specific metric only for Dr. Cho's conclusion that competitiveness was seemingly a "non-existent factor" in drawing the current map. Dr. Cho's other analyses of competitiveness, however, go to that conclusion *and* her separate conclusion that the lack of competitiveness across districts produces an enduring partisan effect.

401 Trial Ex. P087 (Cho Rep. at 37).

ii. Responsiveness and bias

In her initial report, which utilized 2008-2010 election data, Dr. Cho assessed the responsiveness and bias in the simulated maps compared to the current map using two measures based on the seats-votes curve (which shows how, as the proportion of votes a party receives increases, so too should that party's seat share).[402] When Dr. Cho measured responsiveness, she produced her results in a histogram in which, as the values along the x-axis increase (from left to right), the responsiveness increases; thus, maps falling along the right of the x-axis are more responsive than those on the left.[403] Dr. Cho concludes that the current map is "less responsive than almost all of the simulated maps."[404]

402 *See id.* at 37–40.

403 *Id.* at 39; Dkt. 242 (Cho Trial Test. at 199–200).

404 Trial Ex. P087 (Cho Rep. at 38).

Dr. Cho employed a symmetry measure to assess biasedness. This measure is grounded in the concept that "both parties should expect to receive the same number of seats given the same vote proportion."[405] Dr. Cho again produces her results in a histogram. "Here, a value of zero [in the middle of the x-axis on the histogram] is unbiased."[406] Positive values to the right of zero indicate a Republican bias, and negative values to the left indicate a Democratic bias.[407] Dr. Cho finds that, although most of the simulated maps "have a Republican tilt[,] ... the tilt toward Republicans is larger in the current map than it is for the simulated maps."[408] Indeed, some of the

simulated maps were neutral and some even had a Democratic tilt; at any rate, H.B. 369 is far to the right of the simulated maps' Republican tilt as presented in figure 26. [409]

405 *Id.* at 39.

406 *See id.* at 39–40, fig. 26.

407 *See id.*

408 *Id.* at 39.

409 *Id.* at 40, fig. 26.

iii. Seat share

Dr. Cho also compared the seat share between the parties from the current map ***1038** to the seat share in her simulated maps. Based on the use of 2008 and 2010 election data, "none of the [simulated] maps in [Dr. Cho's] sample had the same 12-4 seat share as in the challenged map." [410] Furthermore, figure 19 of Dr. Cho's initial report shows that the most common outcome in the simulated maps was eight or nine Republican seats, at about 1.3 million and 1.2 million respectively. [411] Just over 250,000 of the simulated maps produced a 10-6 seat share in favor of Republicans, [412] and some of the simulated maps even produced six or seven Republican seats. [413] Very few of the simulated maps produced an 11-5 seat share, but that outcome is barely visible in figure 19. [414]

410 *Id.* at 40.

411 *Id.* at 33; Dkt. 242 (Cho Trial Test. at 188).

412 Trial Ex. P087 (Cho Rep. at 33); Dkt. 242 (Cho Trial Test. at 188).

413 Trial Ex. P087 (Cho Rep. at 33, fig. 19).

414 *Id.*; Dkt. 242 (Cho Trial Test. at 188).

Dr. Cho performed the same analysis using 2012-2014 data and 2018 data in her supplemental report. This analysis shows that over the decade, a 9-7 seat share in favor of Republicans became the most common partisan outcome in the simulated maps. [415] An 8-8 seat share is the second most common outcome, but by 2018, the number of 8-8 outcomes was about equal to the number of 10-6 outcomes. [416] "Eleven [Republican] seats occurred 0.12% of the time in the 2008-2010 analysis, 0.20% of the time in the 2012-2014 analysis, and 1.88% of the time in the 2018 analysis." [417] Finally, using the 2018 data, "a small number of maps, 1,445 out of more than 3 million total maps (0.046%) had, like the current map, 12 Republican seats." [418]

415 *See* Trial Ex. P426 (Cho Suppl. Rep. at 3, fig. 1); Dkt. 242 (Cho Trial Test. at 190–91).

416 *See* Trial Ex. P426 (Cho Suppl. Rep. at 3, fig. 1); Dkt. 242 (Cho Trial Test. at 191).

417 Trial Ex. P426 (Cho Suppl. Rep. at 3).

418 *Id.*

3. Dr. J. David Niven

Dr. J. David Niven testified at trial for Plaintiffs as an expert witness. Dr. Niven is a tenured associate professor of political science at the University of Cincinnati, and he has a doctorate in political science from The Ohio State University. [419] He teaches a variety of classes, including on the U.S. Congress and congressional elections, government and politics in Ohio, and political parties, among others. [420] Dr. Niven's scholarship focuses on questions of congressional representation and elections, public opinion, and voting preferences, and he has published in peer-reviewed journals and book chapters on these topics but not on redistricting and gerrymandering specifically. [421] Before writing his reports in this case, Dr. Niven had never used census tracts specifically, though he had "used a variety of census data points in understanding the makeup of districts as a whole." [422] Also before writing his reports in this case, Dr. Niven had never tried to identify boundaries for communities of interest. [423] This Court admitted Dr. Niven as ***1039** an expert in political science, subject to Defendants' *Daubert* motion. [424]

419 Trial Ex. P525 (Niven CV).

420 *See id.*; Dkt. 242 (Niven Trial Test. at 5).

421 Trial Ex. P525 (Niven CV); Dkt. 242 (Niven Trial Test. at 6, 72).

422 Dkt. 242 (Niven Trial Test. at 72–73).

423 *Id.* at 72. Again, "communities of interest" is an amorphous term, but one way to account for this factor is preserving municipalities and counties. *See Graham*, 207 F.Supp.2d at 1294–95. As will be explained, Dr. Niven, in part, examined municipal and county splits. Mr. Cooper agreed that counties and municipal subdivisions are "a more objective way to identify a community of interest." *See* Dkt. 241 (Cooper Trial Test. at 148). Moreover, the Intervenors' expert, Dr. Brunell, agreed that "[t]here is no clear definition of what constitutes a community of interest, but cities and counties are generally characterized as such." Trial Ex. I-060 (Brunell Rep. at 16).

424 *See id.* at 9; *see also* Dkt. 154 (Defs.' Mot. to Exclude Niven). We deny Defendants' motion, but as explained here and in our later analysis, we give greater weight and credit to certain portions of Dr. Niven's report and testimony than others.

Dr. Niven's report and testimony assessed the current map's makeup and the degree to which the districts divide communities of interest and reflect the political preferences of local residents. He undertook this examination by analyzing census tracts [425] that were either kept intact or split and by using the election data contained in "the 2010 Ohio Common and Unified Redistricting Database ('OCURD')" that was available to the map drawers during the 2011 redistricting. [426] Dr. Niven used census tracts as a basis for his analysis because they represent "a compact delineation of people who live in common geographic, cultural, and economic circumstance." [427]

425 A census tract is a "small, relatively permanent statistical subdivision of a county or equivalent entity ...." *See* U.S. CENSUS BUREAU, GLOSSARY, at https://www.census.gov/programs-surveys/geography/about/glossary.html#par_textimage_13 ("Census tract boundaries generally follow visible and identifiable features. They may follow nonvisible legal boundaries, such as minor civil division (MCD) or incorporated place boundaries in some states and situations, to allow for census-tract-to-governmental-unit relationships where the governmental boundaries tend to remain unchanged between censuses.")

426 Trial Ex. P524 (Niven Rep. at 1–2); *see also* Dkt. 242 (Niven Trial Test. at 11–15).

427 Trial Ex. P524 (Niven Rep. at 5).

Dr. Niven finds that between the 2002 redistricting plan and the 2012 redistricting plan, the number of census tracts split between multiple congressional districts rose from 209 to 332 (out of approximately 3,000 census tracts). [428] Dr. Niven further finds that census tracts kept intact had an average Republican composition of 52.14%, whereas split census tracts had a higher composition of Democratic voters, with Republicans averaging 49.25% in split census tracts. [429] We note that Dr. Thornton reaches slightly different results on the partisan makeup of these census tracts and that there is a debate about the statistical significance of these results. *See infra* Section II.D.2.b. (discussing this issue). Nevertheless, both experts agree that split census tracts lean Democratic and intact census tracts lean Republican, and both agree that the number of census splits increased in the current map from the prior one.

428 *Id.* at 5–6; Dkt. 242 (Niven Trial Test. at 18); *see also* Dkt. 242 (Niven Trial Test. at 77) (Dr. Niven stating on cross-examination that he would not be surprised that 88.75% of all census tracts were kept whole).

429 Trial Ex. P524 (Niven Rep. at 6).

We credit Dr. Niven's census-tract analysis to the extent that it shows some differential treatment between Republican and Democratic voters, and we observe that this difference is consistent with the nature of other splits (not involving census tracts) present in the current map. We do not give any significant weight to just the raw number of splits, without any further context. For example, census tracts could contain more than one municipality, so a split census tract could nonetheless keep ***1040** its component municipalities intact. [430]

430 *See* Dkt. 242 (Niven Trial Test. at 105).

In his response to Dr. Thornton, Dr. Niven also shows that, using a four-election index, [431] 9.4% of Republican census tracts and 13.8% of Democratic census tracts were split among multiple congressional districts. [432] Using an eight-election index, [433] 9.7% of Republican census tracts and 13.5% of census tracts were split. [434] In sum, split

census tracts leaned Democratic, and census tracts with more Democratic voters were also more likely to be split into multiple congressional districts than census tracts with more Republican voters. [435]

431 The four-election index includes the 2008 presidential election, and the 2010 gubernatorial, attorney general, and auditor elections. *See* Trial Ex. P526 (Niven Resp. at 1 n.3).

432 *Id.* at 2. A Republican census tract is one that scored 0.50 or higher on the four-election index; a Democratic census tract is one that scored 0.499 or lower. *Id.*

433 This index included those elections in the four-election index and four additional elections: the 2008 attorney general election, and the 2010 secretary of state, treasurer, and U.S. Senate elections. *Id.* at 1–2 n.5.

434 *Id.* at 2–3.

435 Dr. Niven elaborated on these findings at trial. *See generally* Dkt. 242 (Niven Trial Test. at 20–23).

After his statewide analysis, [436] Dr. Niven discussed particular districts. His report focuses on Hamilton County (Districts 1 and 2), District 9, Franklin County (Districts 3, 12, and 15), and Summit County (Districts 11, 13, 14, and 16). Dr. Niven's report also surveys political science literature that shows that, when neighborhoods are divided into different districts, campaign efforts become "more complicated and less efficient ...." [437] Dr. Niven similarly testified at trial that "the political science literature is very clear that the more you subject a neighborhood to political splitting, ... it has a demobilizing effect.... It's harder for parties and other entities to go into a neighborhood and activate voters when those voters live in separate districts and, therefore, are responding to separate candidates." [438]

436 Dr. Niven's analysis regarding the location of congressional offices could benefit from further explanation. Trial Ex. P524 (Niven Rep. at 4). For example, there is no explanation as to whether Democratic constituents were burdened more than Republican constituents. Accordingly, we do not consider this specific portion of Dr. Niven's report and testimony.

437 *Id.* at 5.

438 Dkt. 242 (Niven Trial Test. at 12); *see also id.* at 38.

a. Hamilton County: Districts 1 and 2

Dr. Niven began his analysis of Hamilton County with District 1. He notes that District 1 swung back and forth between electing Republicans and Democrats under the prior map and that one "academic analysis deemed [District 1] a 'textbook example of a marginal district.' " [439] After redistricting, that has not been the case. Dr. Niven's analysis shows, for example, that in 2008 President Obama won the old District 1 with 55.17% of the vote compared to Senator John McCain's 44.83%. By contrast, the same election under the current District 1, which splits Cincinnati and more of Hamilton County than under the old District 1, results in a 52.3% to 47.7% win for Senator McCain. [440] The new District 1 both split Hamilton County and ***1041** added the whole of Warren County, which votes heavily Republican (and voted heavily for Senator McCain in the 2008 presidential election). [441] Using an index that incorporates a wider array of elections ("Dr. Niven's index"), [442] he found that Republican candidates averaged 42.07% of the vote in the old District 1, but that index percentage increased to 51.89% in the new District 1. [443]

439 Trial Ex. P524 (Niven Rep. at 6) (citation omitted).

440 *Id.* at 8.

441 *See id.* at 7; Dkt. 242 (Niven Trial Test. at 27, 30).

442 This index included the OCURD data and the 2008 presidential election, and the 2010 gubernatorial, attorney general, and auditor elections. Trial Ex. P524 (Niven Rep. at 2).

443 Trial Ex. P524 (Niven Rep. at 8).

Meanwhile, District 2 was and remains safely Republican, but fourteen Cincinnati neighborhoods are divided between Districts 1 and 2. [444] Dr. Niven explains that "Cincinnati is unusual in its commitment to formally recognizing and building policy around the city's 52 neighborhoods. Indeed, the city's economic development strategy is built around the individual needs and assets of individual neighborhoods ...." [445] He notes that "while the rest of

Hamilton County gave 52.19% of its vote" to President Obama in 2008, "the Cincinnati neighborhoods divided between the 1st and 2nd districts gave 59.37% of their vote" to President Obama in that election.[446] Looking at those same neighborhoods under Dr. Niven's index, the "split neighborhoods gave more than 75% of their vote to Democratic candidates" and the percentage for the rest of Hamilton County was about 45%.[447] Dr. Niven testified that "the 2nd District becomes something of a donor district. It had more Republicans than was needed to ensure a safe district."[448] In short, Cincinnati and these neighborhoods supported Democratic candidates, and they are split between Districts 1 and 2; District 2 already contained a large Republican majority, and thus it could take on those Democratic voters without putting a Republican candidate at any material risk of losing.

444 *Id.* at 12.

445 *Id.* at 11; *see also* Dkt. 242 (Niven Trial Test at 36) ("[C]andidates campaign to and for those neighborhoods.").

446 Trial Ex. P524 (Niven Rep. at 13).

447 *Id.*

448 Dkt. 242 (Niven Trial Test. at 33); *see also id.* at 34–35.

Throughout his report, Dr. Niven highlighted certain district boundary lines in which the lines divide census tracts populated by Democratic voters. In the case of his example for Hamilton County, the split census tract "is overwhelmingly populated by Democrats" per Dr. Niven's index.[449]

449 Trial Ex. P524 (Niven Rep. at 9–11). We give these particular examples some weight, though they seem to be simply illustrative of the overall trends, which are more important, found by Dr. Niven.

b. District 9

Dr. Niven emphasizes that "[o]ne of the defining aspects of the 9th Congressional district is its comprehensive propensity to divide communities."[450] In fact, District 9 contains no whole counties and five partial counties—Cuyahoga is split between District 9 and three other districts, Lorain is split between District 9 and two other districts, and Erie, Lucas, and Ottawa are split between District 9 and one other district.[451] Dr. Niven further explains that "[i]n its economic development efforts, the state of Ohio places Cleveland and Toledo in separate regions," and thus, in combination ***1042** with other cultural differences between Cleveland and Toledo, District 9 "combines quite disparate communities."[452] Dr. Niven's illustrative example of a suspect boundary for District 9 is in Lorain County, and the boundary divides a census tract that is heavily Democratic and more Democratic than the rest of Lorain County.[453] Moreover, each county in District 9 voted Democratic in the 2008 presidential election and leaned Democratic under Dr. Niven's index.[454]

450 *Id.* at 15.

451 *Id.*

452 *Id.* at 16–17; *see also* Dkt. 242 (Niven Trial Test. at 42–44).

453 Trial Ex. P524 (Niven Rep. at 16).

454 *Id.* at 19.

c. Franklin County: Districts 3, 12, and 15

Dr. Niven finds that Franklin County both packs (District 3) and cracks (Districts 12 and 15) Democratic voters.[455] Dr. Niven ultimately concludes that "what was achieved in these rather odd-looking districts is that a very Democratic County [Franklin County] winds up with two Republican representatives ... out of its three members of Congress."[456] On cross-examination, Dr. Niven acknowledged that under the prior map, Franklin County was split into three districts and that Republican candidates for Congress usually won, with some exceptions, the elections in those districts.[457] As will be discussed in more detail in the analysis, although this redrawing seemingly adds a Democratic district where there previously was not one, it was part of an overall strategy to solidify Republican districts and reduce the statewide number of Democratic districts.

455 *Id.*; Dkt. 242 (Niven Trial Test. at 46).

456 Dkt. 242 (Niven Trial Test. at 46).

457 *Id.* at 100–01.

He begins his analysis with District 15, a District which was competitive in 2006 and was won by a Democratic candidate for Congress in 2008.[458] Dr. Niven's analysis shows President Obama carried the old District 15 by about 29,000 votes, but the same election in the new District 15 would result in Senator McCain winning by 21,000 votes; under Dr. Niven's index, the old District 15 was nearly evenly split between Democratic and Republican supporters, with a very slight Democratic lean, and the new District 15 leans Republican.[459] Dr. Niven notes that nine out of the ten counties added to District 15 in the 2011 redistricting process "were inclined to support Republican candidates."[460] Additionally, the portions of three of the four split counties within District 15 leaned heavily Republican in the prior decade, except for the portion of Franklin County in District 15, which voted 50.52% in favor of Senator McCain and scored a 0.5237 (leaning Republican) under Dr. Niven's index.[461] The portions of those same counties not within District 15, however, had: a less-strong Republican tilt (Fayette County), were competitive (Ross County), or leaned heavily Democratic (Franklin County).[462] He also finds that the new District 15 split seventy-two census tracts (with fifty-eight in Franklin County), but the old District 15 split forty-one (all in Franklin County).[463] In sum, Dr. Niven concludes that ***1043** Democratic-leaning areas were removed from the old District 15, while Republican-leaning areas were added, together resulting in a "net gain of more than 40,000 votes for the Republicans."[464]

458 Trial Ex. P524 (Niven Rep. at 19); Dkt. 242 (Niven Trial Test. at 47).

459 Trial Ex. P524 (Niven Rep. at 22).

460 *Id.*

461 *Id.* at 22, 24.

462 *Id.*

463 *Id.* at 20.

464 *Id.* at 24; *see also id.* at 24 n.57.

District 12 under either the 2008 presidential election results or Dr. Niven's index went from a leaning-Democratic district in the prior decade to a strongly-Republican district under the current map.[465] Dr. Niven's analysis shows that Democratic-leaning voters in Franklin County were removed from District 12 and Republican-leaning voters were added, resulting in a new gain of 60,518 Republican voters (using the 2008 presidential election data).[466] He further finds that census tract splits increased from forty-eight to sixty-one between the prior map and the current map.[467]

465 *See id.* at 25.

466 *Id.*

467 *Id.*

District 3 is the final Franklin County district addressed by Dr. Niven. He concludes that District 3 "is a classic packing example" because it received Democratic voters from Districts 12 and 15.[468] Dr. Niven emphasizes the odd, jagged shape of District 3, and he testified that he included specific, street-level examples of odd lines in his report because "when we look statewide, ... it's hard to appreciate in the most granular detail the number of cuts necessary to achieve these effects."[469] Overall, he found that "14 out of 16 cities in Franklin County are split between multiple [congressional] districts."[470] In responding to Intervenors' expert Dr. Brunell's view that "funny shaped districts are inevitable," *see infra* Section II.D.3., Dr. Niven testified that, in this case, the "funny shapes" were "a strategic choice" and that they are "an illustration of division ... imposed with a partisan tinge such that democrats are far more likely to have found themselves in the midst of these cuts and divides."[471]

468 Dkt. 242 (Niven Trial Test. at 54); *see also* Trial Ex. P524 (Niven Rep. at 26).

469 Dkt. 242 (Niven Trial Test. at 56); *see also id.* at 57 ("without zooming in a little bit," according to Dr. Niven, "you can't appreciate the degree to which ... street by street, house by house, people can be divided ...."); *see also* Trial Ex. P524 (Niven Rep. at 26–27).

470 Trial Ex. P524 (Niven Rep. at 28).

471 Dkt. 242 (Niven Trial Test. at 57–58); Trial Ex. P526 (Niven Resp. at 3).

Dr. Niven explained how gerrymandered district lines can cause confusion. For example, Dr. Niven found that in

Franklin County, voters showed up to the polls for the 2018 special election, only to find out that they did not in fact live in District 12.[472] As it turned out, *election officials* had mis-assigned more than 2,000 people to the wrong congressional district, and the Franklin County Board of Elections took more than 4,000 calls (and received hundreds of emails) from confused voters who could not cast a ballot or whose polling locations were closed.[473]

472 Trial Ex. P524 (Niven Rep. at 27–28 & nn.59, 61–63). Dr. Niven relied on news coverage, as he typically does in his scholarship, for this portion of his report and testimony. *See* Dkt. 242 (Niven Trial Test. at 60); *see also* FED. R. EVID. 803(18).

473 *See* Trial Ex. P524 (Niven Rep. at 27–28 & nn.59, 61–63).

d. Summit County: Districts 11, 13, 14, and 16

Summit County's population is small enough such that it could be placed within a single congressional district—yet ***1044** Summit County is divided into four congressional districts. (The prior map split Summit County into three districts.) Using either the 2008 presidential election or Dr. Niven's index, Dr. Niven's analysis shows that Summit County leaned Democratic.[474] He also finds that census tract splits increased from twenty-seven under the prior map to fifty-five under the current map.[475]

474 Trial Ex. P524 (Niven Rep. at 29) (noting that President Obama won Summit County by about 41,000 votes in 2008 and that Dr. Niven's index scores Summit County as 0.4065, or, put differently, only 40.65% Republican).

475 *Id.*

As for the particular districts in Summit County, Districts 11 and 13 have consistently elected Democratic candidates to Congress under the current map, whereas Districts 14 and 16 have consistently elected Republican candidates. Consistent with these results, using either 2008 presidential election data or Dr. Niven's index, Dr. Niven's analysis shows that voters placed into Districts 11 and 13 leaned heavily in favor of Democratic candidates; meanwhile, voters placed into Districts 14 and 16 were almost evenly divided in the 2008 presidential election, and under Dr. Niven's index, the voters placed in these Districts leaned Republican.[476] Lastly, Dr. Niven finds that split census tracts leaned more Democratic than census tracts kept intact in Summit County, and he therefore concludes that "Summit County residents were not equally apt to have their neighborhoods divided between districts – as more heavily Democratic areas were more likely to be divided."[477]

476 *Id.* at 31–32.

477 *Id.* at 32.

4. Dr. Lisa Handley

Dr. Lisa Handley, an election consultant who works on voting rights and redistricting, testified for Plaintiffs as an expert witness.[478] She has taught and lectured on voting rights and redistricting and has published articles and books on these subjects.[479] She has served as a redistricting consultant, aiding jurisdictions to draw lines in compliance with the VRA.[480] She has also served as an expert witness performing racial bloc voting analyses in cases in which districting plans are challenged under Section 2 of the VRA.[481] She has been hired as an expert by the Department of Justice in five cases and has provided expert testimony in over twenty cases throughout her career.[482] The Court qualified Dr. Handley as an expert in the VRA, including on racially polarized voting and analysis of such voting patterns.[483]

478 Dkt. 240 (Handley Trial Test. at 132–33).

479 *Id.* at 133.

480 *Id.* at 134.

481 *Id.*

482 *Id.* at 135.

483 *Id.* at 135–136. Intervenors filed a Motion to Exclude the Expert Report and Testimony of Dr. Handley prior to trial and maintained their objections at trial. Dkt. 152-1 (Intervenors' Mot. to Exclude Handley); Dkt. 240 (Handley Trial Test. at 136). Intervenors argued that Dr. Handley's report and testimony were irrelevant because the case at bar is a partisan-gerrymandering case, not a VRA case. They also argued that her report and testimony were improper because they relied on

data post-dating the drawing of the 2012 plan and failed to include a confidence interval. Dkt. 152-1 (Intervenors' Mot. to Exclude Handley at 1–2). We address each argument in turn.

First, we reject Intervenors' argument that the Section 2 analysis is irrelevant. It is true that Plaintiffs have challenged the 2012 map as an unconstitutional partisan gerrymander, not as a violation of Section 2 of the VRA. However, Defendants have made Section 2's requirements relevant to this case. They have argued that District 11 was drawn in its present shape in part to ensure that African-American voters were able to elect their preferred candidate in that district. Plaintiffs therefore offer Dr. Handley's testimony to challenge that justification and demonstrate that there was no need to extend District 11 south into Summit County to pick up additional African-American voters to comply with the VRA. We discuss the interaction of the VRA, Defendants' minority electoral opportunity justification, and Dr. Handley's analysis further in Sections V.A.2.d.iii., V.C.2.b.ii., where we scrutinize each of Defendants' proffered legitimate legislative justifications.

Second, while Dr. Handley's report and analysis do rely in part on data that post-dated the 2011 redistricting and therefore was unavailable to the map drawers at the time, they also rely on data that predates the redistricting. Dkt. 240 (Handley Trial Test. at 150). The pattern of District 11 electing Black-preferred candidates by sizable margins does not differ between the pre-2011 and post-2011 elections that Dr. Handley considered. *Id.* at 151. Any issues that Dr. Handley's reliance on data that was not available to the map drawers in 2011 presents will go to the weight that we give Dr. Handley's testimony, not its admissibility.

Third, we conclude that Dr. Handley adequately explained why she did not provide confidence intervals for her ecological-inference analysis, and we overrule Intervenors' objection on that basis. Dr. Handley provided standard errors for each of her ecological-inference estimates. *Id.* at 143. However, she explained that she did not use the standard errors to produce confidence intervals because that would require a normal distribution, and the ecological-inference analysis does not produce a normal distribution. *Id.* at 143–44. She testified that she "routinely" submits expert reports involving ecological-inference estimates without confidence intervals, and that these reports have been accepted. *Id.* at 144.

***1045** District 11 has consistently elected African-American representatives to Congress since 1968, when it was first drawn as a majority Black district.[484] Handley's report indicated that since 2002, the Black-preferred congressional candidate (whether or not that candidate was African American) has won District 11 by a considerable margin.[485] This is true of elections both before and after the 2011 redistricting.[486] In fact, the tightest congressional race since 2002 in District 11 was won by Stephanie Tubbs Jones in that year with 76.3% of the total vote.[487] Prior to the 2011 redistricting, District 11 had a BVAP of 57.7%, although it was originally drawn in 2001 with a BVAP of 52.3%.[488] After the redistricting, its BVAP was 52.4%.[489]

484 Trial Ex. P254 (Handley Rep. at 2 n.2). Representative Louis Stokes was elected in 1968 and served as a congressman for 30 years. Representative Stephanie Tubbs Jones was then elected in 1998. She was succeeded by Congresswoman Marcia Fudge, who has represented District 11 since 2008. *Id.*

485 *Id.* at 5.

486 *Id.*; Dkt. 240 (Handley Trial Test. at 141 (concluding that "prior to the 2011 redistricting ... Black-preferred candidates were winning by overwhelmingly high percentages in all of the statewide and federal contests").

487 Trial Ex. P254 (Handley Rep. at 3).

488 *Id.* at 6 n.7.

489 *Id.*

Dr. Handley conducted a "district-specific, functional analysis of voting patterns by race to ascertain the black voting age population necessary to provide black voters with an opportunity to elect their candidates of choice in the vicinity of the 11th Congressional District of Ohio."[490] The analysis must be district specific because the BVAP required to elect the Black-preferred candidate differs from jurisdiction to jurisdiction based on factors such as the type of election (e.g., federal versus local), turnout and voting patterns of African Americans and whites, the ***1046**

cohesiveness of African-American voters in supporting particular candidates, and "crossover" voting patterns of whites who also support Black-preferred candidates.[491] Dr. Handley's analysis estimated the vote share that Black-preferred candidates would have received had District 11 been configured as 55%, 50%, 45%, or 40% Black.[492] She conducted this analysis using data from statewide and federal elections from 2008 through 2016 occurring within the vicinity of the current District 11.

490 *Id.* at 1.

491 Dkt. 240 (Handley Trial Test. at 137, 142)

492 *Id.* at 142.

Dr. Handley used three different statistical techniques to complete this analysis: homogeneous-precinct analysis, ecological-regression analysis, and ecological-inference analysis.[493] Both homogenous-precinct analysis and ecological-regression analysis were used in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court's seminal Section 2 case.[494] Ecological-inference analysis developed later to address a shortcoming of ecological-regression analysis but has subsequently been widely accepted.[495] All three statistical techniques yielded similar results.[496]

493 *Id.*

494 *Id.* at 142–43.

495 *Id.* at 143.

496 *Id.* at 150.

Dr. Handley concluded that with a 45% BVAP in District 11, African-American voters would have a realistic opportunity to elect their candidate of choice with a "comfortable margin."[497] In fact, even with a BVAP as low as 40%, African-American voters would have elected the Black-preferred candidate in the elections studied.[498] She concluded that there is no need to draw a majority African-American District 11 in order to allow African-American voters to elect their candidate of choice there.[499]

497 Trial Ex. P254 (Handley Rep. at 17); Dkt. 240 (Handley Trial Test. at 149).

498 Dkt. 240 (Handley Trial Test. at 149).

499 Trial Ex. P254 (Handley Rep. at 1).

5. Mr. William Cooper

William Cooper, a mapping consultant, testified as an expert witness at trial.[500] Over the course of his career, Mr. Cooper has drawn plans for about 750 jurisdictions, many of which were statewide plans and around six of which were congressional districting plans.[501] Mr. Cooper has also previously drawn plans specifically for partisan-gerrymandering cases.[502] Mr. Cooper generally submits illustrative or remedial districting plans, and courts have implemented several of his remedial plans.[503] This Court qualified Mr. Cooper as an expert in the fields of redistricting, map drawing, and demography[504] and found his testimony and reports credible and reliable.

500 Dkt. 241 (Cooper Trial Test. at 136).

501 *Id.* at 136–37.

502 *Id.* at 137–38.

503 *Id.* at 139.

504 *Id.* at 140.

Mr. Cooper used census data and mapping software "to reexamine the plan that was adopted in 2012 and apply traditional redistricting principles to result in a map that was a little more fair for Democratic voters and at the same time visually more appealing" and also "undid ... [the] partisan ***1047** gerrymander."[505] He used Maptitude software, the same kind used by the map drawers in 2011, to do this work.[506] Mr. Cooper relied upon traditional redistricting principles (equipopulation, contiguity, compliance with the VRA, and preserving communities of interest) to craft his Proposed Remedial Plan and also made sure that it would satisfy the requirements of Ballot Initiative 1.[507] He "did not pair incumbents except when in direct conflict with the other factors."[508] Mr. Cooper had the CSU dataset used by the map drawers available to him while he was drawing his Proposed Remedial Plan and "occasionally glanced at it" although he "was not constantly monitoring every little—every little change."[509] The Proposed Remedial Plan that he created was intended to be a forward-looking plan that avoided the pairing of the current congressional officeholders.[510]

505 *Id.* The data Mr. Cooper was given to create the Proposed Remedial Plan featured in his first report included an error—an incorrect address for Representative Jordan. *Id.* at 167. This error resulted in the inadvertent pairing of incumbent Representatives Jordan and Davidson in the original Proposed Remedial Plan. *Id.* Upon learning of this error, Mr. Cooper drafted a corrected Proposed Remedial Plan, which included slight changes at the border of Districts 4 and 8. Trial Ex. P091 (Cooper Errata at 2). This correction did not result in any changes to the compactness, minority voting strengths, or county and municipal divides of the earlier version. Dkt. 241 (Cooper Trial Test. at 168–69).

506 Dkt. 241 (Cooper Trial Test. at 143).

507 Trial Ex. P090 (Cooper Decl. at 3); Dkt. 241 (Cooper Trial Test. at 146). Ballot Initiative 1 requires that "any plan drawn in the future, at least after the 2020 census at minimum, would have to keep the city of Cincinnati in a single district and the city of Cleveland in a single district." Dkt. 241 (Cooper Trial Test. at 146).

508 Trial Ex. P090 (Cooper Decl. at 3).

509 Dkt. 241 (Cooper Trial Test. at 151–52).

510 Trial Ex. P092 (Cooper Suppl. Decl. at 1).

Mr. Cooper explained the traditional redistricting factors that drove his maps and the manner in which those factors are measured. Equipopulation means that a district is the exact population of the ideal district size, plus or minus one.[511] Contiguity means that a district is entirely contiguous with itself; there are no severed sections. Compactness can be measured with an "eyeball test ... just take a look at it and see if it makes sense visually" or with mathematical tests such as the Reock and Polsby-Popper measures, both of which can be run using Maptitude.[512] The Polsby-Popper and Reock metrics measure compactness on a scale of zero through one; the closer to one, the more compact the district. The "Polsby-Popper score is a perimeter score over area of a district"—the ratio of the perimeter and the area of a district generates the score. A low score is "an indication that it's not a very compact district."[513] The Reock score is "a ratio of an area for a circle drawn around the district." Mr. Cooper testified that "districts that start getting below .20 are somewhat problematic, generally speaking."[514]

511 Dkt. 241 (Cooper Trial Test. at 147).

512 *Id.* at 147–48.

513 *Id.* at 157–58.

514 *Id.* at 158.

Mr. Cooper defined a community of interest as "an area or a region where there are certain cultural or socioeconomic ties, historical ties."[515] He testified that minority populations can be considered communities of interest and that counties or municipal ***1048** subdivisions are "a more objective way to identify communities of interest."[516] Maptitude allows users to monitor how many counties and metropolitan civil divisions are split as a plan is drawn.[517] He stated that, generally, maps with fewer districts overall should contain fewer county splits if traditional districting principles are being applied.[518]

515 *Id.* at 148.

516 *Id.*

517 *Id.* at 150.

518 *Id.* at 151.

Mr. Cooper also compared the shapes of several districts from the 2012 map to his Proposed Remedial Plan, commenting on the 2012 districts' irregular shapes and frequent splits of county lines and municipal boundaries.[519] The Proposed Remedial Plan splits fourteen counties and twenty-seven political subdivisions.[520] In contrast, the 2012 map splits twenty-three counties and seventy-three political subdivisions, fifty-five of which are populated.[521] Mr. Cooper also compared the compactness of the districts in the 2012 map with those in his Proposed Remedial Plan. The Proposed Remedial Plan "score[d] significantly higher on Polsby-Popper in terms of minimums and maximums as well as the overall mean" than the 2012 map.[522]

519 *Id.* at 153–56.

520 *Id.* at 150; Trial Ex. P091 (Cooper Errata at 3; Ex. Q); Trial Ex. P454 (Cooper Decl. Apps. at Ex. F).

521 Dkt. 241 (Cooper Trial Test. at 158–59).

522 *Id.* at 157; Trial Ex. P454 (Cooper Decl. Apps. at Ex. H). Mr. Cooper also explained that the chart was somewhat misleading because the Reock and Polsby-Popper scores for District 9 are inflated "because of the way the Census Bureau has extended water blocks that are part of these Counties along Lake Erie, out into the middle of Lake Erie. And if you remove those water blocks, then District 9 scores very low." Dkt. 241 (Cooper Trial Test. at 157).

Mr. Cooper's Proposed Remedial Plan was conscious of advancing minority voting power in various districts. First, it included a minority-opportunity district contained entirely within Cuyahoga County with a 47% BVAP, higher than the 45% that Dr. Handley calculated was necessary to allow minorities in the district to elect a candidate of their choice.[523] Mr. Cooper testified that simply by keeping the City of Cleveland whole in District 11 and including "a couple of suburbs," achieving this 47% BVAP "just happened" without "trying to max it out in any way."[524] Second, Mr. Cooper's Proposed Remedial Plan included a District 1 with a higher percentage BVAP than the 2012 map's District 1. The Proposed Remedial Plan's District 1 has a 26.74% BVAP; the 2012 map's District 1 has a 21.30% BVAP.[525] He testified that this increase of over five percentage points resulted "because [he] left Cincinnati in a single district rather than splitting it into part of District 2 as well as District 1."[526] Third, the District 3 included in his Proposed Remedial Plan had roughly the same BVAP as was present in the 2012 map.[527]

523 Dkt. 241 (Cooper Trial Test. at 159).

524 *Id.* at 160.

525 Trial Ex. P454 (Cooper Decl. Apps. at Ex. D-3; E-2); Dkt. 241 (Cooper Trial Test. at 160–61).

526 Dkt. 241 (Cooper Trial Test. at 161).

527 *Id.*

Mr. Cooper also responded to the report of Defendants' expert Dr. Hood.[528] Dr. Hood had challenged the Proposed Remedial Plan, arguing that it would not have been politically viable had it been implemented ***1049** in 2012 because it would have paired many incumbents. Mr. Cooper maintained in his response that the Proposed Remedial Plan was "presented for future use, not solely as a point of comparison to the 2012 plan."[529] He also drew and demonstrated the feasibility of two hypothetical plans that shared many features with his Proposed Remedial Plan but could have been implemented in 2011 without pairing more incumbents than the adopted 2012 map did.[530]

528 *Id.* at 141.

529 Trial Ex. P093 (Cooper Second Suppl. Decl. at 2).

530 *Id.* at 4–19.

D. Defendants' and Intervenors' Expert Witnesses

1. Dr. M.V. Hood III

Dr. M.V. Hood III, a tenured professor of political science at the University of Georgia, testified as an expert for Defendants at trial.[531] Dr. Hood has taught courses in Southern politics, American politics, research methods, election administration, and the legislative process.[532] His work has appeared in peer-reviewed journals between forty and fifty times and he has published four articles "directly related to redistricting in one way or another" in peer-reviewed journals.[533] Dr. Hood has testified as an expert witness in several cases involving redistricting.[534] We qualified Dr. Hood as an expert in "American politics and policy, quantitative political analysis and election administration, including redistricting."[535] We, however, can draw limited inferences from his testimony and report due to some inapt comparisons, unexplained and apparently meaningful exclusions of certain elections in his partisan indices, and admitted failures to account for certain confounding variables in some of his analyses.[536]

531 Dkt. 247 (Hood Trial Test. at 135).

532 *Id.* at 136–37.

533 *Id.* at 137.

534 *Id.* at 140.

535 Dkt. 274 (Hood Trial Test. at 141). Prior to trial, Plaintiffs filed a *Daubert* motion to exclude the expert report and testimony of Dr. Hood. Dkt. 150-1 (Pls.' Mot. to Exclude Hood). We conclude

that none of Plaintiffs' criticisms of Dr. Hood's report and testimony are sufficiently severe to preclude us from qualifying him as an expert. Rather, where well-founded, they will impact the weight that we will give his testimony and report.

536 Courts in several other cases in which Dr. Hood has testified as an expert witness have afforded Dr. Hood's testimony little weight for similar reasons. *See, e.g., Ne. Ohio Coal. for the Homeless v. Husted*, No. 06-cv-896, 2016 WL 3166251, at *23 (S.D. Ohio June 7, 2016); *see also, e.g., Veasey v. Perry*, 71 F.Supp.3d 627, 663 (S.D. Tex. 2014); *Frank v. Walker*, 17 F.Supp.3d 837, 882 (E.D. Wis. 2014).

a. Incumbent pairing, core retention, compactness, and county and municipality splits

Dr. Hood's report stated that the 2012 map paired three sets of incumbents.[537] He also testified that the 2012 map's core retention level, the "percentage of a member's constituents [who] were carried over from their previous district," was "55.7% across the 16 districts."[538] Dr. Hood concluded, based on the number of incumbents who were paired and the core-retention rate, "that at least some weight was given in the plan to the ... criteria protecting incumbents to the extent possible."[539] Dr. Hood, however, agreed that ***1050** "there is no agreed-upon standard for what levels of core retention indicates that the goal of a districting map is to protect incumbents."[540] He also acknowledged that in a previous academic article, he had concluded that "a core retention level of 68.7 percent greatly altered the relationship between representatives and constituents."[541]

537 Dkt. 247 (Hood Trial Test. at 144–45).

538 *Id.* at 145.

539 *Id.* at 146.

540 *Id.* at 193.

541 *Id.*

Dr. Hood compared the 2012 map with the 2002 map. He testified that the 2012 map was "on par with the 2002 plan in terms of compactness" measured with both the Polsby-Popper and Reock tests.[542] He stated that the 2002 plan split twenty-one counties and the 2012 plan split twenty-three counties.[543] He found that the 2002 plan split 4.3% of Ohio's municipalities while the 2012 plan split 4.5% of Ohio's municipalities. From this data, he concluded that the 2012 map "is on par with the 2002 benchmark plan" in terms of its adherence to traditional redistricting criteria.[544]

542 *Id.* at 144.

543 *Id.* at 147. In so testifying, Dr. Hood corrected an error in his report, which had indicated that the 2002 map split 25 counties. *Id.* at 146.

544 *Id.* at 147–48.

Dr. Hood also compared the 2002 map to Plaintiffs' Proposed Remedial Plan in terms of compactness and splits of communities of interest, defined here as counties and municipalities. He found that the Proposed Remedial Plan had "slightly higher" compactness scores than the 2002 map measured by both the Polsby-Popper and Reock tests. He also testified that Mr. Cooper's hypothetical plans, which were designed as alternatives that could have been enacted in 2012, also had higher compactness scores than the adopted 2012 map.[545] The Proposed Remedial Plan splits fourteen counties while the 2002 map split twenty-one.[546] The Proposed Remedial Plan splits 1.7% of Ohio's municipalities while the 2002 map split 4.3% of them.[547] Mr. Cooper's hypothetical plans also split fewer counties and municipalities than the enacted 2012 map.[548]

545 *Id.* at 148, 198; *see also* Trial Ex. D4 (Hood Rep. at 8, tbl. 7). Dr. Hood did not calculate the compactness scores himself; he requested that they be calculated and reproduced the reports. Dkt. 247 (Hood Trial Test. at 189).

546 Dkt. 247 (Hood Trial Test. at 148–49); *see also* Trial Ex. D4 (Hood Rep. at 8, tbl. 8).

547 Dkt. 247 (Hood Trial Test. at 149); *see also* Trial Ex. D4 (Hood Rep. at 9, tbl. 9).

548 Dkt. 247 (Hood Trial Test. at 198–99).

Dr. Hood also demonstrated that, had Plaintiffs' Proposed Remedial Plan been enacted in 2012, it would have resulted in the pairing of six sets of incumbents, the majority of which would have been Republican pairings.[549] Dr. Hood calculated that had the Proposed Remedial Plan

been enacted in 2012, its mean core-retention figure would have been 39.5%.[550] As is discussed in the summary of Mr. Cooper's testimony, the Proposed Remedial Plan was designed principally as a forward-looking map to be implemented today, using the 2012 map rather than the 2002 map as a baseline. It designed its incumbent pairings based off where current representatives live under the 2012 map. This makes it an inapt comparison to count incumbent pairings that would have resulted had it been implemented in 2012, when ***1051** a different set of representatives would have been the affected incumbents. Similarly, the implementation of the 2012 map shifted the district lines and assigned constituents to new districts. Therefore, it is odd to conduct core-retention analysis of the Proposed Remedial Plan against the baseline of the 2002 district lines when it was designed with the 2012 lines as its baselines. On cross-examination, Dr. Hood acknowledged that Mr. Cooper's hypothetical plans, which were designed as alternatives that could have been enacted in 2012, had core retention rates that were "highly similar" to those of the actually-enacted 2012 map.[551]

549 *Id.* at 148; *see also* Trial Ex. D4 (Hood Rep. at 9, tbl. 10).

550 Dkt. 247 (Hood Trial Test. at 150).

551 *Id.* at 197.

b. Political geography

Dr. Hood also discussed Ohio's political geography—"the spatial distribution of partisans in Ohio."[552] He created a partisan vote index using fifteen statewide contested elections from four election cycles prior to the 2011 redistricting.[553] He then used this partisan vote index to color code and plot areas of Democratic, strong Democratic, Republican, and strong Republican support on several maps of Ohio.[554] Based on these maps, Dr. Hood concluded that "there's a much larger Republican footprint outside of urban areas. Much of the Democratic footprint during this time is inside urban areas, like Cleveland and Columbus, Cincinnati."[555] He calculated that "about 78.5% of Ohio's land area" leans Republican, and 21.5% of its land area leans Democratic.[556]

552 *Id.* at 151.

553 *Id.* at 153.

554 *Id.*; *see also* Trial Ex. D4 (Hood Rep. at App., figs. 1–5).

555 Dkt. 247 (Hood Trial Test. at 154).

556 *Id.*

Dr. Hood then calculated a Moran's I statistic to determine that from 2004 to 2010 "Republican VTDs tend[ed] to be located proximate to other Republican VTDs, and Democratic VTDs tend[ed] to be located proximate to other Democratic VTDs" in Ohio.[557] Dr. Hood acknowledged on cross-examination that this analysis did not "indicate that Democrats are differentially clustered than Republicans"—that they cluster with other members of their own party at higher rates than Republican voters do.[558] His analysis also demonstrated that "Democratic VTDs are more likely to be located in urban areas" than Republican VTDs.[559]

557 *Id.* at 155.

558 *Id.* at 199–200.

559 *Id.* at 156.

c. Partisan leanings

Dr. Hood then used his first partisan index to analyze the partisan leaning of Ohio's congressional districts as drawn under the 2012 map.[560] He determined that six were safe Republican districts, five were competitive, Republican-leaning districts, four were safe Democratic districts, and one was a competitive, Democratic-leaning district.[561]

560 Plaintiffs argue that Dr. Hood cherry-picked the elections in his partisan index to skew the results, particularly by omitting 2002 election data. *See id.* at 207–13.

561 Trial Ex. D4 (Hood Rep. at 15, tbl. 15). Hood termed a district a safe Republican district if the partisan index indicated that it would vote over 55% Republican. Competitive, Republican-leaning districts would vote 50-55% Republican. Safe Democratic districts would vote less than 45% Republican, and competitive, Democratic-leaning districts would vote 45-50% Republican. Dkt. 247 (Hood Trial Test. at 157).

***1052** Dr. Hood did the same analysis applying the partisan index to the Plaintiff's Proposed Remedial Plan and found that the only differences between it and the 2012 map were that under the Proposed Remedial Plan there would be "on[e] less safe Republican district and one additional competitive district leaning Democratic."[562] On cross-examination, Dr. Hood conceded that his "index state[s] a lower Republican percentage as compared to [an index that includes] the full set of elections based on the statewide contested elections for the decade preceding the 2010 redistricting cycle, including 2002."[563] When the 2002 congressional election results are included in the index, there are no competitive districts, rather than the six competitive districts that Dr. Hood indicated.[564] Such an index predicts voting outcomes that more reliably correspond to the actual electoral outcomes observed in the elections since the 2012 redistricting.[565]

562 Dkt. 247 (Hood Trial Test. at 160).

563 *Id.* at 216–17.

564 *Id.* at 219.

565 *Id.* at 220–21.

Dr. Hood created another partisan index using elections from 2012, 2014, and 2016, and then used the same process described earlier to color code the partisan leanings of VTDs on a map of Ohio.[566] Comparing that map to the color-coded map he produced of Ohio using elections from the preceding decade, he concluded that Ohio has become increasingly Republican over time.[567]

566 Dr. Hood agreed that the races he included in creating this index "were the two most Republican of the five statewide races in 2014," and therefore the application of this index would make the map look more Republican-leaning than the application of an index that included the other races. *Id.* at 230.

567 *Id.* at 168–70; *see also* Trial Ex. D4 (Hood Rep. at App., figs. 7-8); Trial Ex. D5 (Hood Suppl. Rep. at 8, tbl. 6).

Finally, Dr. Hood used this latter partisan index to evaluate the partisan leanings of each individual Plaintiff's new district under the Proposed Remedial Plan compared to the partisan leanings of their current district under the 2012 map.[568] He concluded, based on this analysis, that two of the seventeen individual Plaintiffs would have a better chance of electing a Democratic representative under the Proposed Remedial Plan versus under the current map—Plaintiff Griffiths in District 7 and Plaintiff Hutton in District 14.[569]

568 Dkt. 247 (Hood Trial Test. at 171); *see also* Trial Ex. D4 (Hood Rep. at 30).

569 Dkt. 247 (Hood Trial Test. at 172).

d. Other influences on electoral success

Dr. Hood also testified about various factors that "influence the outcome of congressional races"—"[f]undraising, media attention, name recognition, incumbency," as well as "candidates and campaigns."[570] He testified that there is a strong trend of incumbents being reelected to office that is recognized in the political science literature and was observable in Ohio after the 2011 redistricting—all of the unpaired incumbent congressional representatives were reelected in 2012 and in every congressional election in Ohio since then.[571] Relatedly, Dr. Hood testified about challenger quality, which he measures by whether the challenger has held prior ***1053** elective office.[572] He concluded that "[t]ypically, more often than not, the challengers" of incumbents in Ohio from 2012 through 2018 were "political novices" without prior elective officeholding experience.[573] Dr. Hood admitted on cross-examination that he did nothing "to assess whether the district lines themselves prevented the recruitment of experienced candidates" and that it was possible that they had.[574]

570 *Id.* at 160.

571 *Id.* at 161; *see also* Trial Ex. D4 (Hood Rep. at 18, tbl. 17); Trial Ex. D5 (Hood Suppl. Rep. at 4, tbl. 2).

572 Dkt. 247 (Hood Trial Test. at 163).

573 *Id.*; *see also* Trial Ex. D4 (Hood Rep. at 19, tbl. 18); Trial Ex. D5 (Hood Suppl. Rep. at 5, tbl. 3).

574 Dkt. 249 (Hood Trial Test. at 9–10).

Dr. Hood also examined "the amount of campaign contributions that were collected by the Republican and Democrat" in each election because fundraising is helpful in winning elections.[575] He concluded that, in Ohio between 2012 and 2016, the incumbents had "outraised challengers by

about $ 1.2 million on average."[576] On cross-examination, Dr. Hood admitted that he did nothing "to determine that the district lines themselves did not cause Democratic challengers to fail to raise comparable funds" and admitted that it was possible that the lines themselves affected challenger fundraising abilities.[577]

575 Dkt. 247 (Hood Trial Test. at 163–64).

576 *Id.* at 164; *see also* Trial Ex. D4 (Hood Rep. at 20, tbl. 19); Trial Ex. D5 (Hood Suppl. Rep. at 5, tbl. 4) (reflecting the fundraising in the 2018 congressional elections, in which three challengers outraised the incumbents they faced).

577 Dkt. 249 (Hood Trial Test. at 9).

e. Efficiency gap and seat-share relationship

Dr. Hood plotted the efficiency gap numbers for Ohio from 1992 to 2016 against the seat share of the congressional delegation.[578] He concluded based on the regression from this plot that the efficiency gap is "closer to zero as the seat share is more evenly balanced" between the parties and increases "as the seat share tilts one way or another."[579]

578 Dkt. 247 (Hood Trial Test. at 166).

579 *Id.* at 167.

2. Dr. Janet Thornton

Dr. Janet Thornton testified at trial for Defendants as an expert witness. Dr. Thornton is currently the managing director and an economist and applied statistician at Berkeley Research Group, LLC, a consulting firm located in Florida.[580] Dr. Thornton has a doctorate and master's degree in economics from Florida State University, as well as a bachelor's degree in economics and political science from the University of Central Florida.[581] Dr. Thornton's fields of specialization in her academic background were labor economics and applied statistics.[582] Additionally, Dr. Thornton has "been working with census data since the early 1980s" and has also "work[ed] with data from the 1960 d[e]cennial census all the way up to the current time period ...."[583] Although Dr. Thornton has prepared statistical analyses and served as an expert in voting cases related to, for example, the effect of voter-identification laws on voter-participation rates by race and minority status, Dr. Thornton has never served as an expert in ***1054** a redistricting case.[584] And although Dr. Thornton has never been precluded from testifying as an expert, at least one court found her analysis "simplistic and not credible." *See Democratic Nat'l Comm. v. Reagan*, 329 F.Supp.3d 824, 838 (D. Ariz. 2018). Dr. Thornton has also not published any articles related to voting.[585] This Court qualified Dr. Thornton as an expert in economic and statistical analysis, subject to Plaintiffs' *Daubert* motion.[586]

580 Trial Ex. D8 (Thornton CV).

581 *Id.*

582 Dkt. 246 (Thornton Trial Test. at 86).

583 *Id.* at 87–88.

584 *See* Trial Ex. D8 (Thornton CV); Dkt. 246 (Thornton Trial Test. at 90–91).

585 *See* Trial Ex. D8 (Thornton CV); Dkt. 246 (Thornton Trial Test. at 125–27).

586 Dkt. 246 (Thornton Trial Test. at 92–93); *see also* Dkt. 155, 155-1 (Pls.' Mot. to Exclude Thornton). We deny Plaintiffs' *Daubert* motion, but we consider Dr. Thornton's report and testimony for limited purposes and do not credit portions of her analysis, as explained herein.

Dr. Thornton's report and testimony are offered to rebut Plaintiffs' experts Dr. Cho and Dr. Niven. As to Dr. Cho, Defendants presented Dr. Thornton's report and testimony to critique the underlying data and assumptions in Dr. Cho's report.[587] As to Dr. Niven, Defendants offered Dr. Thornton's report and testimony to rebut Dr. Niven's conclusion that the splitting of census tracts in the current plan is correlated with the political composition of census tracts.[588] Before turning to Dr. Thornton's critique of each of these Plaintiffs' experts, two preliminary matters need to be addressed.

587 Dkt. 246 (Thornton Trial Test. at 91).

588 *See* Trial Ex. D8 (Thornton Rep. at 24–27).

First, we give no weight to Dr. Thornton's finding that "Dr. Cho failed to provide all of the underlying code and output sufficient to replicate all of her findings."[589] This finding is entirely off base. Dr. Thornton admitted that she is not

an expert in C++ and that she cannot read it without the help of a manual;[590] and again, Plaintiffs offered to provide Defendants with the code. *See supra* Section II.C.2. More importantly, the code is not the algorithm; the code simply implements the algorithm. Consequently, nothing prohibited Dr. Thornton from critiquing the MCMC algorithm used by Dr. Cho if she had been qualified to do so.[591]

589 *Id.* at 4.

590 Dkt. 246 (Thornton Trial Test. at 133–35); *see also* Trial Ex. D8 (Thornton CV) (C and C++ are not included in the programming languages listed as ones of which she has knowledge).

591 This distinction between reviewing the algorithm and the code is underscored by Dr. Cho's testimony on behalf of the defendants in a Pennsylvania gerrymandering case. As Dr. Cho explained in her report in that case (which was read into the record on cross-examination at this trial): "[I]ndeed, the point is not whether I would have been allowed some short amount of time to view the code, but whether the algorithm has been sufficiently scrutinized by the scientific community to allow others, including the Courts, to have confidence in the process and the results." *See* Dkt. 243 (Cho Trial Test. at 84). Nonetheless, the fact remains that Plaintiffs offered to provide the full code to Defendants, who apparently declined the offer.

Second, Dr. Thornton is an expert in statistics generally, not in political science or redistricting, and she has never run an MCMC algorithm or, prior to this case, reviewed, evaluated, or assessed an MCMC algorithm.[592] We consider her findings with that backdrop. Ultimately, we give some weight to her critiques of the underlying data that Dr. Cho used as a basis for assessing her simulated maps, ***1055** but several of Dr. Thornton's other critiques miss the mark and are not credible.

592 Dkt. 246 (Thornton Trial Test. at 129).

a. Rebuttal to Dr. Cho

Dr. Thornton opines that "the manner in which [Dr. Cho] generates new maps (i.e., simulations) is biased towards selecting half of the districts in which the Republican votes outnumber the Democratic votes and half of the districts in which Democratic votes outnumber the Republican votes."[593] In other words, Dr. Thornton's opinion is that the process Dr. Cho used to produce the simulated maps was biased toward creating an 8-8 map. This is wrong. As explained earlier, Dr. Cho analyzed the competitiveness and partisan outcomes of the simulated maps only *after* the simulated maps were generated. *See supra* Section II.C.2.[594] Dr. Thornton offered no evidence to rebut this sequence of events.

593 Trial Ex. D8 (Thornton Rep. at 12).

594 We note, however, that Dr. Cho's competitiveness metric (which Dr. Cho used *after* generating the simulated maps) is based on optimal competitiveness. As such, the closer a map is to an 8-8 partisan outcome, the more competitive the map will score, i.e., a score closer to zero under Dr. Cho's competitiveness metric. *See supra* note 400. We consider this specific metric only for Dr. Cho's conclusion that competitiveness seems to have been "almost a non-existent factor if one at all" in the drawing of H.B. 369. *See supra* Section II.C.2.b.i. & note 400. Dr. Cho's other competitiveness analyses support that conclusion, too.

In a similar manner, Dr. Thornton criticizes the election data that Dr. Cho used to assess the partisanship of the simulated maps as compared to the current map. This criticism, however, is distinct in an important way because it goes to Dr. Cho's after-the-fact assessment of partisanship and not the creation of the simulated maps. The general thrust of Dr. Thornton's critique on this front is that the 2008-2010 data used by Dr. Cho contains higher Democratic vote totals than in the 2012-2016 data.[595] Further, Dr. Cho never used the 2016 statewide Democratic vote share for her analysis, which Dr. Thornton computed as 42.4% (lower than the other indices used by Dr. Cho).[596] Dr. Thornton concludes that Dr. Cho's selection and use of election data "is faulty, misleading, and unreliable."[597]

595 *See* Trial Ex. D8 (Thornton Rep. at 15–17 & fig. 1).

596 *Id.* at 16–17 & fig. 1.

597 *Id.* at 16.

We give some weight to this particular conclusion—Dr. Cho's omission of the 2016 election data (which was less favorable

to the Democratic Party) and use of 2008-2010 data to assess the partisan effect of the 2012 plan raises some concern. At the same time, Dr. Thornton's critique on this point does not significantly undermine Dr. Cho's conclusions. After all, the 2008-2010 election data were part of the data available to the map drawers, so that data is not irrelevant to assessing whether different districts could have been drawn. It is true, however, that the Democratic vote shares have decreased in the present decade as compared to the last, and this waning in support is relevant to partisan effect. In response, Dr. Cho provided an updated analysis in her supplemental report that incorporated the 2012-2014 and 2018 election data; that analysis showed the most common Republican vote share as nine seats, and eight and ten Republican seats were also not uncommon. *See supra* Section II.C.2. This cures at least part of Dr. Thornton's critique, specifically that using the 2008-2010 data misleadingly resulted in eight Republican seats being most common. In any event, Dr. Cho's supplemental report further shows that incorporating ***1056** recent election data does not significantly alter her conclusions on partisan effect—a 12-4 map is still a *highly* unusual outlier under all her analyses. In sum, although we give some weight to Dr. Thornton's critique on Dr. Cho's selection and use of data, hence rendering Dr. Cho's findings less probative than they otherwise could be, we do not find that Dr. Thornton has significantly undermined Dr. Cho's conclusions.

Dr. Thornton also performed her own analysis using a binomial distribution, but we do not give any weight to that analysis. Dr. Thornton's analysis used the Republican statewide vote share in congressional races "to predict the number of Republican seats."[598] As an example, in 2016, the Republican vote share was 58.2%, and Dr. Thornton multiplied that number by 16 (i.e., the number of seats) to arrive at 9.31 as the expected number of seats (2.69 fewer seats than the actual outcome of 12).[599] Dr. Thornton then calculated "the number of standard deviations associated with the difference between the actual and predicted number of Republican seats."[600] When the difference is less than two standard deviations, whether positive or negative, the difference is not considered statistically significant.[601] From this analysis, Dr. Thornton concludes that for 2012, 2014, and 2016, "the difference between the actual and predicted number of Republican seats using the Republican vote share are not statistically significant."[602]

598 Dkt. 246 (Thornton Trial Test. at 112).

599 *Id.*; Trial Ex. D8 (Thornton Rep. at 19–20, tbl. 3).

600 Trial Ex. D8 (Thornton Rep. at 19).

601 *Id.*; Dkt. 246 (Thornton Trial Test. at 112–13).

602 Dkt. 246 (Thornton Trial Test. at 113).

Several factual and legal problems are apparent in Dr. Thornton's analysis. Factually, under the binomial distribution, the expected number of Republican seats unquestionably reflects proportional representation—Dr. Thornton multiplied the statewide vote share by the number of seats. Legally, proportional representation is not required. *See infra* Section IV.B. For this reason, Dr. Cho does not assume proportional representation.[603] The analysis incorporates yet another faulty assumption that each district has a 51% chance of being won by a Republican because Republicans won 51% of the congressional vote across the State; this assumption does not comport with basic understandings of congressional elections, i.e., that although some districts may be competitive (a 51% Republican to 49% Democrat district), other districts lean heavily in favor of one party or the other. Finally, Dr. Thornton's analysis has nothing to do with whether Republicans and Democrats are statistically treated similarly or differently under the current map—she assesses only whether the actual number of Republican seats differs in a statistically significant way from the expected number of Republican seats. This analysis, without more, says nothing about how the current map affects Democratic voters compared to Republican voters. For all of these reasons, we give no weight to her statistical significance analysis.

603 Trial Ex. P087 (Cho Rep. at 31) ("We do not have a system of proportional representation ...."). In fact, Dr. Thornton is the only expert in this case who incorporates an assumption of proportional representation into her analysis.

Additionally, Dr. Thornton applied a similar analysis comparing the difference between the number of Republican seats in 2010 and the number of Republican seats ***1057** in 2012.[604] Again, she concluded that this difference was not statistically significant.[605] We find that this analysis is simplistic and not particularly helpful. To be sure, the Republicans flipped the congressional delegation in 2010 from one that was a Democratic majority to one that was a Republican majority, and this Republican majority has

been maintained. But that simply shows part of the problem with the 2012 map: Despite fluctuating vote shares, the seat share has remained 12-4; under the prior plan, the seat share fluctuated as did the vote share. Indeed, the fact that a political party that controlled the redistricting process maintained (or slightly improved) their seat-share percentage from before redistricting to after is not surprising if they have drawn an effective partisan gerrymander.

604 Trial Ex. D8 (Thornton Rep. at 21).

605 *Id.*; Dkt. 246 (Thornton Trial Test. at 114–15).

Lastly, Dr. Thornton critiqued Dr. Cho for not considering incumbency in her analysis, and Dr. Thornton herself observed the success of incumbent candidates under the current map.[606] This critique holds some weight, but Dr. Cho's analysis still permits an inference, albeit less strong, on the partisan effect of the current map. *See infra* Section V.A.2.d. (addressing the problems with the incumbent-protection justification as applied to this case).

606 Trial Ex. D8 (Thornton Rep. at 21–24); Dkt. 246 (Thornton Trial Test. at 115–16).

b. Rebuttal to Dr. Niven

Defendants also offered Dr. Thornton to rebut some of Dr. Niven's findings. According to Dr. Thornton, she performed analyses similar to Dr. Niven's but reached different results.[607] First, her "attempt to replicate Dr. Niven's finding [on the political orientation of census tracts left intact versus those which were split] result[ed] in an estimate that 50.48% of census tracts left intact are Republican in contrast to 48.18% among those that were split under the current plan" using the same election data as Dr. Niven.[608] The corresponding numbers from Dr. Niven were 52.14% (or 0.5214) and 49.25% (or 0.4925).[609] Dr. Thornton further critiques Dr. Niven's failure to perform the same calculations for the prior plan, which according to Dr. Thornton shows "a 0.4% increase in the percentage Republican among census tracts left intact" between the 2002 plan and the 2012 plan "and a 2.4% decrease in the percentage Republican among census tracts that were split between the two plans ...."[610] Second, Dr. Thornton "prepared correlation statistics to determine if the splitting of a census tract is correlated with the percentage Republican" using the same election data as Dr. Niven.[611] She concludes that "split census tracts are, statistically speaking, not correlated with the percentage Republican in the census tract as measured by Dr. Niven under either the prior plan or the current plan."[612] At trial, Dr. Thornton further testified that "there is no statistically significant difference in the proportion Republican and ***1058** whether or not a census tract is split."[613]

607 *See* Trial Ex. D8 (Thornton Rep. at 26–27); Dkt. 246 (Thornton Trial Test. at 116–17).

608 Trial Ex. D8 (Thornton Rep. at 26).

609 *See* Trial Ex. P524 (Niven Rep. at 6).

610 Trial Ex. D8 (Thornton Rep. at 26).

611 *Id.*

612 *Id.*; *see also id.* at 27 & n.38 (noting that the correlation coefficient of the current plan is -0.02429, with a probability of occurring by chance of 18.77%).

613 Dkt. 246 (Thornton Trial Test. at 116).

As an initial matter on this issue, we credit Dr. Niven's census tract analysis for a limited purpose. *See supra* Section II.C.3. Debates about the strength of various correlations aside, each expert's calculations are close to 50%, and both experts agree that split census tracts lean slightly Democratic. Moreover, Dr. Thornton's analysis is not entirely clear—she measured whether "the splitting of a census tract is correlated with the percentage Republican ...."[614] Dr. Niven, on the other hand, seems to have tested the statistical significance of the difference between census tracts that were left intact (which lean Republican) and those that were split (which lean Democratic).[615] An analysis of this differential treatment between Republican and Democratic voters seems to be absent from Dr. Thornton's report.

614 Trial Ex. D8 (Thornton Rep. at 26).

615 *See* Trial Ex. P524 (Niven Rep. at 6).

3. Dr. Thomas Brunell

Dr. Thomas Brunell testified at trial for the Intervenors as an expert witness. Dr. Brunell is a tenured professor of political science at the University of Texas at Dallas.[616] He received his bachelor's, master's, and doctorate, all in political science, from the University of California, Irvine.[617] Dr. Brunell

teaches classes on Congress, political parties and interest groups, campaigns and elections, redistricting, and statistics, among others.[618] He has published books and articles in peer-reviewed journals on redistricting, elections, issues of representation in government, and party polarization.[619] Dr. Brunell has served as an expert witness in several other redistricting and VRA cases.[620] This Court qualified Dr. Brunell as an expert in the fields of redistricting, elections, the VRA and representation, and statistics.[621]

616 Trial Ex. I-060 (Brunell CV).

617 *Id.*

618 *Id.*; Dkt. 246 (Brunell Trial Test. at 188–89).

619 Trial Ex. I-060 (Brunell CV); Dkt. 246 (Brunell Trial Test. at 189–91).

620 Dkt. 246 (Brunell Trial Test. at 192).

621 *Id.* at 192–93. Plaintiffs filed a *Daubert* motion to exclude Dr. Brunell. Plaintiffs argue his methodology renders his opinions unreliable, but Plaintiffs do not object to his qualifications. *See id.*; Dkt. 153, 153-1 (Pls.' Mot. to Exclude Brunell). We deny Plaintiffs motion, but at the same time, we do not give much weight to Dr. Brunell's report and testimony and find portions of it unhelpful, as explained below. In brief, much of his report suffers from a scarcity of explanation. The Court notes that Dr. Brunell offered a few new and previously undisclosed expert opinions at trial. To the extent that Dr. Brunell offered expert opinions on topics about which he was previously made aware but failed to include in his report, we exclude such testimony because it was neither substantially justified nor harmless. *See* FED. R. CIV. P. 26(a)(2)(B)(i); 37(c)(1).

Dr. Brunell's report and testimony is offered to rebut Plaintiffs' experts Dr. Cho, Dr. Warshaw, Dr. Niven, Dr. Handley, and Mr. Cooper.

a. Rebuttal to Dr. Cho

Dr. Brunell questions whether Dr. Cho's simulated maps "serve as a good basis for comparison to the actual map."[622] For various reasons, Dr. Brunell opines that Dr. Cho's maps cannot serve as a good comparison to the current map. He asserts that "all of Professor Cho's maps would likely be tossed" because they ***1059** do not perfectly equalize population.[623] For the reasons we explained earlier, *see supra* Section II.C.2., we do not find this critique persuasive. In brief, Dr. Cho's 1% population deviation does not alter or undermine her analysis of partisan outcomes. We further note this criticism, along with others, offered by Dr. Brunell seems to miss the point of Dr. Cho's simulated maps.[624] Dr. Cho's simulated maps are not offered as examples of maps that should be enacted by the State per se; rather, the simulated maps provide a baseline to compare the partisan outcomes between the current map and maps that incorporate only neutral criteria. Moreover, Dr. Brunell critiques Dr. Cho's failure to consider incumbent protection, and he testified that protecting incumbents is "automatically going to make all of her districts different from ... one of the main stated goals by the legislature here in Ohio."[625] We address this point in the context of evaluating the proof of partisan effect and considering Defendants' justifications for the map, *see infra* Section V.A.2.d. (addressing the problems with the incumbent-protection justification as applied to this case), and we observe again that Representative Huffman described incumbent protection as "subservient" to other criteria in the process of creating H.B. 319.[626]

622 Dkt. 246 (Brunell Trial Test. at 194).

623 Trial Ex. I-060 (Brunell Rep. at 2).

624 For example, Dr. Brunell criticizes Dr. Cho for not turning over any shape files that would visually display some of her maps. *Id.* ("It is ... highly unlikely that any of them would be considered by the legislature."); Dkt. 246 (Brunell Trial Test. at 197). Although it is true that Dr. Cho did not turn over "shape files," we credit Dr. Cho's report and testimony and find that her simulated maps serve their purpose as maps that incorporate only neutral criteria in order to assess expected partisan outcomes based on, for example, political geography.

625 Dkt. 246 (Brunell Trial Test. at 196–97).

626 *See* Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 19) (statement of Rep. Huffman). Dr. Brunell also criticizes Dr. Cho for failing to consider preserving the core of prior districts in her simulated maps. Trial Ex. I-060 (Brunell Rep. at

11); Dkt. 246 (Brunell Trial Test. at 204). But he also testified that this criterion is "part of protecting incumbents at one level," and he agreed that this criterion could appear as improperly partisan "since the Republicans were advantaged ahead of time or they had more seats before the last round of redistricting ... then that would carry through ... to the next round of redistricting." Dkt. 246 (Brunell Trial Test. at 205).

Dr. Brunell incorrectly reads Dr. Cho's histograms to "suggest[ ] that there are just a handful of different maps in Prof. Cho's exercises, each with hundreds of thousands of repetitions."[627] Dr. Cho responds in her rebuttal report that Dr. Brunell's inference is unsupported by the data provided: "none of these histograms can suggest anything about how many different maps are represented since two drastically different maps can have the same metrics.... The number of bars in the histograms has no relationship with the similarity of the maps."[628] Accordingly, we reject this critique by Dr. Brunell.

627 Trial Ex. I-060 (Brunell Rep. at 5); *see also id.* at 4 (lodging the same critique at the fact that Dr. Cho's simulated maps produced three concentrated percentages of BVAPs, and concluding that "at least for this variable, there are really slight variations on three different districts").

628 Trial Ex. P088 (Cho Rebuttal Rep. at 14–15).

Next, Dr. Brunell disagrees with Dr. Cho's conclusion that the current map is not responsive to voters. Instead, he "would characterize Prof. Cho [sic] simulated maps as hyper-responsive."[629] He ***1060** further offered his normative view that responsiveness is not necessarily a positive feature of a map because "[m]assive volatility in the seat shares of the two parties is probably not conducive to good public policy."[630] As a basis for his conclusions on responsiveness, Dr. Brunell partly relied on "an old article by Edward Tufte, who was one of the first people to ... talk about these two metrics of swing ratio and bias" (which are related to responsiveness).[631] In fact, the article is from the early 1970s, and the data provided are for Great Britain, New Zealand, the United States generally, Michigan, New Jersey, and New York.[632] Importantly, much of the data *precede* the one-person, one-vote cases decided in the early-to-mid-1960s—an era in which districts were malapportioned. Tufte also used a linear fit of the data, not a seats-votes curve like Dr. Cho, which is a different model with different underlying assumptions.[633] Because Dr. Brunell's critique is based in on an inapt comparison, we give it little to no weight.

629 Trial Ex. I-060 (Brunell Rep. at 7).

630 *Id.*

631 Dkt. 246 (Brunell Trial Test. at 218).

632 Trial Ex. I-060 (Brunell Rep. at 9, tbl. 1).

633 Trial Ex. P088 (Cho Rebuttal Rep. at 15).

Lastly, Dr. Brunell misunderstands the point of Dr. Cho's individual Plaintiff-specific analyses. He takes issue with the fact that, because some Plaintiffs end up in the same district under Dr. Cho's simulated maps, "we cannot know what the partisanship of all 16 of the districts looks like" in the simulated maps.[634] As Dr. Cho responds, this specific analysis "was never intended for this purpose, and [she] never suggested that the plaintiff data could be or should be used in this way."[635] We agree. Dr. Cho's Plaintiff-specific analysis provides a comparison between *each Plaintiff's* current district and *each Plaintiff's* set of simulated districts, and this analysis is thus some evidence of whether Plaintiffs currently live in a packed or cracked district. The Plaintiff-specific analysis is just that, Plaintiff-specific; it does not compare the current map as a whole to the set of simulated maps as a whole. Dr. Cho has made such a comparison in a separate analysis.

634 *Id.* at 9; *see also id.* at 9–11.

635 Trial Ex. P088 (Cho Rebuttal Rep. at 5).

b. Rebuttal to Dr. Warshaw

Dr. Brunell's critique of Dr. Warshaw's metrics focuses only on the efficiency gap. First, Dr. Brunell points out supposed issues with using actual congressional elections to calculate the efficiency gap, including uncontested elections and the variability of candidates.[636] Dr. Warshaw acknowledges some drawbacks in his report, but he also explains that "[i]n practice, ... both legislative races and other statewide races produce similar efficiency gap results for modern elections where voters are well sorted by party and ideology."[637] We do not find unreasonable Dr. Warshaw's use of actual congressional election results to calculate the efficiency gap in congressional elections.[638] Second, Dr. Brunell quibbles

with the efficiency gap's definition of wasted votes, ***1061** stating that "[i]t is not clear why *all votes* for the winning candidate greater than the total number of votes for the losing candidate are not classified as wasted."[639] Dr. Warshaw, however, explains in his rebuttal the logic behind the definition of wasted votes, a term of art in the context of the efficiency gap—only "50%+1 of the total votes, rather than 1 more vote than the losing candidate's current vote tally, are needed to win a counter-factual election" and therefore the efficiency gaps considers wasted votes for the winning candidate beyond that 50%+1.[640] Dr. Brunell's critique does not thread the needle, telling us why the generally-accepted definition of wasted votes from the efficiency gap literature poses a problem for measuring the extent of a partisan gerrymander. Accordingly, it does not impact our view of the helpfulness of the efficiency gap as a tool. Third, according to Dr. Brunell, "[i]t is hard to say how much of a gap is too much. Is five too much, or seven, or ten?"[641] Furthermore, he criticizes the metric's variability across elections.[642] While these criticisms have some merit, they do not overcome Dr. Warshaw's use of other metrics and how Dr. Warshaw holistically determines whether a map is a gerrymander (e.g., a map must also be an outlier). *See supra* Section II.C.1. Accordingly, we find that Dr. Brunell does not undermine Dr. Warshaw's conclusions or the usefulness of the efficiency gap.

636 Trial Ex. I-060 (Brunell Rep. at 12–13).

637 Trial Ex. P571 (Warshaw Rep. at 6–7 n.5).

638 Indeed, as Dr. Warshaw testified at trial, although he used congressional election results, other election results would "yield very similar answers ... [b]ecause the voters are cleanly sorted into parties and they typically vote the same way for different offices, the correlation between congressional election results and presidential election results is about .9." Dkt. 241 (Warshaw Trial Test. at 34).

639 Trial Ex. I-060 (Brunell Rep. at 14).

640 Trial Ex. P572 (Warshaw Rebuttal Rep. at 5).

641 Trial Ex. I-060 (Brunell Rep. at 14).

642 *Id.*

c. Rebuttal to Dr. Niven

The thrust of Dr. Brunell's response to Dr. Niven is that "when electoral boundaries are being drawn some cities, counties, communities, neighborhoods have to be divided" and "[t]he boundaries have to go somewhere ...."[643] Although that may be true as a general proposition, it does not respond to Dr. Niven's findings that the divisions imposed by the current map are more likely to be imposed on Democratic voters than Republican voters. *See supra* Section II.C.3. Dr. Brunell also comments on some conceptions of communities of interest used by Dr. Niven, noting that "[t]here is no clear definition of what constitutes a community of interest, but cities and counties are generally characterized as such[.]"[644]

643 *Id.* at 16–17.

644 *Id.* at 16.

d. Rebuttal to Dr. Handley

Dr. Brunell's rebuttal to Dr. Handley does not contain any criticisms. His report simply states: "It is interesting to note that Dr. Handley recommended a majority African American district of over 61 percent BVAP in a recent lawsuit in Euclid, Ohio, which is in Cuyahoga County ...."[645] We find this statement entirely unhelpful. That case addressed a non-partisan election and required a different jurisdiction-specific analysis, and Dr. Brunell agreed that to do a proper assessment of racially polarized voting in this case would require looking at partisan election outcomes.[646] He also admitted that "[i]n the current District 11, [he] think[s] that Dr. Handley's advice of 45 percent [BVAP] is correct .... That's not for Cuyahoga County. That's for Congressional District ***1062** 11."[647]

645 *Id.* at 18.

646 Dkt. 247 (Brunell Trial Test. at 94).

647 *Id.* at 95.

e. Rebuttal to Mr. Cooper

Likewise, Dr. Brunell's rebuttal to Mr. Cooper does not contain any helpful critiques. He simply concludes that "[i]t isn't clear why the policy decisions of Mr. Cooper are better for the citizens of Ohio than the combined policy preferences of the state legislature."[648] He also states that "[i]t is worth noting" that the Proposed Remedial Plan pairs more incumbents.[649] The whole question in this case is not whether, in a vacuum, Mr. Cooper's maps are "better"

than the 2012 map but whether the current map enacted by the State in H.B. 369 is constitutional. If not, the Proposed Remedial Plan is offered as a possible remedy to replace an unconstitutional partisan gerrymander. We therefore reject Dr. Brunell's critiques of Mr. Cooper.

[648] Trial Ex. I-060 (Brunell Rep. at 19).

[649] *Id.*

III. STANDING

Before turning to the merits of this case, we must address two threshold issues. First, we address Plaintiffs' standing to bring these claims. That is, are these the right Plaintiffs to bring these claims? Second, in the next Part, we will turn to the justiciability of partisan-gerrymandering claims. That is, are courts, rather than another branch of government, the proper forum to hear these claims?

To establish standing, Plaintiffs must show: (1) "an injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is "likely ... that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks omitted). At least one "plaintiff must demonstrate standing for each claim ... press[ed] and for each form of relief that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008); *see also Town of Chester v. Laroe Estates, Inc.*, —— U.S. ——, 137 S.Ct. 1645, 1651, 198 L.Ed.2d 64 (2017). These requirements ensure that plaintiffs who invoke a federal court's jurisdiction have "a personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and that the federal court does not become "a forum for generalized grievances ...." *Lance v. Coffman*, 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007).

For the reasons that follow, we conclude that each individual Plaintiff and each organizational Plaintiff has standing to bring their district-specific vote-dilution claims. We further conclude that the individual Plaintiffs and organizational Plaintiffs have standing to bring their statewide First Amendment associational claim. Because Plaintiffs have standing for their claims that H.B. 369 violates the First and Fourteenth Amendments, they also have standing to pursue their claim that H.B. 369 exceeds the State's powers under Article I. Before turning to these standing analyses, we emphasize that just because Plaintiffs have suffered an "injury in fact" for standing purposes does not mean that they necessarily succeed on the merits; in other words, showing "a personal stake in the outcome of the controversy," *Baker*, 369 U.S. at 204, 82 S.Ct. 691, does not guarantee an outcome in one's favor. Plaintiffs support with admissible evidence their contentions that they have suffered an injury in fact; for standing purposes, that is enough. We address fully whether the evidence ***1063** is sufficient to prove Plaintiffs' claims in our discussion of the merits.

A. Vote-Dilution Claims

To establish standing for their vote-dilution claims, the individual Plaintiffs must each establish that they live in an allegedly gerrymandered district just as in the racial-gerrymandering context. *See Gill v. Whitford*, —— U.S. ——, 138 S.Ct. 1916, 1930, 201 L.Ed.2d 313 (2018) ("A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.' " (quoting *United States v. Hays*, 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995))). In pursuing these claims, we recognize that, as in other redistricting cases, "[v]oters, of course, can present statewide *evidence* in order to prove ... gerrymandering in a particular district." *Ala. Legislative Black Caucus v. Alabama*, —— U.S. ——, 135 S.Ct. 1257, 1265, 191 L.Ed.2d 314 (2015). Each individual Plaintiff and district will be addressed in turn.

1. District 1: Linda Goldenhar

Linda Goldenhar has lived at her current address and voted in District 1 for seventeen years.[650] Goldenhar has voted in every congressional and presidential election in Ohio since 1992, and in each of these elections, she has voted for a Democratic candidate.[651] Representative Chabot, a Republican, has represented District 1 since winning election in 1994, except in 2008 when Representative Chabot lost to Steve Driehaus; after that, Representative Chabot defeated Representative Driehaus in 2010. Goldenhar thus lives in a district that allegedly cracks Democratic voters, and she is a Democratic voter.

[650] Dkt. 230-15 (Goldenhar Dep. at 7).

[651] *Id.* at 11–13.

Admissible evidence supports Goldenhar's contention that District 1 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 95.6% of them would have placed Plaintiff Goldenhar in a district that would have provided a higher likelihood of electing a Democrat." [652] Therefore, Goldenhar's district is more Republican than the vast majority of the alternate, simulated, non-partisan districts that she could live in, which indicates that her district is cracked. Under the Proposed Remedial Plan, Goldenhar would remain in District 1. The Proposed Remedial Plan's District 1 is more competitive than the current District 1, and in 2018, a Democratic candidate would have won District 1 with 57.2% of the vote. [653]

652 Trial Ex. P087 (Cho Rep. at 13).

653 *See* Trial Ex. P598 (Cooper Third Suppl. Decl. at 4, fig. 2). Figure 2 shows two competitive elections under the Proposed Remedial Plan, both of which would be won by the Republican candidate; one election in which a Democratic candidate would receive 44.3% of the vote; and one election won by the Democratic candidate with 57.2% of the vote. The 2012 plan, by contrast, has one competitive election, in which the Democratic candidate received 47.8% of the vote; the next closest election was in 2016, in which the Democratic candidate received 40.7%.

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Goldenhar has standing for her vote-dilution claim.

2. District 2: Douglas Burks

Douglas Burks has lived at his current address and voted in District 2 since the enactment of the 2012 plan. [654] Burks has voted in every election since the enactment ***1064** of the 2012 plan, and he has identified as a Democrat since 1980. [655] Representative Wenstrup, a Republican, has represented District 2 since 2012. Burks thus lives in a district that allegedly cracks Democratic voters, and he is a Democratic voter.

654 Dkt. 239 (Burks Trial Test. at 225).

655 *See id.*

Admissible evidence supports Burks's contention that District 2 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 99.87% of them would have placed Plaintiff Burks in a district that would have provided a higher likelihood of electing a Democrat." [656] Therefore, Burks's district is more Republican than the vast majority of the alternate, simulated, non-partisan districts that he could live in, which indicates that his district is cracked. Under the Proposed Remedial Plan, Burks would be placed in District 1 (with Goldenhar, *see supra*), which is considerably more competitive than the current District 2. [657]

656 Trial Ex. P087 (Cho Rep. at 14).

657 *See* Trial Ex. P598 (Cooper Third Suppl. Decl. at 4, fig. 2).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Burks has standing for his vote-dilution claim.

3. District 3: Sarah Inskeep

Sarah Inskeep has lived at her current address and voted in District 3 since 2016. [658] Prior to that, Inskeep lived in Cincinnati, where she grew up and attended college. [659] Inskeep is a Democratic voter. [660] Representative Joyce Beatty, a Democratic Congresswoman, has represented District 3 since 2012. Inskeep thus lives in a district that allegedly packs Democratic voters, and she is a Democratic voter.

658 *See* Dkt. 230-21 (Inskeep Dep. at 6–7, 28–29).

659 *Id.* at 7–8.

660 *Id.* at 53–54.

Admissible evidence supports Inskeep's contention that District 3 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, none of them would have placed Plaintiff Inskeep in a district that would have provided a higher likelihood of electing a Democrat." [661] Therefore, Inskeep's district is more Democratic than all the alternate, simulated, non-partisan districts that she could live in, which indicates that her district is packed. Under the Proposed Remedial Plan, Inskeep would remain in District 3. The Proposed Remedial Plan's District 3, though still safely

Democratic, produces a Democratic vote share ranging from 58.2% in 2014 to 68.3% in 2018, compared to the 63.6% (2014) to 73.6% (2018) under the current map. [662]

661 Trial Ex. P087 (Cho Rep. at 15).

662 Trial Ex. P598 (Cooper Third Suppl. Decl. at 4, fig. 2). Figure 2 shows that, under the current plan, the Democratic vote share exceeds 70% in 2012 and 2018. Under the Proposed Remedial Plan, these percentages are 66.9% for 2012 and 68.3% for 2018.

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Inskeep has standing for her vote-dilution claim.

4. District 4: Cynthia Libster

Cynthia Libster has lived at her current address and voted in District 4 for almost thirty years. [663] Libster is a lifelong Democratic voter. [664] Representative Jordan, a Republican, has represented District 4 since winning election in 2006. Libster thus lives in a district that allegedly cracks ***1065** Democratic voters, and she is a Democratic voter.

663 *See* Dkt. 230-30 (Libster Dep. at 9–10).

664 *Id.* at 54–55.

Admissible evidence supports Libster's contention that District 4 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 98.25% of them would have placed Plaintiff Libster in a district that would have provided a higher likelihood of electing a Democrat." [665] Therefore, Libster's district is more Republican than the vast majority of alternate, simulated, non-partisan districts that she could live in, which indicates that her district is cracked.

665 Trial Ex. P087 (Cho Rep. at 16).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Libster has standing for her vote-dilution claim.

5. District 5: Kathryn Deitsch

Kathryn Deitsch has lived in District 5 since 2013. [666] Deitsch has affiliated with the Democratic Party since she "was first able to vote." [667] Representative Latta, a Republican, has represented District 5 since before the enactment of the current plan. Deitsch thus lives in a district that allegedly cracks Democratic voters, and she is a Democratic voter.

666 *See* Dkt. 230-11 (Deitsch Dep. at 14).

667 *Id.* at 19.

Admissible evidence supports Deitsch's contention that District 5 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 95.45% of them would have placed Plaintiff Deitsch in a district that would have provided a higher likelihood of electing a Democrat." [668] Therefore, Deitsch's district is more Republican than the vast majority of alternate, simulated, non-partisan districts that she could live in, which indicates that her district is cracked.

668 Trial Ex. P087 (Cho Rep. at 17).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Deitsch has standing for her vote-dilution claim.

6. District 6: LuAnn Boothe

LuAnn Boothe has lived at her current address for thirty-four years and voted in District 6 throughout the entirety of the current plan. [669] Boothe has always been a Democratic voter. [670] Representative Johnson, a Republican, has represented District 6 since 2011, after defeating then-incumbent Representative Wilson (a Democratic Congressman) in 2010. Boothe thus lives in a district that allegedly cracks Democratic voters, and she is a Democratic voter.

669 Dkt. 230-6 (Boothe Dep. at 7–8).

670 *Id.* at 21. Boothe voted for a Republican once, but she "learned her lesson" and doesn't "think [she] would ever do it again. It would have to be an extreme circumstance ...." *Id.* at 49, 90.

Admissible evidence supports Boothe's contention that District 6 is gerrymandered. Dr. Cho's analysis shows that

"[a]mong the set of simulated maps, 100% of them would have placed Plaintiff Boothe in a district that would have provided a higher likelihood of electing a Democrat."[671] Therefore, Boothe's district is more Republican than all the alternate, simulated, non-partisan districts that she could live in, which indicates that her district is cracked.

671 Trial Ex. P087 (Cho Rep. at 18).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Boothe has standing for her vote-dilution claim.

7. District 7: Mark Griffiths

Mark Griffiths has lived at his current address for almost sixteen years and has ***1066** voted in District 7 since the enactment of the 2012 plan.[672] Griffiths is a registered Democrat and has always voted for the Democratic candidate for Congress.[673] Representative Gibbs, a Republican, began representing District 7 when the current plan was enacted.[674] Griffiths was previously represented by then-Congresswoman Betty Sutton and, prior to that, then-Congressman Sherrod Brown, both Democrats. Griffiths thus lives in a district that allegedly cracks Democratic voters, and he is a Democratic voter.

672 Dkt. 240 (Griffiths Trial Test. at 40).

673 *Id.* at 40–42. Griffiths voted Republican once, in the 2016 Senate race. *Id.* at 41–42.

674 *Id.* at 40. The Court takes judicial notice of the fact that Representative Gibbs previously served in Congress for District 18, which was eliminated due to Ohio losing two seats in Congress after the 2010 census. FED. R. EVID. 201.

Admissible evidence supports Griffiths's contention that District 7 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 100% of them would have placed Plaintiff Griffiths in a district that would have provided a higher likelihood of electing a Democrat."[675] Therefore, Griffiths's district is more Republican than all the alternate, simulated, non-partisan districts that he could live in, which indicates that his district is cracked. Under the Proposed Remedial Plan, Griffiths would be placed in District 9, a competitive district that would have elected a Democratic candidate in 2012 and 2018 and a Republican candidate in 2014 and 2016.[676]

675 Trial Ex. P087 (Cho Rep. at 19).

676 *See* Trial Ex. P598 (Cooper Third Suppl. Decl. at 4, fig. 2).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Griffiths has standing for his vote-dilution claim.

8. District 8: Lawrence Nadler

Lawrence Nadler has lived at his current address, located in District 8, for twenty-six years.[677] Nadler affiliates with the Democratic Party and votes for Democratic candidates.[678] Representative Davidson, a Republican, has represented District 8 since 2016 after then-Speaker of the U.S. House of Representatives John Boehner resigned his seat. Nadler thus lives in a district that allegedly cracks Democratic voters, and he is a Democratic voter.

677 Dkt. 230-36 (Nadler Dep. at 6–7).

678 *Id.* at 8.

Admissible evidence supports Nadler's contention that District 8 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 100% of them would have placed Plaintiff Nadler in a district that would have provided a higher likelihood of electing a Democrat."[679] Therefore, Nadler's district is more Republican than all the alternate, simulated, non-partisan districts that he could live in, which indicates that his district is cracked.

679 Trial Ex. P087 (Cho Rep. at 20).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Nadler has standing for his vote-dilution claim.

9. District 9: Tristan Rader and Chitra Walker

First, Tristan Rader has lived at his address since October 2013 and, after moving to his current address, has voted in District 9 in every election.[680] Rader generally votes for

Democratic candidates and ***1067** he has been involved in several Democratic campaigns.[681] Representative Kaptur, a Democratic Congresswoman, has represented District 9 since the current plan was enacted and she was first elected to Congress in 1982. At the time of the 2012 plan's enactment, Representative Kaptur was Ohio's longest-serving member of Congress. Rader thus lives in a district that allegedly packs Democratic voters, and he is a Democratic voter.

680 Dkt. 230-40 (Rader Dep. at 8–9, 13)

681 *Id.* at 18; *see also, e.g.*, *id.* at 29–30.

Admissible evidence supports Rader's contention that District 9 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 13.55% of them would have placed Plaintiff Rader in a district that would have provided a higher likelihood of electing a Democrat."[682] Therefore, Rader's district is more Democratic than the vast majority of the alternate, simulated, non-partisan districts that he could live in, which indicates that his district is packed. Under the Proposed Remedial Plan, Rader would be placed in the new District 9 (with Griffiths, *see supra*).

682 Trial Ex. P087 (Cho Rep. at 22).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Rader has standing for his vote-dilution claim.

Second, Chitra Walker also lives in District 9 and has lived at a few addresses throughout the district since 2008.[683] Walker is a Democratic voter.[684] Walker thus lives in a district that allegedly packs Democratic voters, and she is a Democratic voter.

683 Dkt. 230-50 (Walker Dep. at 8–9).

684 *Id.* at 11, 28.

Admissible evidence supports Walker's contention that District 9 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 15.91% of them would have placed Plaintiff Walker in a district that would have provided a higher likelihood of electing a Democrat."[685] Therefore, Walker's district is more Democratic than the vast majority of the alternate, simulated, non-partisan districts that she could live in, which indicates that her district is packed. Under the Proposed Remedial Plan, Walker would also be placed in the new District 9 (with Rader and Griffiths, *see supra*).

685 Trial Ex. P087 (Cho Rep. at 21).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Walker has standing for her vote-dilution claim.

10. District 10: Ria Megnin

Ria Megnin has lived at her current address and voted in District 10 since 2012.[686] Megnin is affiliated with the Democratic Party and votes for Democratic candidates.[687] Representative Turner, a Republican, has represented District 10 since the enactment of the current plan and has served in Congress for sixteen years. Megnin thus lives in a district that allegedly cracks Democratic voters, and she is a Democratic voter.

686 Dkt. 230-32 (Megnin Dep. at 9, 13).

687 *Id.* at 68, 71–72.

Admissible evidence supports Megnin's contention that District 10 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 99.75% of them would have placed Plaintiff Megnin in a district that would have provided a higher likelihood of electing a Democrat."[688] Therefore, Megnin's district is more Republican than almost all of the ***1068** alternate, simulated, non-partisan districts that she could live in, which indicates that her district is cracked.

688 Trial Ex. P087 (Cho Rep. at 23).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Megnin has standing for her vote-dilution claim.

11. District 11: Andrew Harris

Andrew Harris has lived in what is now District 11 since 1997 and been voting since he turned eighteen years old in 2008.[689] Harris is a registered Democratic voter and always votes for Democratic candidates.[690] Representative Fudge, a Democratic Congresswoman, represents District 11 and

has served in Congress since 2008. Harris thus lives in a district that allegedly packs Democratic voters, and he is a Democratic voter.

689 Dkt. 230-17 (Harris Dep. at 7–8, 10).

690 *Id.* at 10.

Admissible evidence supports Harris's contention that District 11 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, none of them would have placed Plaintiff Harris in a district that would have provided a higher likelihood of electing a Democrat." [691] Therefore, Harris's district is more Democratic than all of the alternate, simulated, non-partisan districts that he could live in, which indicates that his district is packed.

691 Trial Ex. P087 (Cho Rep. at 24).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Harris has standing for his vote-dilution claim.

12. District 12: Aaron Dagres

Aaron Dagres has lived at his current address and voted in District 12 for about eight years. [692] Dagres is a registered Democratic voter and has always voted for Democratic candidates, except in a 2012 presidential primary that was not contested on the Democratic side. [693] Representative Balderson, a Republican, first won election in a 2018 special election and then went on to win the general election; Representative Balderson replaced Representative Tiberi (also a Republican), an incumbent at the time of the current plan's enactment. Dagres thus lives in a district that allegedly cracks Democratic voters, and he is a Democratic voter.

692 Dkt. 240 (Dagres Trial Test. at 84–85).

693 *Id.* at 85.

Admissible evidence supports Dagres's contention that District 12 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 100% of them would have placed Plaintiff Dagres in a district that would have provided a higher likelihood of electing a Democrat." [694] Therefore, Dagres's district is more Republican than all the alternate, simulated, non-partisan districts that he could live in, which indicates that his district is cracked. Under the Proposed Remedial Plan, Dagres would be placed in a new District 12, which mostly remains a safe-Republican district, but Democratic candidates would receive a higher vote share. [695] In 2018, the Democratic candidate would have won remedial District 12. [696]

694 Trial Ex. P087 (Cho Rep. at 25).

695 *See* Trial Ex. P598 (Cooper Third Suppl. Decl. at 4, fig. 2).

696 *See id.*

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Dagres has standing for his vote-dilution claim.

*1069 *13. District 13: Elizabeth Myer*

Elizabeth Myer has lived at her current address, located in the current District 13, for over twenty years. [697] Myer is a registered Democratic voter and votes for Democratic candidates. [698] Representative Ryan, a Democratic Congressman, has represented District 13 since the current plan's enactment and he was an incumbent at that time. Myer thus lives in a district that allegedly packs Democratic voters, and she is a Democratic voter.

697 Dkt. 240 (Myer Trial Test. at 112–13).

698 *Id.* at 115.

Admissible evidence supports Myer's contention that District 13 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, none of them would have placed Plaintiff Myer in a district that would have provided a higher likelihood of electing a Democrat." [699] Therefore, Myer's district is more Democratic than all the alternate, simulated, non-partisan districts that she could live in, which indicates that her district is packed. Under the Proposed Remedial Plan, Myer would be placed in a new District 13, a Democratic-leaning but fairly competitive district. [700] The remedial District 13 would have consistently elected a Democratic candidate from 2012 to 2018, but the Democratic vote share is lower, and the 2016 (54.2% Democratic vote share) and 2018 (51.4% Democratic vote share) would have been competitive. [701]

699 Trial Ex. P087 (Cho Rep. at 26).

700 *See* Trial Ex. P598 (Cooper Third Suppl. Decl. at 4, fig. 2).

701 *See id.* No elections in this district under the current plan were competitive.

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Myer has standing for her vote-dilution claim.

14. District 14: Beth Hutton

Beth Hutton has lived at her current address, located in District 14, for over thirty years.[702] Hutton has voted in almost every single U.S. congressional race since 1972.[703] She always votes in the Democratic primaries and typically votes for Democratic candidates at the federal level, with the exception of voting for Representative Steve LaTourette (a Republican) the first time he ran.[704] Representative Joyce, a Republican, began representing District 14 in 2013 after Representative LaTourette retired. Hutton thus lives in a district that allegedly cracks Democratic voters, and she is a Democratic voter.

702 Dkt. 230-20 (Hutton Dep. at 8–10).

703 *Id.* at 12.

704 *Id.* at 12–16.

Admissible evidence supports Hutton's contention that District 14 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 100% of them would have placed Plaintiff Hutton in a district that would have provided a higher likelihood of electing a Democrat."[705] Therefore, Hutton's district is more Republican than all the alternate, simulated, non-partisan districts that she could live in, which indicates that her district is packed. Under the Proposed Remedial Plan, Hutton would be placed in District 13 (with Myer, *see supra*).

705 Trial Ex. P087 (Cho Rep. at 27).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Hutton has standing for her vote-dilution claim.

15. District 15: Theresa Thobaben

Teresa Thobaben has lived at her current address, located in District 15, for ***1070** thirty-seven years.[706] Thobaben has voted in every congressional election that she can recall since her first election in 1972.[707] Thobaben has always considered herself a Democrat and consistently voted for Democratic candidates.[708] Representative Stivers, a Republican, has represented District 15 since 2010 after defeating then-incumbent Democratic Representative Mary Jo Kilroy (in the former District 15). Thobaben thus lives in a district that allegedly cracks Democratic voters, and she is a Democratic voter.

706 Dkt. 220-48 (Thobaben Dep. at 8–9).

707 *Id.* at 9–11.

708 *Id.* at 11.

Admissible evidence supports Thobaben's contention that District 15 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 79.28% of them would have placed Plaintiff Thobaben in a district that would have provided a higher likelihood of electing a Democrat."[709] Therefore, Thobaben's district is more Republican than the vast majority of alternate, simulated, non-partisan districts that she could live in, which indicates that her district is packed.

709 Trial Ex. P087 (Cho Rep. at 28).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Thobaben has standing for her vote-dilution claim.

16. District 16: Constance Rubin

Constance Rubin has lived at and voted in District 16 for the past eight years.[710] Rubin has been a Democratic voter since at least 1984, though she formerly voted Republican when she first registered to vote in 1973.[711] Now former-Representative Jim Renacci, a Republican, had represented District 16 since 2011 after beating then-Democratic incumbent Congressman John Boccieri in the 2010 election; in January 2019, Representative Anthony

Gonzalez, a Republican, began serving as the Congressman for District 16. [712] Rubin thus lives in a district that allegedly cracks Democratic voters, and she is a Democratic voter.

710 Dkt. 230-42 (Rubin Dep. at 7–8).

711 *Id.* at 16, 23–24. Rubin says that it is "[h]ighly doubtful" that she would vote for a Republican again, *id.* at 24–25, and Rubin has been a member of the Stark County Democratic Party since 1984 and served on its Central Committee from 2004 to 2010, *id.* at 16.

712 The Court takes judicial notice of this fact. FED. R. EVID. 201.

Admissible evidence supports Rubin's contention that District 16 is gerrymandered. Dr. Cho's analysis shows that "[a]mong the set of simulated maps, 100% of them would have placed Plaintiff Rubin in a district that would have provided a higher likelihood of electing a Democrat." [713] Therefore, Rubin's district is more Republican than all alternate, simulated, non-partisan districts that she could live in, which indicates that her district is packed.

713 Trial Ex. P087 (Cho Rep. at 29).

For these reasons, and for the reasons below that apply to all Plaintiffs, we find that Plaintiff Rubin has standing for her vote-dilution claim.

17. Statewide Evidence of Injury in Fact and Causation

Statewide evidence bolsters each individual Plaintiff's contention that the current map was drawn with the predominant purpose of packing or cracking Democratic voters in each district and had that effect. As explained above, Dr. Warshaw employed four partisan-bias metrics to ***1071** measure the partisan advantage of the current plan: the efficiency gap, the mean-median gap, two partisan symmetry metrics, and declination. [714] Based on his analysis of these measures, Dr. Warshaw concluded that "Democratic voters in Ohio are efficiently packed and cracked across districts.... As a result, Ohio's elections are unresponsive to normal shifts in voters' preferences within the historical range of congressional election results in Ohio." [715] Notably, these effects align with the map drawers' own statements that "it is a tall order to draw 13 'safe' seats," and their thoughts that "this map is the one [that] put the most number of seats in the safety zone given the political geography of [Ohio] ...." [716] That is, the map efficiently packs and cracks each and every district in an effort to favor Republican candidates to the fullest and most durable extent possible.

714 *See* Trial Ex. P571 (Warshaw Rep. at 5–13).

715 *Id.* at 4.

716 *See* Trial Ex. P385 (Congressional Redistricting Talking Points at LWVOH_0052438).

The individual Plaintiffs present other evidence of causation as well. Dr. Cho's analysis shows that although "a 12-4 seat share [the outcome of every election under the 2012 plan] is possible, ... it is unusual given a map creation process that does not consider partisanship." [717] In her initial report, Dr. Cho's maps were based on 2008 and 2010 election data, which showed that "*none* of [her simulated maps] had the same 12-4 seat share as in the challenged map." [718] In her supplemental report, in which Dr. Cho uses the 2018 election data, only 0.046% of the over 3-million simulated maps (i.e., 1,445 out of 3,037,645) produce the same 12-4 seat share. [719] Moreover, Mr. Cooper's Proposed Remedial Plan splits fewer counties and adheres to traditional redistricting principles ("one-person-one-vote, incumbent non-pairing where possible, compactness, contiguity, the non-dilution of minority voting strength, and respect for communities of interest"). [720] Dr. Warshaw bolsters these findings by comparing the partisan-bias metrics from elections under the current plan to those under historical elections and concluding that the current plan's partisan bias is extreme. [721] The alternative maps (both the simulations and Mr. Cooper's maps) and Ohio's own historical maps thus provide baselines against which to measure the extremity of this map's partisan bias; collectively, this evidence establishes causation for standing purposes.

717 Trial Ex. P087 (Cho Rep. at 40).

718 *Id.* (emphasis added); *see also id.* at 33–37 (analyzing competitiveness and concluding that the simulated maps are more competitive than the current map, thus providing evidence that the current map packs and cracks voters).

719 Trial Ex. P426 (Cho Suppl. Rep. at 3).

720 *See* trial Ex. P090 (Cooper Decl. at 11, 14–18); *see also* Trial Ex. P092 (Cooper Suppl. Decl.) (providing hypothetical maps that pair the same number of incumbents and in the same configuration (a Republican pairing, a Democratic pairing, and a Democratic candidate versus a Republican candidate) as the 2012 plan but are similar in demographic and partisan measures to the Proposed Remedial Plan).

721 *See* Trial Ex. P571 (Warshaw Rep. at 21–27); Trial Ex. P476 (Warshaw 2018 Update at 6–8).

18. Redressability

Plaintiffs request injunctive relief that prohibits the State from conducting future elections under the current map. They further request that a non-gerrymandered map be implemented in its place.

***1072** Clearly, the Court can enjoin future use of the 2012 map. Further, it is possible to enact a non-gerrymandered map for the upcoming election. The Proposed Remedial Plan offers just one possible example of such a non-gerrymandered map that could replace the current map. [722] Dr. Warshaw concludes that, using the same partisan-bias metrics that he used to analyze the current map, "the remedial plan ... displays very low levels of partisan bias and high levels of responsiveness. Thus, [Dr. Warshaw] believe[s] that the remedial plan would improve the representational link between voters and Ohio's members of Congress." [723] In other words, the Proposed Remedial Plan is one example of a map that unpacks and uncracks Plaintiffs, permitting their votes to carry more weight and thereby remedying the injury caused by the 2012 map. *See Gill*, 138 S.Ct. at 1931. Dr. Cho's simulations also show that, for each individual Plaintiff, many possible districts exist in which Plaintiffs' votes would carry more weight because the districts are neither packed nor cracked. [724] Thus, Plaintiffs' injuries are redressable.

722 *See* Trial Ex. P091 (Cooper Errata at 2, fig. 1).

723 Trial Ex. P571 (Warshaw Rep. at 43).

724 *See generally* Trial Ex. P087 (Cho Rep. at 13–29); *see also* Trial Ex. P426 (Cho Suppl. Rep. at 3–4) (showing that, using data from across election cycles, the simulated maps contain more competitive districts and that H.B. 369 is an outlier compared to the simulated maps in terms of how many seats Republicans win).

19. Organizational Plaintiffs

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Common Cause v. Rucho*, 318 F.Supp.3d 777, 827 (M.D.N.C. 2018) (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).

As discussed in the summaries of their testimony, Plaintiffs APRI and the League are both non-partisan organizations. APRI and the League aim to encourage voter engagement and effective and educated voting. The League has also made significant efforts to study and curb partisan gerrymandering, for example commissioning a study on the creation of the 2012 map. [725] APRI has put forth evidence that it has Democratic-voting members who live at least in Districts 5 (Stephanie White) and 12 (Andre Washington). The discussion above in the individual-Plaintiff sections shows that there is evidence, sufficient for standing purposes, that both of those districts dilute Democratic voters' votes. *See supra* Sections II.A.2., III.A.5., III.A.12. Similarly, the League has put forth evidence that it has at least one Democratic-voting member who lives in District 14 (John Fitzpatrick). The discussion above in the individual-Plaintiff sections shows that there is evidence, sufficient for standing purposes, that District 14 dilutes Democratic voters' votes. *See, e.g., supra* Sections II.A.2., III.A.14.

725 Dkt. 239 (Miller Trial Test. at 154–55, 156–57).

Plaintiffs NEOYBD, HCYD, and OSU College Democrats are all partisan organizations composed of members who vote for Democratic candidates. All three organizations work to educate and mobilize voters to support Democratic candidates, among other things. NEOYBD's Democratic ***1073** members live in Districts 9, 11, 13, and 14. HCYD's Democratic members live in Districts 1 and 2. OSU College Democrats' members live in Districts 3, 12, and 15. Evidence was presented at trial supporting the conclusion that each of these districts was intentionally gerrymandered for partisan gain. *See, e.g., supra* Sections III.A.1–3, III.A.9, III.A.11–15.

As previously discussed in the context of the individual Plaintiffs, evidence of causation and redressability pertaining to each of these districts was also introduced at trial.

We therefore conclude that APRI, at minimum, has associational standing to bring Fourteenth and First Amendment vote-dilution claims on behalf of its members to challenge Districts 5 and 12 as partisan gerrymanders. We conclude that the League, at minimum, has associational standing to bring Fourteenth and First Amendment vote-dilution claims on behalf of Fitzpatrick to challenge District 14 as a partisan gerrymander. *See Rucho*, 318 F.Supp.3d at 827 (finding that the League had standing to challenge North Carolina's District 9 because "League member Klenz live[d] in that district and testified to and provided evidence that her vote was diluted on the basis of invidious partisanship"); *see also League of Women Voters of Mich. v. Benson*, 373 F.Supp.3d 867, 933–34, 2019 WL 1856625, at *47 (E.D. Mich. Apr. 25, 2019) (concluding that the League had standing to challenge gerrymandered districts on behalf of its members based on similar evidence). Similarly, we conclude that the partisan organizational Plaintiffs have derivative standing to challenge the districts in which their members live. At minimum, we find that NEOYBD has standing to challenge Districts 9, 11, 13, and 14, that HCYD has standing to challenge Districts 1 and 2, and that OSU College Democrats has standing to challenge Districts 3, 12, and 15.

* * *

In sum, the individual Plaintiffs have presented enough evidence to show that they each have a personal stake in the case to satisfy standing requirements. There is some evidence that individual Plaintiffs actually live in packed or cracked districts and, consequently, they have suffered injuries in fact that are fairly traceable to the way in which the current map was drawn. Furthermore, the individual Plaintiffs have evidence of alternative maps, including the Proposed Remedial Plan and Dr. Cho's simulations, that show other possible districts exist in which the individual Plaintiffs' votes would not be diluted. The organizational Plaintiffs, for their part, represent members who, like the individual Plaintiffs, live in arguably packed and cracked districts. They have derivative standing to represent the interests of their members in a suit that is germane to their own interests and may rely on the same evidence of injury, causation, and redressability as do the individual Plaintiffs. Whether this evidence, along with Plaintiffs' other evidence, is enough to prove their claims on the merits will be addressed in Part V.

B. First Amendment Associational Claim

For Plaintiffs' First Amendment associational claim, statewide standing principles apply. To establish standing on this claim, the individual Plaintiffs must point to evidence of their membership in and activities supporting the Democratic Party; to establish an injury in fact, Plaintiffs must demonstrate that the gerrymandered map weakened their Party's ability to carry out its core functions and purposes. Importantly, the "[p]artisan-asymmetry ***1074** metrics such as the efficiency gap measure ... the effect that a gerrymander has on the fortunes of political parties." *Gill*, 138 S.Ct. at 1933. As such, "evidence of partisan asymmetry well fits a suit alleging associational injury" like this one. *Id.* at 1939 (Kagan, J., concurring). In *Gill*, the plaintiffs failed to establish standing under this theory because they "did not emphasize their membership in [the Democratic] [P]arty, or their activities supporting it." *Id.* Put another way, the concern for standing for this claim is whether the individual Plaintiffs are the sort of people who are politically engaged and actively work toward electing candidates of their party. If so, they have "a personal stake in the outcome of the controversy." *Baker*, 369 U.S. at 204, 82 S.Ct. 691.

As a threshold matter, the individual Plaintiffs fit this bill. *See supra* Section II.A.1. These Plaintiffs engage in a variety of get-out-the-vote, party-mobilization, fundraising, and other campaign and political activities. *See supra* Section II.A.1. There is also no serious dispute that nothing about the current map categorically prohibits Plaintiffs from engaging in these activities. *See Benson*, 373 F.Supp.3d at 953–54, 2019 WL 1856625, at *65 (reasoning that although the challenged map "does not categorically prevent Plaintiffs from engaging in political activity, ... 'constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights.' ") (citation omitted) (alteration in original). The issue, though, is whether these Plaintiffs are able "to associate for the advancement of [their] political beliefs ... [and are able] to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), or whether the redistricting plan "has the purpose and effect of burdening a group of voters' representational rights." *Vieth v. Jubelirer*, 541 U.S. 267, 314, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (Kennedy, J., concurring in the judgment); *see also Gill*, 138 S.Ct. at 1938 (Kagan, J., concurring); *Norman v. Reed*, 502 U.S. 279, 288, 112

S.Ct. 698, 116 L.Ed.2d 711 (1992) (noting the constitutional right derived from the First and Fourteenth Amendments to "advance[ ] the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences.") (collecting cases). So long as the 2012 map weakened their Party's ability to carry out its core functions and purposes, Plaintiffs have suffered an injury for their associational claim.

Here, Plaintiffs have presented evidence of partisan asymmetry to establish both an injury in fact and causation. Dr. Warshaw's analysis of the partisan-bias metrics concludes that "Ohio's congressional districts are unresponsive to changes in voters' preferences" and that this "pro-Republican advantage in congressional elections in Ohio causes Democratic voters to be effectively shut out of the political process in Congress."[726] Moreover, the partisan bias "has been durable between the 2012 and 2018 elections."[727] Actual election results also bear out an injury in fact. Despite Democrats winning between 39% and 47% of the statewide vote, Democratic candidates have won only 25% of Ohio's congressional elections under the current map; meanwhile, the Republican statewide vote share has fluctuated between 51% and 59%, but Republican candidates have won 75% of those elections. Part of Dr. Cho's analysis provides additional support, as she finds that "[i]n each of the simulation analyses [using data from the 2008-2018 ***1075** election cycles], 9 Republican seats is the common and expected outcome of a non-partisan map creation process."[728] Together, this evidence helps support, for standing purposes, the sort of long-lasting and substantial injury about which the First Amendment associational claim is concerned.

726 Trial Ex. P571 (Warshaw Rep. at 43).

727 Trial Ex. P476 (Warshaw 2018 Update at 1).

728 Trial Ex. P426 (Cho Suppl. Rep. at 3) ("In each of the simulation analyses [using data from the 2008-2018 election cycles], 9 Republican seats is the common and expected outcome of a non-partisan map creation process.").

Lastly, as with their vote-dilution claims, the individual Plaintiffs satisfy redressability as well. *See supra* Section III.A.18. In particular, Mr. Cooper's comparison of election results between the current plan and the Proposed Remedial Plan shows better responsiveness and more competitive seats are possible with a different map.

"An organization suffers an injury in fact when its mission is 'perceptibly impaired' by the challenged action, which it may show through a 'demonstrable injury to the organization's activities' and a 'consequent drain on the organization's resources.' " *League of Women Voters of Mich. v. Johnson*, 352 F.Supp.3d 777, 801 (E.D. Mich. 2018) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982)). Plaintiff organizations APRI and the League engage in voter education, registration, and get-out-the-vote efforts in furtherance of their beliefs in the importance of voters' participation in representational democracy. The League also puts on candidate forums, creates voter guides, answers voters' questions, and runs various other programs designed to encourage and facilitate informed and effective voting. APRI and the League presented evidence at trial supporting the conclusion that the 2012 map hinders their ability to advance their aims and "to associate for the advancement of political beliefs." *Williams*, 393 U.S. at 30, 89 S.Ct. 5. They offered evidence suggesting that the jagged lines of the 2012 map and its propensity to split communities of interest cause voter confusion, which saps their resources. Their members' testimony supported an inference that uncompetitive and unresponsive districts cause voter apathy in Ohio, making it more difficult for APRI and the League to register voters and get out the vote. Evidence was presented suggesting that noncompetitive districts may result in candidates declining to participate in candidate forums put on by the League. *See Rucho*, 318 F.Supp.3d at 831. Finally, Dr. Warshaw and Mr. Cooper's evidence, discussed above, applies uniformly here to support causation and redressability.

We conclude that APRI and the League have provided competent evidence to establish at least independent associational standing for their First Amendment associational claim based on the 2012 map's negative impact on their ability effectively to associate to advance their belief in active and informed voter participation in the democratic process. *See Benson*, 373 F.Supp.3d at 954–56, 2019 WL 1856625, at *66 (concluding, after reviewing similar evidence, and that the challenged plan "injured the League by engendering voter apathy that hampers the League's voter engagement, voter education, and get out the vote efforts; preventing the League from making progress on voting rights issues through legislative reforms; and making it difficult for

the League to secure Republican candidates' participation in candidate forums and voter education guides.").

With regard to the partisan organizational Plaintiffs, "[a]s Justice Kagan recognized in *Gill*, 'what is true for party members may be doubly true for party officials and triply true for the party itself ***1076** (or for related organizations).' " *Rucho*, 318 F.Supp.3d at 830 (quoting *Gill*, 138 S.Ct. at 1938 (Kagan, J., concurring)). Plaintiffs NEOYBD, HCYD, and OSU College Democrats presented evidence at trial showing that their organizational abilities are hindered by the 2012 map. They have had difficulty recruiting and retaining members due to the lack of competitive races and have had to dedicate limited resources to combatting voter apathy and confusion, which one could infer are worsened by uncompetitive and unresponsive districts. They have had difficulty fundraising, mobilizing voters, recruiting candidates, and winning elections. Dr. Warshaw's testimony, discussed above, demonstrates that the current map is highly uncompetitive and unresponsive. Mr. Cooper's testimony demonstrates that a non-gerrymandered map would result in more competitive elections, in which the Democratic organizations would be more able to mobilize and compete. We conclude that the partisan organizational Plaintiffs have standing to pursue their First Amendment associational claim.

C. Article I Claim

As we explained previously, a state necessarily exceeds its powers under Article I if it runs afoul of the First and Fourteenth Amendments. Plaintiffs have standing to pursue their First Amendment and Fourteenth Amendment claims. That is enough to establish that Plaintiffs have standing for their claim that the State has exceeded its powers under Article I.

IV. JUSTICIABILITY, THE POLITICAL QUESTION DOCTRINE, AND THE ROLE OF THE FEDERAL COURTS IN REDISTRICTING

A. Justiciability and The Political Question Doctrine

The Supreme Court has recognized that partisan gerrymandering is incompatible with democratic principles. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, —— U.S. ——, 135 S.Ct. 2652, 2658, 192 L.Ed.2d 704 (2015); *Vieth*, 541 U.S. at 292, 124 S.Ct. 1769 (plurality); *id.* at 316, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment); *see also id.* at 331, 124 S.Ct. 1769 (Stevens, J., dissenting) ("The problem, simply put, is that the will of the cartographers rather than the will of the people will govern."); *id.* at 345–46, 124 S.Ct. 1769 (Souter, J., dissenting) ("[T]he increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine.") (collecting sources); *id.* at 355, 124 S.Ct. 1769 (Breyer, J., dissenting) ("Sometimes purely political 'gerrymandering' will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm."). As the Supreme Court has stated, "the core principle of republican government [is] that the voters should choose their representatives, not the other way around." *Ariz. State Legislature*, 135 S.Ct. at 2677 (quoting Mitchell Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005)); *see also Powell v. McCormack*, 395 U.S. 486, 547, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) ("A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' ") (citation omitted). Partisan gerrymandering goes against these foundational principles. But do courts have a role in adjudicating challenges to alleged partisan gerrymanders—that is, are such challenges justiciable?

The Supreme Court has held that partisan gerrymandering claims are justiciable. *Davis v. Bandemer*, 478 U.S. 109, 125, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). In *Bandemer*, the Supreme Court considered an ***1077** allegation that "Indiana Republicans had gerrymandered Indiana's legislative districts 'to favor Republican incumbents and candidates and to disadvantage Democratic voters' through what the plaintiffs called the 'stacking' (packing) and 'splitting' (cracking) of Democrats." *See Gill*, 138 S.Ct. at 1927. Drawing on racial gerrymandering doctrine as well as one-person, one-vote equal-protection cases, the *Bandemer* majority held that the partisan-gerrymandering case before it did *not* present a nonjusticiable political question. *Bandemer*, 478 U.S. at 122–25, 106 S.Ct. 2797. The Supreme Court, importantly, has not overturned *Bandemer*'s central holding. *See Gill*, 138 S.Ct. at 1927–29 (reviewing post-*Bandemer* cases).

In *Bandemer*, however, the Supreme Court did not "settle on a standard for what constitutes an unconstitutional partisan gerrymander." *See Gill*, 138 S.Ct. at 1927. Indeed, a majority of the Supreme Court has not yet settled on an appropriate standard for these claims, though various plaintiffs and amici have pressed for several theories at the Court in the years since *Bandemer*. *See id.* at 1926–29 (discussing partisan-gerrymandering precedent); *see also* Samuel Issacharoff &

Pamela Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 541–43 (2004). While *Bandemer* is partisan gerrymandering's *Baker v. Carr*, 369 U.S. at 209, 82 S.Ct. 691 (holding that malapportionment claims are justiciable), such claims do not yet have their *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (articulating what is now known as the one-person, one-vote principle for state legislative apportionment); *see also Wesberry v. Sanders*, 376 U.S. 1, 7–8, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) (same for congressional apportionment).

In *Baker v. Carr*, the Supreme Court laid out six factors for determining whether an issue is a nonjusticiable a political question. *See Baker*, 369 U.S. at 217, 82 S.Ct. 691. The Supreme Court explained that:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. Baker v. Carr thus saw the political question doctrine as primarily concerned with the separation of powers. *Id.* at 210, 82 S.Ct. 691. The first two factors are the most important: (1) a textual commitment of an issue to one of the political branches and (2) an absence of judicially manageable standards. *See Vieth*, 541 U.S. at 277–78, 124 S.Ct. 1769 (plurality). If an issue qualifies as a political question, the issue is nonjusticiable, and, consequently, the federal courts have no role in adjudicating it.

Defendants make arguments on each factor. *See* Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 44–52). All the arguments go to essentially three points: (1) The states have authority over elections and redistricting, and courts should not second guess the states' political judgment; (2) To the extent problems exist, plaintiffs should seek a remedy from Congress (or the ***1078** states); and (3) Judicially manageable standards are lacking. As a threshold matter, we observe that federalism concerns and respect for state sovereignty are conspicuously absent from *Baker v. Carr*'s list of justiciability considerations and, again, the political question doctrine is centered on separation of powers between the judiciary and the federal political branches, Congress and the President. *See Baker*, 369 U.S. at 210, 82 S.Ct. 691. But throughout this opinion, we respond to all these points, and we further conclude that workable standards, which contain limiting principles, exist so that courts can adjudicate these types of gerrymandering claims just as they have adjudicated other types of gerrymandering claims.

Turning to *Baker v. Carr*'s first factor—a textual commitment of an issue to a political branch—we find this factor does not weigh against justiciability. Though the *Vieth* plurality did not rely on this factor in discussing whether partisan-gerrymandering claims are justiciable, *see Vieth*, 541 U.S. at 277–81, 124 S.Ct. 1769 (plurality), the plurality still noted that "[i]t is significant that the Framers provided a remedy for [gerrymandering] in the Constitution." *See Vieth*, 541 U.S. at 275, 124 S.Ct. 1769 (plurality). Article I, § 4 of the United States Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations ...." One could argue, as Justice Frankfurter once did, that this language means "that the Constitution has conferred upon Congress exclusive authority to secure fair representation" and protect the right to vote against gerrymandering. *See Colegrove v. Green*, 328 U.S. 549, 554, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946) (plurality). Defendants echo this argument. *See* Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 45) ("[T]o seize supervisory authority over elections is to seize congressional power, an invasion of authority allocated to 'a coordinate political department.' ").

Simply put, the Supreme Court explicitly rejected that argument in *Wesberry*, 376 U.S. at 6–7, 84 S.Ct. 526. "The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I."

Id. at 7, 84 S.Ct. 526. That statement applies with equal force in the partisan-gerrymandering context, in which the core concern is that those in power are manipulating district lines in order to choose their voters and thereby render election results a foregone conclusion. Indeed, the Supreme Court's "willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering." *See Vieth*, 541 U.S. at 310, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment). The Supreme Court "made it clear in *Baker* that nothing in the language of [Article I] gives support to a construction that would immunize state congressional apportionment laws ... from the power of courts to protect the constitutional rights of individuals from legislative destruction ...." *Wesberry*, 376 U.S. at 6, 84 S.Ct. 526. In other election-law contexts, the Supreme Court has held that "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or ... the freedom of political association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (citing *Wesberry*, 376 U.S. at 6–7, 84 S.Ct. 526); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). Here, the ***1079** allegation is similarly that a state redistricting law targets a disfavored party's and its voters' rights to vote and to associate. In short, the argument that the Constitution designates Congress as the sole branch to fix gerrymandering, and that the states have the principal responsibility over election laws, was also present in other cases, and similar concerns that led the Supreme Court to reject the argument are present here. To accept fully Defendants' arguments against justiciability and their interpretation of Article I would erase decades of constitutional law. We decline to do so.

Moreover, as explained, evidence in this case shows that congressional staffers and the political arm of the Republican Party in Congress had a hand in drawing the challenged map. *See supra* Section I.A.3. In other words, not only is Congress unlikely to fix partisan gerrymandering, but evidence shows that Members of Congress, and their colleagues on congressional campaign committees, are part of the problem. *See supra* Section I.A.3.; *see also* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 682 (5th ed. 2016) (noting that "in the 2000 redistricting, several courts ... found that national party leaders in the United States House of Representatives played a central role in the redistricting process.... If Congress was originally envisioned as a detached, neutral umpire that might stand above partisan conflicts in the states, Congress is now a self-interested player in the partisan struggles over districting."). Accordingly, both parties in Congress benefit from partisan gerrymandering and appear to participate in the practice of partisan gerrymandering. *Cf.* ISSACHAROFF ET AL., THE LAW OF DEMOCRACY, *supra* at 682 ("[T]he fates of national political parties and state parties have, over time, become closely bound together .... Indeed ... some states were prompted to engage in re-redistricting in the middle of the [2000] decade, precisely because national party leaders in the United States House pressed for this."); Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 43) (stating that the map-drawing "process was also aided significantly by John Boehner, then-Speaker of the U.S. House"). The courts are the logical branch to turn to in the face of such legislative self-dealing, and in this case, judicially manageable standards also exist to adjudicate the issue presented. [729]

729 Of course, a legislature's failure to act is insufficient alone to warrant the Court's intervention. *See Gill*, 138 S.Ct. at 1929 (" 'Failure of political will does not justify unconstitutional remedies.' Our power as judges to 'say what the law is,' rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right.") (citations omitted).

As the four-justice plurality in *Vieth* saw it, the political question doctrine's second factor (an absence of judicially manageable standards) was at issue for partisan gerrymandering. *See Vieth*, 541 U.S. at 278, 124 S.Ct. 1769 (plurality). The plurality found it problematic that in the years after *Bandemer*, lower courts did not shape a partisan-gerrymandering standard and, with one unique exception, did not provide relief for such claims. *Id.* at 279–80 & 280 n.6, 124 S.Ct. 1769. Ultimately, the plurality stated that "[l]acking [judicially discernible and manageable standards], we must conclude that political gerrymandering claims are nonjusticiable ...." *Id.* at 281, 124 S.Ct. 1769. This view did not command a majority of the Supreme Court at the time, and in the intervening years since *Vieth*, lower courts have shaped standards and found that plaintiffs have satisfied those standards.

***1080** As another district court recently observed, "a majority of the Supreme Court *never* has found that a claim

raised a nonjusticiable political question solely due to the alleged absence of a judicially manageable standard for adjudicating the claim." *See Rucho*, 318 F.Supp.3d at 842 n.19. Indeed, in *Nixon v. United States*, the Supreme Court stated that its reasoning:

> makes clear[ ] [that] the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.

Nixon v. United States, 506 U.S. 224, 228–29, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993); *see also id.* at 238, 113 S.Ct. 732 (holding that challenges to procedures used in Senate impeachment proceedings are nonjusticiable); *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) ("The ultimate responsibility for these decisions [about the composition, training, equipping, and control of a military force] is appropriately vested in branches of the government which are periodically subject to electoral accountability."); *Pac. States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 141–43, 32 S.Ct. 224, 56 L.Ed. 377 (1912) (claims arising under the Guaranty Clause of Article IV, § 4 are nonjusticiable and issues arising under that Clause are committed to Congress). *Vieth*, therefore, would have been an unprecedented step if the Court had held partisan-gerrymandering claims nonjusticiable solely due to an alleged lack of a manageable standard.

There are good reasons why the Supreme Court has not taken such an unprecedented step. As Justice Kennedy explained, "[r]elying on the distinction between a claim having or not having a workable standard of that sort involves ... proof of a categorical negative.... This is a difficult proposition to establish, for proving a negative is a challenge in any context." *Vieth*, 541 U.S. at 311, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment). Justice Kennedy thus concluded that just because no judicially manageable standard "has emerged in this case should not be taken to prove that none will emerge in the future." *Id.* He then gave one illustrative example of an easy case: "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." *Id.* at 312, 124 S.Ct. 1769. Such a law would, of course, be simple discrimination and unconstitutional. But "the Constitution forbids sophisticated as well as simple-minded modes of discrimination." *Reynolds*, 377 U.S. at 563, 84 S.Ct. 1362 (citations and internal quotation marks omitted). Additionally, if courts were to rely solely on the lack of a judicially manageable standard to conclude that an issue qualifies as a political question, then courts would be opining on the manageability of standards not involved in the case at hand. That would be imprudent because a court can dispose of only the matters in a case currently before it; to be sure, however, the reasoning of a court's decision could spell trouble for a future potential standard if the future standard suffered from the same defects as that which was previously held nonjusticiable. Accordingly, even if there were a lack of a judicially manageable standard in this case (though we conclude that manageable standards exist), ***1081** we would not conclude that all future partisan-gerrymandering claims are nonjusticiable.

Although the Supreme Court's precedent leaves "few clear landmarks for addressing" partisan gerrymandering, we can find some rough guidance in the summary provided in *Gill*. *See* 138 S.Ct. at 1926. In *Bandemer* itself, the plurality would have required the plaintiffs "to 'prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group,' " *id.* at 1927 (quoting *Bandemer*, 478 U.S. at 127, 106 S.Ct. 2797 (plurality)), but the *Bandemer* plurality also concluded that "the plaintiffs had failed to make a sufficient showing on [actual discriminatory effect] because their evidence of unfavorable election results for Democrats was limited to a single election cycle." *Gill*, 138 S.Ct. at 1927 (citing *Bandemer*, 478 U.S. at 135, 106 S.Ct. 2797 (plurality)). Then in *Vieth*, the four-justice plurality, "would have held that the plaintiffs' claims were nonjusticiable because there was no 'judicially discernible and manageable standard' by which to decide them." *Id.* at 1927–28 (quoting *Vieth*, 541 U.S. at 306, 124 S.Ct. 1769 (plurality)). The plurality in *Vieth* thus necessarily rejected the proposed standard that a majority of voters should be able to elect a majority of a congressional delegation (proportional representation). Justice Kennedy also rejected that standard. *See Gill*, 138 S.Ct. at 1928

(citing *Vieth*, 541 U.S. at 308, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment)). Justice Kennedy, however, left the door open in *Vieth* for a partisan-gerrymandering standard in future cases. Just two years after *Vieth*, the Supreme Court returned to the question of partisan gerrymandering in *League of United Latin American Citizens v. Perry* ("*LULAC* "), 548 U.S. 399, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). In *Gill*, as in the case before us, the relevant portion of *LULAC* was the discussion of the partisan symmetry standard proposed by an amicus. *See Gill*, 138 S.Ct. at 1928. That particular version of the symmetry standard " 'measure[d] partisan bias' by comparing how the two major political parties 'would fare hypothetically if they each ... received a given percentage of the vote.' " *Id.* (quoting *LULAC*, 548 U.S. at 419, 126 S.Ct. 2594 (opinion of Kennedy, J.)). Although Justice Kennedy expressed concern about adopting the proposed symmetry standard because it was "based on unfair results that would occur in a hypothetical state of affairs," and because it faced the problem of not "providing a standard for deciding how much partisan dominance is too much," *LULAC*, 548 U.S. at 420, 126 S.Ct. 2594, Justice Kennedy ultimately stated, "*[w]ithout altogether discounting its utility in redistricting planning and litigation*, I would conclude asymmetry *alone* is not a reliable measure of unconstitutional partisanship." *Id.* (emphasis added). The *Gill* Court further noted that Justices Stevens, Souter, and Ginsburg expressed some support, or at least did not discount the usefulness of, asymmetry. *See Gill*, 138 S.Ct. at 1928–29 (citing Justice Stevens's partial dissent and Justice Souter's partial dissent, joined by Justice Ginsburg). In sum, although partisan symmetry as a stand-alone measure has not garnered support from a majority of the Supreme Court, of all the proposed standards, partisan symmetry has received perhaps the most support.

In the absence of clear direction from the Supreme Court, three-judge federal district court panels [730] have established ***1082** justiciable standards. *See Benson*, 373 F.Supp.3d at 911–14, 2019 WL 1856625, at *27–28; *Rucho*, 318 F.Supp.3d at 860–68, 929, *appeal docketed* —— U.S. ——, 139 S.Ct. 782, 202 L.Ed.2d 510 (2019); *Whitford v. Gill*, 218 F.Supp.3d 837, 884 (W.D. Wis. 2016), *vacated and remanded on other grounds*, —— U.S. ——, 138 S.Ct. 1916, 201 L.Ed.2d 313 (2018); *Shapiro v. McManus*, 203 F.Supp.3d 579, 596–97 (D. Md. 2016). Generally, the prevailing difficulty in partisan-gerrymandering cases seems to be evaluating partisan effect, or, in Justice Kennedy's words, "how much partisan dominance is too much." *LULAC*, 548 U.S. at 420, 126 S.Ct. 2594 (opinion of Kennedy, J.); *see also Vieth*, 541 U.S. at 344, 124 S.Ct. 1769 (Souter, J., dissenting). The federal courts that have recently adjudicated partisan-gerrymandering claims have converged considerably on common ground both in establishing standards for assessing a redistricting plan's constitutionality and for evaluating partisan effect. *See infra* Part V. For now, we observe that district courts have found partisan symmetry to be a useful partisan-effect standard, in combination with actual election results, analyses of simulated maps, and analyses that show redistricting plans are extreme or are historical outliers in their partisan effect. *See, e.g.*, *Benson*, 373 F.Supp.3d at 893–909, 913–14, 2019 WL 1856625, at *12–24, 28; *Rucho*, 318 F.Supp.3d at 884; *Whitford*, 218 F.Supp.3d at 898, 905 (but not using analyses of simulated maps). As we will explain, the standards and analyses in these cases, and proposed in the case before us, shore up the deficiencies identified by the Supreme Court in prior cases. *See infra* Part V.

730 State Supreme Courts, too, have established judicially manageable standards by which to evaluate compliance with their own state constitutions. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737 (2018); *see also id.* at 816 (noting that the standards articulated "also comport with the minimum requirements for congressional districts guaranteed by the United States Constitution, as interpreted by the United States Supreme Court.") (citing *Wesberry*, 376 U.S. at 18, 84 S.Ct. 526).

B. Evidentiary Metrics and Statistics

Plaintiffs utilize several evidentiary metrics and Dr. Cho's computer-simulated maps, among other things, to help the Court decide the merits of the partisan-gerrymandering claims. Defendants argue that none of those evidentiary metrics offers an answer to when a map is unconstitutionally gerrymandered and that no expert has offered an opinion on that subject. This critique falls flat, and it is important to clarify and emphasize that the judicially manageable standards about which we are concerned for justiciability are *legal standards*. We set forth those legal standards in Part V of this opinion. The evidentiary metrics and simulated maps, however, are offered by a party to show that the legal standard is met. We apply these metrics, simulated maps, and other evidence to the justiciable legal standards, and we find that they prove the elements of the underlying claims. *See infra* Sections V.A.2., V.B., V.C.2. This practice is nothing new. Courts routinely utilize statistical analyses in other contexts, including the similar context of racial vote-dilution cases under the VRA. *See, e.g.*, *Rural W. Tenn. African-Am.*

Affairs Council v. Sundquist, 209 F.3d 835, 844 (6th Cir. 2000) (affirming the district court and explaining that the district court "ably considered a complex body of statistical and anecdotal evidence to determine that [a state house reapportionment plan] unlawfully dilutes African–American voting strength in rural west Tennessee."); *United States v. City of Euclid*, 580 F.Supp.2d 584, 596 (N.D. Ohio 2008) ("Statistical evidence of racial bloc voting may be established by three analytical models: homogenous precinct analysis ('HPA'), bivariate ecological regression ***1083** analysis ('BERA'), and King's ecological inference method ('King's EI method').").

We find *Rucho*'s reasoning on this point persuasive and adopt it here. In *Rucho*, the three-judge district court ably surveyed caselaw in which the Supreme Court, as well as district courts, have "relied on statistical and social science analyses as *evidence* that a defendant violated a standard set forth in the Constitution or federal law." *See* 318 F.Supp.3d at 853; *see also id.* at 852–58 (providing an overview of caselaw and noting that the Supreme Court has embraced empirical analyses and statistical measures in apportionment, antitrust, Confrontation Clause, equal-protection, redistricting, and voting cases). We agree that "when a variety of different pieces of evidence, empirical or otherwise, all point to the same conclusion—as is the case here—courts have *greater* confidence in the correctness of the conclusion because even if one piece of evidence is subsequently found infirm other probative evidence remains." *See id.* at 858. Although it is true, as Dr. Warshaw himself acknowledged at trial, that each of the four statistical metrics that he analyzed has pros and cons, [731] it is equally true that all the metrics point strongly in one direction. What's more, as will be explained, the metrics and other evidence strongly suggest that the 2012 plan is an outlier, and that fact raises further concern about the plan's constitutionality.

731 *See, e.g.*, Dkt. 240 (Warshaw Trial Test. at 210–11) (efficiency gap); *id.* at 223 (mean-median difference); *id.* at 229–30 (declination); *id.* at 238 (the two asymmetry measures).

Courts should not simply accept or give the greatest amount of weight possible to social-science measures or theories. Of course, we still have the obligation to ensure that an expert's "testimony is based on sufficient facts or data," is "the product of reliable principles and methods," and that "the expert has reliably applied the principles and methods to the facts of the case." *See* FED. R. EVID. 702; *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589–95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). When judges are the factfinders, "the court must carefully weigh empirical evidence[ ] and discount such evidence's probative value if it fails to address the relevant question, lacks rigor, is contradicted by more reliable and compelling evidence, or is otherwise unworthy of substantial weight." *Rucho*, 318 F.Supp.3d at 855.

After the benefit of hearing trial testimony from Plaintiffs' and Defendants' experts and Defendants' cross-examination, we find that Plaintiffs' evidence and experts are more persuasive. As detailed later, we find some evidence quite probative and other evidence less so, but, overall, the evidentiary metrics utilized by Plaintiffs provide strong support for their legal claims. In other words, the evidentiary metrics are strong evidence that voters were packed and cracked across the 2012 map. Dr. Warshaw also gave illustrative examples of when the metrics would be less probative of a partisan gerrymander, and therefore, he would not conclude that a plan was a partisan gerrymander. [732] The evidentiary metrics, therefore, are workable in their own right and would not lead to every plan in the country being struck down as unconstitutional. Courts, in turn, would apply the legal standards and utilize the various metrics to determine on a case-by-case basis whether certain maps pass constitutional muster. Courts can apply ***1084** these metrics to the legal standards in such a way that limits exist.

732 *See* Dkt. 240 (Warshaw Trial Test. at 191–92, 246–48).

To be sure, metrics based on a theory of proportional representation would *not* be legally relevant. *See Vieth*, 541 U.S. at 288, 124 S.Ct. 1769 (plurality) ("[T]he Constitution contains no such principle [of proportional representation]."); *id.* at 338, 124 S.Ct. 1769 (Stevens, J., dissenting) ("The Constitution does not, of course, require proportional representation ...."); *see also LULAC*, 548 U.S. at 419, 126 S.Ct. 2594 (opinion of Kennedy, J.) ("To be sure, there is no constitutional requirement of proportional representation ...."). None of the proffered metrics in this case, however, are based on proportional representation. [733] For example, the metrics analyzed by Dr. Warshaw measure asymmetry, a distinct concept. On the one hand, proportional representation means that the number of seats in the legislature that a party receives is equal to the percentage of votes that the party receives in an election. For example, if Party X receives 40% of the popular vote and there are 100 seats in the legislature, then Party X would receive

40 seats under a proportional-representation scheme. On the other hand, partisan symmetry is based on the principle that a particular vote share should translate into a particular number of seats, regardless of which party receives that vote share. For example, if Party X receives 53% of the vote and wins 60 out of 100 seats, then when Party Y receives 53% of the vote, Party Y should also have a real chance to win about 60 out of 100 seats. A difference between the parties' abilities to translate the same vote share into seats demonstrates an asymmetry.

733 One critique of the efficiency gap is that it is *not* equivalent to proportional representation. *See* Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131, 1213 (2018).

In other areas of election law, several metrics comfortably coexist. *See* Nicholas Stephanopoulos & Eric McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1551–54 (2018). First, in malapportionment cases, the Supreme Court has cited a handful of measures (and sometimes multiple measures in the same case) for population deviation. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 728, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983) (noting the total deviation between the most and least populous districts and the average deviation, i.e., the average difference between each district's population and the population required for perfect equality); *Gaffney v. Cummings*, 412 U.S. 735, 737 & nn.1–2, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (using the two measures in *Karcher* and also citing the ratio of the largest district population to the smallest district population); *Mahan v. Howell*, 410 U.S. 315, 319, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973) (using the same three measures as *Gaffney*, in addition to noting the proportion of the population that could elect a majority of the state house); *Swann v. Adams*, 385 U.S. 440, 442–43, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967) (using all these measures). Next, in the context of Section 2 of the VRA, courts have utilized three metrics to measure racial polarization in voting —HPA, BERA, and King's EI method, mentioned above. *See, e.g.*, *City of Euclid*, 580 F.Supp.2d at 596; *see also Thornburg v. Gingles*, 478 U.S. 30, 52–53, 53 n.20, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (citing only HPA (or "extreme case analysis") and BERA, and noting that "[t]he District Court found both methods standard in the literature for the analysis of racially polarized voting."). And finally, the compactness of a district can be quantified ***1085** in dozens of ways. *See* Stephanopoulos & McGhee, *The Measure of a Metric, supra* at 1553 & nn. 178–83. Compactness, which is one assessment of a district's shape, can be relevant in racial vote-dilution cases as well as VRA § 2 cases. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 913, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) ("Shape is relevant not because bizarreness is a necessary element of the constitutional wrong ..., but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines."); *Gingles*, 478 U.S. at 50, 106 S.Ct. 2752 ("[T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."). So too can several metrics be used in partisan-gerrymandering cases.

The brunt of Defendants' argument against social-science measures seems focused on the efficiency gap. Dkt. 253 (Defs.' & Intervenors' PFOF at 106–13). But Plaintiffs do not offer the efficiency gap as the ultimate Rosetta Stone to decipher what is or is not an unconstitutional partisan gerrymander. Rather, the efficiency gap is just one tool in the evidentiary toolbox. When it comes to malapportionment, racially polarized voting, and compactness, courts have not limited their toolbox, and we see no reason to limit it for partisan gerrymandering. To the contrary, that all the measures strongly point in the same direction gives us greater confidence in reaching a conclusion in this case. *See Rucho*, 318 F.Supp.3d at 858.

C. Pragmatic and Historical Considerations

We now turn to other relevant considerations for whether the federal courts ought to intervene to address partisan gerrymandering. Importantly, these considerations are absent from the list of considerations for determining whether an issue presents a nonjusticiable political question. Instead, these points are pragmatic or historical in nature, and they are worthy of response.

1. Courts are not picking political winners and losers

One concern about allowing courts to adjudicate partisan-gerrymandering claims is that the courts would be dictating political winners. Dkt. 136 (Defs.' Mot. for Summ. J. at 18). But, as mentioned, the core concern about partisan gerrymandering is that representatives choose their voters and not vice-versa—that is, when partisan gerrymandering amounts to a constitutional violation, the winners and losers

are often already predetermined by those in power. Rather than dictating outcomes in these cases, courts are only fixing *the process* by which voters enact political change. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 102–03 (1980) (explaining that in our system of government "[m]alfunction occurs when ... the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out," and that judges "are conspicuously well situated" to correct such malfunction). If courts find a constitutional violation and fix it, then *the voters* pick the winners and losers in districts that adhere to the Constitution.

As we will explain further, the evidence in this record shows that, in fact, the party in power sought to lock in a 12-4 map, and, despite receiving a fluctuating percentage of the statewide vote, they were successful. Experience has shown that legislators are unlikely to act as neutral umpires in this context. Judges, however, play precisely that role. Rather than decide who wins an election in these cases, the courts' role is to ensure an even playing field, just as courts have done with other forms of gerrymandering. ***1086** *See Vieth*, 541 U.S. at 310, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment).

Furthermore, this non-intervention argument has its roots in reasoning from *Colegrove*. *See* 328 U.S. at 553, 66 S.Ct. 1198 (plurality) ("Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests."). As Justice Frankfurter put it, "Courts ought not enter this political thicket." *Id.* at 556, 66 S.Ct. 1198.

Given courts' now well-established involvement in redistricting, as well as other voting and elections matters, history has shown that *Colegrove*'s concerns have not carried the day. In *Baker v. Carr*, the Supreme Court relied not on political judgment, but on the "well developed and familiar" "standards under the Equal Protection Clause ... to determine ... that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *See Baker*, 369 U.S. at 226, 82 S.Ct. 691. In fact, the Supreme Court arguably first entered the so-called "political thicket" a few years earlier, in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). *Gomillion*, not *Baker v. Carr*, was the first time that the Supreme Court found a constitutional violation because of how a state drew district lines. In *Gomillion*, the district at issue was changed from a square shape "into a strangely irregular twenty-eight-sided figure.... The essential inevitable effect of this redefinition of [the City of] Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident." *Id.* at 341, 81 S.Ct. 125. The Court held that the plaintiffs stated a claim that the redrawing of the boundaries around Tuskegee violated the Fifteenth Amendment. *Id.* at 345–47, 81 S.Ct. 125. Justice Whittaker took a different approach; he noted the fact that those removed from Tuskegee were not actually deprived of the right to vote under the Fifteenth Amendment; indeed, they could still cast a vote, just not in Tuskegee. *See id.* at 349, 81 S.Ct. 125 (Whittaker, J., concurring). Instead, Justice Whittaker concluded that the State violated the Equal Protection Clause of the Fourteenth Amendment by fencing out black voters from one political subdivision and placing them into another. *Id.* (Whittaker, J., concurring). Years later, the Supreme Court conclusively adopted this view in its racial-gerrymandering jurisprudence. *See Shaw v. Reno*, 509 U.S. 630, 644–45, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("This Court's subsequent reliance on *Gomillion* in other Fourteenth Amendment cases suggests the correctness of Justice Whittaker's view.").

The upshot is that, although the federal courts' role in redistricting may be an "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977), it is an obligation nonetheless—and for good reason. As the Supreme Court has recognized, the right to vote "is preservative of other basic civil and political rights," and therefore, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds*, 377 U.S. at 562, 84 S.Ct. 1362. Critically, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555, 84 S.Ct. 1362. Contrary to the *Colegrove* plurality's concerns, courts have not been involving themselves in politics or picking winners and losers; rather, courts have protected the right to vote from infringement by political actors who, history has shown, attempt to manipulate elections laws to their advantage and to disadvantage ***1087** a disfavored group. Sometimes, courts must level the playing field.

2. Partisan gerrymandering is not a self-limiting enterprise

Experience has proven that the view that "political gerrymandering is a self-limiting enterprise" is incorrect. *See Bandemer*, 478 U.S. at 152, 106 S.Ct. 2797 (O'Connor, J., concurring in the judgment). The reasoning under this position went as follows:

> In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat —risks they may refuse to accept past a certain point. Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious.

Id. (citations omitted). But this view did not contemplate two factors: advances in (1) technology and (2) methods for collecting data on voters, whose party affiliation is stable and whose behavior is increasingly predictable.

First, "technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts." *Gill*, 138 S.Ct. at 1941 (Kagan, J., concurring). Consequently, "[g]errymanders have ... become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides." *Id.* That is, increasingly sophisticated technology and map-drawing methods have allowed the parties to maximize the number of seats, while minimizing the risks mentioned above. Evidence in the record shows that this is what happened during the Ohio 2010 redistricting cycle. *See* Trial Ex. P385 (Congressional Redistricting Talking Points at LWVOH_0052438) ("Given [Ohio's political geography], it is a tall order to draw 13 'safe' seats. Speaker[ ] Boehner's team worked on several concepts, but this map is the one they felt put the most number of seats in the safety zone given the political geography of the state, our media markets, and how to best allocate caucus resources."). And the actual election results—with Republicans winning the same twelve seats and Democrats winning the same four seats in each election—confirm that the map drawers were successful. "The technology will only get better, so the 2020 cycle will only get worse." *Gill*, 138 S.Ct. at 1941 (Kagan, J., concurring).

Second, as technology has advanced, so too have methods for collecting data on voters. *See* David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. ECON. PERSP. 51 (2014) ("The techniques used as recently as a decade or two ago by political campaigns to predict the tendencies of citizens appear extremely rudimentary by current standards."). The improved efficiency of data collection and predictive methods "has led the political parties to engage in an arms race to leverage ever-growing volumes of data to create votes." *Id.* at 51. For example, political campaigns utilize state voter-registration databases that are supplemented with a variety of consumer data from commercial data brokers, and the need to store, manage, and analyze all this data has created "a new breed of political consulting firms ...." Ira S. Rubenstein, *Voter Privacy in the Age of Big Data*, 2014 WIS. L. REV. 861, 867–77 (2014). And "[i]n the 2012 election cycle, an emerging trend for these firms was the formation of new partnerships with online advertising firms that specialized ***1088** in tracking people on the web." *Id.* at 877. Moreover, although a voter's partisanship is not immutable per se, research has shown that, in fact, political affiliation is stable and predictable. *See, e.g.*, Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 AM. J. POL. SCI. 365 (2017) ("Greater clarity of party differences ... makes Americans less open to a change in their behavior and ultimately more reliable in which party they support across time."); DONALD GREEN ET AL., PARTISAN HEARTS AND MINDS 3, 11 (2002) (finding that, often, "sharp partisan differences eclipse corresponding sex, class, or religion effects" and that "partisanship tends to be stable among adults"). Voters, of course, think for themselves—the point is simply that, once voters adopt a particular political affiliation, their choice is fairly solidified and highly predictive of voting behavior. Accordingly, modern political parties and their map drawers utilize increasingly vast amounts of increasingly precise voter data.

These developments have allowed the political parties to achieve the maximum number of safe seats through a gerrymander, while simultaneously minimizing the risks of creating an "overambitious gerrymander." *See Bandemer*, 478 U.S. at 152, 106 S.Ct. 2797 (O'Connor, J., concurring in the judgment). The result is that, even more so than in the 2000 redistricting cycle, "the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine." *See Vieth*, 541 U.S. at 345, 124 S.Ct. 1769 (Souter, J., dissenting). The courts ought not leave disfavored voters at the mercy of advancing

technology when a party in power exploits that technology to draw district lines with "the purpose and effect of imposing burdens on a disfavored party and its voters," *see id.* at 315, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment), and "to dictate electoral outcomes," *see Thornton*, 514 U.S. at 833–34, 115 S.Ct. 1842.

3. Gerrymandering's long history [734]

734 For additional background information, *see* Brief for Historians as Amicus Curiae Supporting Appellees, *Gill v. Whitford*, 138 S.Ct. 1916 (2018) (No. 16-1161), 2017 WL 4311107. We utilize some of the historical material referenced therein.

It is true that "[p]olitical gerrymanders are not new to the American scene," *Vieth*, 541 U.S. at 274, 124 S.Ct. 1769 (plurality), but a deeper dive into its long history demonstrates that it has not simply been accepted throughout our political past. Furthermore, "our inquiry is sharpened rather than blunted by the fact that" partisan gerrymandering has been frequent and become increasingly efficient. *See I.N.S. v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

At the outset, we note that gerrymandering's history during the Founding is somewhat distinct from the specific context of *partisan* gerrymandering, which, of course, requires parties. That is because "[t]he idea of political parties ... was famously anathema to the Framers, as it had long been in Western political thought." Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2320 (2006). Yet even though "the Framers had attempted to design a 'Constitution Against Parties,' " they almost immediately organized into two coalitions. *Id.* (citation omitted). "Political affiliations initially were much more informal and localized, and did not evolve into the more organized form we commonly associate with parties until the Jacksonian Era in the 1830s." James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?*, 7 MICH. J. RACE & L. 357, 427 (2002). But ***1089** even though political parties are not mentioned in the Constitution, the Supreme Court has stepped in to protect the parties and their supporters against state laws that infringe on their constitutional rights. *See, e.g.*, *Calif. Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) (striking down California's blanket primary law because it violated the parties' First Amendment right of association); *Tashjian*, 479 U.S. 208, 107 S.Ct. 544 (striking down Connecticut's closed primary law for the same reason). In any event, once parties began to take shape, they were both victims of gerrymandering (i.e., the disfavored party's voters in the electorate) and participants in gerrymandering (i.e., the party in government).

Although gerrymandering may have a long history in the United States, those close to the Founding strongly denounced the practice. After an 1812 Democratic-Republican gerrymander in Massachusetts, for example, the citizens in one county petitioned the legislature "to 'alter' the [redistricting] law which they characterized as 'unconstitutional, unequal, and unjust.' " ELMER C. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 71 (1907) (citation omitted). The Federalists viewed the gerrymander as "a blow at the constitution and a travesty upon the Bill of Rights when it allowed the minority to govern." *Id.* As for the district that spawned the "portmanteau" of "gerrymander," [735] the newspaper that published the now famous political cartoon of the "Gerry-Mander" stated that "This Law inflicted a grievous wound on the Constitution ...." *The Gerry-Mander, or Essex South District Formed into a Monster!*, SALEM GAZETTE, Apr. 2, 1813. On the other side of the aisle, the Federalists also engaged in gerrymandering. In New Jersey, Republicans saw an 1812 redistricting law as "a 'deadly poisoned arrow, levelled with certain aim at the inestimable right of suffrage.' " ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850, at 117 (1987) (citation omitted). Thus, despite both sides condemning the practice as unconstitutional, the parties continued to engage in a retaliatory tit-for-tat.

735 *See Ariz. State Legislature*, 135 S.Ct. at 2658 n.1 ("The term 'gerrymander' is a portmanteau of the last name of Elbridge Gerry, the eighth Governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander.") (citing GRIFFITH, *supra* at 16–19).

Criticism of gerrymandering persisted into the late-1800s. James Garfield, then a member of the U.S. House of Representatives, admitted that he benefitted from gerrymandering in Ohio. Then-Representative Garfield stated:

> [N]o man, whatever his politics, can justly defend a system that may in theory, and frequently does in practice, produce results such as these.... There are about ten thousand Democratic voters in my district, and they have been voting there ... without any more hope of having a Representative on this floor than of having one in the Commons of Great Britain....
>
> I think they ought to have more hope. The Democratic voters in the nineteenth district of Ohio ought not by any system to be absolutely and permanently disenfranchised.

41 CONG. GLOBE, 41st Cong., 2d Sess., 4737 (June 23, 1870) (statement of Rep. James A. Garfield). President Benjamin Harrison similarly criticized gerrymandering. In his Third Annual Message, President Harrison recognized that "the primary intent and effect of this form of political robbery have relation to the selection of members of the House of Representatives." President ***1090** Benjamin Harrison, Third Annual Message (Dec. 9 1891). [736] He explained:

> If I were called upon to declare wherein our chief national danger lies, I should say without hesitation in the overthrow of majority control by the suppression or perversion of the popular suffrage. That there is a real danger here all must agree; but the energies of those who see it have been chiefly expended in trying to fix responsibility upon the opposite party rather than in efforts to make such practices impossible by either party.

Id. Gerrymandering thus raised concerns about the disfavored party's (often the minority party's) representational rights and the right to vote.

736 Available at: https://millercenter.org/the-presidency/presidential-speeches/december-9-1891-third-annual-message-0.

Significantly, in the late-nineteenth century, State Supreme Courts did not close their courthouse doors to challenges to gerrymandered maps. In Wisconsin, the State Supreme Court declared that the challenged "apportionment act violates and destroys one of the highest and most sacred rights and privileges of the people of this state, guarantied to them by the ordinance of 1787 and the constitution, and that is 'equal representation in the legislature.' " *See State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 729 (1892). The court further explained that:

> If the remedy for these great public wrongs cannot be found in this court, it exists nowhere. It would be idle and useless to recommit such an apportionment to the voluntary action of the body that made it. But it is sufficient that these questions are judicial and not legislative. The legislature that passed the act is not assailed by this proceeding, nor is the constitutional province of that equal and co–ordinate department of the government invaded. The law itself is the only object of judicial inquiry, and its constitutionality is the only question to be decided.

Id. at 730. The same year, the Indiana Supreme Court also struck down its State's legislative redistricting law. *See Parker v. State ex rel. Powell*, 133 Ind. 178, 32 N.E. 836, 843 (1892). These cases further bolster the ahistorical nature of the claim that gerrymandering has been an *accepted* practice in American history.

Early gerrymanders often shared a notable attribute—the party in power drew maps in its favor with malapportioned districts. *See, e.g.*, GRIFFITH, *supra* at 8 ("A gerrymander is intended to disfranchise the majority or to secure [the majority] an influence disproportionate to its size."); *see also id.* at 72–73; ZAGARRI, *supra* at 115–16 ("No longer able to count on a statewide majority, [Federalists] supported a vastly inequitable districting plan designed to elect as many Federalists as possible. The first district, for example, was to contain approximately 30 percent more people than the third district and over 20 percent more than the second and fourth districts."). Of course, voters could not even challenge such districting schemes in federal court until the Supreme Court decided *Gomillion* and *Baker v. Carr*. And after the one-person, one-vote cases, legislatures' focus on gerrymandering shifted from malapportionment to other contexts, such as gerrymandering based solely on

political affiliation. Accordingly, given that gerrymandering's constitutionality has been questioned essentially since its inception and that the federal courts have played a role in overseeing redistricting since *Gomillion* and *Baker v. Carr*, we do ***1091** not give great weight to the fact that "[p]olitical gerrymanders are not new to the American scene." *See Vieth*, 541 U.S. at 274, 124 S.Ct. 1769 (plurality).

Gerrymandering's history, however, provides greater clarity to the current problem. Historical examples of gerrymanders often involved "crude linedrawing." *See Gill*, 138 S.Ct. at 1941 (Kagan, J., concurring). Today, the practice is far more efficient and precise, which has resulted in gerrymanders that are more extreme and durable. *See supra* Section IV.C.2. Indeed, evidence in this case shows just that. *See infra* Sections V.A.2., V.C.2. If historically partisan gerrymandering was a self-limiting enterprise, that is increasingly not the case today. Moreover, because gerrymandering has persisted over time, comparative analyses can be done that show the gerrymanders of today are generally historical outliers and can withstand fluctuating statewide votes. Again, the evidence here shows that this applies to Ohio. *See supra* Section II.C.1.; *infra* Sections V.A.2.b., V.C.2.a. In sum, the long history of gerrymandering does not show that the practice has been "accepted," and, in fact, history allows courts to compare today's gerrymanders to past ones and thus better to understand the scope and gravity of the problem.

4. Alternative state remedies

At one time, the Supreme Court "long resisted any role in overseeing the process by which States draw legislative districts. 'The remedy for unfairness in districting,' the Court once held, '*is to secure State legislatures that will apportion properly*, or to invoke the ample powers of Congress.' " *Evenwel v. Abbott*, —— U.S. ——, 136 S.Ct. 1120, 1123, 194 L.Ed.2d 291 (2016) (quoting *Colegrove*, 328 U.S. at 556, 66 S.Ct. 1198 (plurality)) (emphasis added). Defendants seek to revive this argument that remedies in the states foreclose judicial intervention. *See* Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 41–42, 45). After *Baker v. Carr*, however, the Supreme Court essentially rejected this reasoning and "confronted [the] ingrained structural inequality [of malapportionment] ...." *See Evenwel*, 136 S.Ct. at 1123.

Today, we recognize that some states have adopted various approaches to attempt to curtail partisan gerrymandering. *See, e.g.*, *Ariz. State Legislature*, 135 S.Ct. at 2662 & nn. 6–9 (surveying state constitutional provisions and state statutes);[737] MICH. CONST. art. 4, § 6; COLO. CONST. art. 5, § 44; OHIO CONST. art. 19, §§ 1–2; UTAH CODE ANN. § 20A-19-103. State Supreme Courts have stepped in, too. *See, e.g.*, *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737 (2018); *cf. People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (holding that re-redistricting mid-decade was unconstitutional under the State Constitution, thus adopting a principle similar to that which the Supreme Court rejected in *LULAC*). But rather than militating against judicial intervention, the movement in the states on the issue of partisan gerrymandering, in addition to decisions by other three-judge panels, can help inform our consideration of the underlying principles involved in this case. *Cf. Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2596–97 & Apps. A–B, 192 L.Ed.2d 609 (2015) (collecting state and federal judicial decisions ***1092** and state statutes that "help[ed] to explain and formulate the underlying principles" that the Supreme Court considered in that case). Simply put, the fact that some specific states are addressing this issue does not preclude the federal courts from performing their "role in overseeing the process by which States draw legislative districts" or from performing their role in vindicating federal rights. *See Evenwel*, 136 S.Ct. at 1123. Further, to state the obvious, if the allegation is that the State has perpetrated a constitutional violation, then it would be absurd to decline to adjudicate the claims on the basis that plaintiffs must seek a remedy with the entity that committed the alleged violation in the first place. The recently passed state measures that allow for independent or truly bipartisan redistricting, however, might potentially limit the necessity of federal court intervention in the next redistricting cycle.

737 We observe that *Arizona State Legislature* cited Ohio as an example. *See* OHIO REV. CODE § 103.51 (creating a legislative task force on redistricting). But this statute did not remove the political parties from the redistricting process (nor did it foster a truly bipartisan map-drawing process). The facts of this case clearly show that the political parties and the legislators still draw the maps.

* * *

Finally, many of the same arguments that were lodged against judicial intervention in other forms of gerrymandering over fifty years ago are the same as those presented to us today:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires.

Reynolds, 377 U.S. at 566, 84 S.Ct. 1362. At bottom, we borrow our answer from the Supreme Court. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Id.* (quoting *Gomillion*, 364 U.S. at 347, 81 S.Ct. 125).

As stated previously, in *Vieth*, four justices nonetheless thought that the Supreme Court's and the lower courts' inability to shape a substantive standard counseled against the justiciability of partisan-gerrymandering claims. *Vieth*, 541 U.S. at 278–79, 124 S.Ct. 1769 (plurality). In the years since *Vieth*, federal district courts have shaped such standards. We now turn to those governing legal principles.

V. LEGAL STANDARDS AND APPLICATION

As a threshold matter, we conclude that the legal and evidentiary standards below shore up various deficiencies found by the Supreme Court in prior partisan-gerrymandering cases. First, our analysis is based on results across several election cycles, which shows that the current map's partisan effects are durable and largely impervious to fluctuations in voter preferences. *See Gill*, 138 S.Ct. at 1927 (citing *Bandemer*, 478 U.S. at 135, 106 S.Ct. 2797 (plurality)). Second, this analysis is not based solely on hypothetical election results. *See Gill*, 138 S.Ct. at 1928 (citing *LULAC*, 548 U.S. at 419, 126 S.Ct. 2594 (opinion of Kennedy, J.)). Apart from the measures of asymmetry in the vote-seat curve, every other metric utilized by Dr. Warshaw is grounded in actual election results, and these metrics illuminate the extent of partisan bias that occurs in the current (not hypothetical) state of affairs. Third, we do not view the analysis adopted here and by other three-judge panels as leading inexorably to striking down every map in the country. Although we do not ***1093** explicitly adopt Dr. Warshaw's requirements that must be present to classify a map a partisan gerrymander, we find them instructive. Under that rubric, a map is a partisan gerrymander only if there is one-party control of redistricting, the party in control party is favored by the map, the partisan-bias metrics all point in the same direction and point toward an advantage for the party that controlled the redistricting, and the redistricting plan is an historical outlier in its partisan effects. Courts determining how the evidence in any given case applies to the test that we elaborate and employ today may also consider these factors, which we find important in our ultimate determination. Acknowledging that the partisan-bias metrics offer a range of results, then, is not to say that use of those metrics will necessarily result in courts striking down every challenged map.

A. Equal Protection Vote-Dilution Claim

1. Legal standard

A state's partisan gerrymander violates the Equal Protection Clause of the Fourteenth Amendment when it "den[ies] to any person within [the State's] jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Partisan gerrymanders violate equal protection by electorally disadvantaging the supporters of the party that lacked control of the districting process because of their support of that party. *See Rucho*, 318 F.Supp.3d at 860.

We adopt the three-part test to prove a violation of the Fourteenth Amendment's Equal Protection Clause in a partisan-gerrymandering claim. Plaintiffs must prove (1) a discriminatory partisan intent in the drawing of each challenged district and (2) a discriminatory partisan effect on those allegedly gerrymandered districts' voters. *Bandemer*, 478 U.S. at 127, 106 S.Ct. 2797 (plurality op.); *id.* at 161, 106 S.Ct. 2797 (Powell, J., concurring and dissenting). Then, (3) the State has an opportunity to justify each district on other, legitimate legislative grounds. *See Rucho*, 318 F.Supp.3d at

861 (citing *Bandemer*, 478 U.S. at 141–42, 106 S.Ct. 2797) (plurality op.)); *Whitford*, 218 F.Supp.3d at 910–27.

a. Intent

To prove the first prong, Plaintiffs must demonstrate that those in charge of the redistricting "acted with an intent to 'subordinate adherents of one political party and entrench a rival party in power." *Rucho*, 318 F.Supp.3d at 862 (quoting *Ariz. State Legislature*, 135 S.Ct. at 2658). It is not enough for Plaintiffs to show merely that the map drawers "rel[ied] on political data or [took] into account political or partisan considerations," *id.*, because the Supreme Court has acknowledged that political considerations may sometimes have a place in districting, *Karcher*, 462 U.S. at 739, 103 S.Ct. 2653 ("We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time."). For example, map drawers may design maps in a nondiscriminatory manner to avoid pairing incumbents, *Karcher*, 462 U.S. at 740, 103 S.Ct. 2653, to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties," *Gaffney*, 412 U.S. at 752, 93 S.Ct. 2321, or to keep intact political subdivisions, *Abrams v. Johnson*, 521 U.S. 74, 100, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). But these approved uses of political or partisan data differ enormously from employing historical partisan data to expertly vivisect a ***1094** state's voter population to extract the most partisan advantage possible. *See Gaffney*, 412 U.S. at 754, 93 S.Ct. 2321 (noting potential constitutional infirmities "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized").

Plaintiffs argue that they must demonstrate only that partisan intent was a motivating factor for the redistricting scheme, not that it predominated over all other aims. *See* Dkt. 251 (Pls.' Post-Trial Br. at 31 n.8). Defendants do not engage in the debate on the proper level of intent. They disavow any accusation of partisan intent and claim that their main motivations in drawing the 2012 map were the protection of incumbents and a desire "to preserve and advance minority electoral prospects." *See* Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 4–27).

The Supreme Court has given conflicting indications of which level of intent plaintiffs must show in such a claim. Some cases suggest that partisan intent as a mere motivating factor is enough. For example, in *Bandemer*, the Court required political-gerrymandering plaintiffs to show "intentional discrimination against an identifiable political group," and did not specify that intentional discrimination must predominate over other aims. *Bandemer*, 478 U.S. at 127, 106 S.Ct. 2797 (plurality op.). In *Vieth*, the Supreme Court criticized the proposed predominant-purpose standard in the political-gerrymandering context. 541 U.S. at 284–86, 124 S.Ct. 1769 (plurality op.); *id.* at 308, 124 S.Ct. 1769 (Kennedy, J., concurring). *Village of Arlington Heights v. Metropolitan Housing Development Corp.* and its progeny require only that the discriminatory purpose be "a motivating factor in the decision." 429 U.S. 252, 265–66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

Other Supreme Court cases suggest that partisan intent must predominate over other goals in the redistricting. For example, *Shaw* racial-gerrymandering claims alleging violations of the Fourteenth Amendment require proof that "race was the *predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916, 115 S.Ct. 2475 (emphasis added). Yet, "the Supreme Court expressly has characterized *Shaw*-type racial-gerrymandering claims as ' "analytically distinct" from a vote dilution claim' " of the type that Plaintiffs here bring. *Rucho*, 318 F.Supp.3d at 863 (quoting *Miller*, 515 U.S. at 911, 115 S.Ct. 2475). *Shaw* racial-gerrymandering claims do not require plaintiffs to prove that the disparate electoral treatment was invidious, only that it existed. *See Miller*, 515 U.S. at 904, 115 S.Ct. 2475. In other cases, in which the plaintiff claims that a state enacted a voting scheme to "invidiously discriminate on the basis of race," the Supreme Court has not required a showing that the invidious discrimination was the predominant purpose of the scheme. *Rucho*, 318 F.Supp.3d at 846 (citing *Miller*, 515 U.S. at 911, 115 S.Ct. 2475; *Mobile v. Bolden*, 446 U.S. 55, 66, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality op.)). In partisan-gerrymandering claims, the disparate treatment must be invidious. *Ariz. State Legislature*, 135 S.Ct. at 2658. "That a partisan gerrymandering plaintiff must meet the heightened burden of showing invidiousness weighs heavily against extending the predominance requirement for *Shaw*-type racial gerrymandering claims to partisan gerrymandering claims." *Rucho*, 318 F.Supp.3d at 864.

We observe that district courts have not uniformly adopted either the "motivating factor" or "predominant

purpose" standard for intent in partisan-gerrymandering cases. *Compare* ***1095** *Benson*, 373 F.Supp.3d at 912 & n.33, 2019 WL 1856625, at *27 & n.33 (predominant-purpose test), *and Rucho*, 318 F.Supp.3d at 860–68 (same), *with Whitford*, 218 F.Supp.3d at 887 (motivating-factor test). In *Rucho*, the district court reasoned that the Supreme Court relied heavily on *Shaw* racial-gerrymandering claims in its most recent partisan-gerrymandering case, *Gill*, and therefore adopted *Shaw*'s predominance requirement. 318 F.Supp.3d at 864. In *Benson*, the district court similarly chose the predominant-purpose standard due to *Gill*'s reliance on racial-gerrymandering cases that employ the standard. *Benson*, 373 F.Supp.3d at 912 & n.33, 2019 WL 1856625, at *27 & n.33. The district court in *Whitford*, however, distinguished the *Shaw* racial-gerrymandering cases. 218 F.Supp.3d at 887 n.171. It relied on *Arlington Heights* in requiring only that plaintiffs demonstrate that partisan intent was a motivating factor in the line drawing, not the " 'sole[ ]' intent or even 'the "dominant" or "primary" one.' " *Id.* at 887–88 (quoting *Arlington Heights*, 429 U.S. at 265, 97 S.Ct. 555). The district court in *Gill* reasoned that "it rarely can 'be said that a legislature or administrative body operating under a broad mandate made a decision motivated by a single concern,' " and acknowledged that a plethora of factors animate decisions in the major undertaking of redistricting. *Id.* at 888 (quoting *Arlington Heights*, 429 U.S. at 265, 97 S.Ct. 555).

In the absence of clear guidance from the Supreme Court and given the connections the Court has recently drawn *in Gill* between partisan- and racial-gerrymandering cases, we follow *Benson* and *Rucho* in electing the predominant-purpose standard. We note, however, that if Plaintiffs meet the predominant-purpose standard, they necessarily satisfy the motivating-factor standard as well.

Moreover, although courts have acknowledged that some partisan considerations are possible in the redistricting process, courts have recognized that partisan considerations are not included in the traditional redistricting principles. For example, excessive partisan considerations cannot serve as a justification for population deviations for state legislative redistricting plans, even when the population deviations are within the 10% safe harbor. *See Larios v. Cox*, 300 F.Supp.2d 1320, 1347–53 (N.D. Ga.), *aff'd mem.*, 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831 (2004) (concluding that a state legislative plan violated one-person, one-vote, relying on the fact that the plan protected only Democratic incumbents and pitted many Republican incumbents against each other and that "the defendant ha[d] not attempted to justify the population deviations because of compactness, contiguity, respecting the boundaries of political subdivisions, or preserving the cores of prior districts."); *Hulme v. Madison County*, 188 F.Supp.2d 1041, 1047–52 (S.D. Ill. 2001) (concluding that a plan violated one-person, one-vote, similarly relying on evidence of excessive partisanship as the reason for a deviation of 9.3% and on the State's failure to offer another justification). *Larios* and *Hulme* thus represent examples of courts developing "a 'second-order' judicial check on partisan gerrymandering through the one person, one vote doctrine." Michael Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 384 (2017). These cases, and others post-*Vieth*, demonstrate that when partisanship predominates, partisanship is not a legitimate districting criterion. *Id.* at 384–90; *see also Harris v. Ariz. Indep. Redistricting Comm'n*, —— U.S. ——, 136 S.Ct. 1301, 1307, 194 L.Ed.2d 497 (2016) ("Appellants' basic claim is that deviations in their apportionment ***1096** plan from absolute equality of population reflect the Commission's political efforts to help the Democratic Party. We believe that appellants failed to prove this claim because, as the district court concluded, the deviations predominantly reflected Commission efforts to achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party. Appellants failed to show to the contrary."); *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 345 (4th Cir. 2016) ("Plaintiffs have proven that it is more probable than not that the population deviations at issue here reflect the predominance of a[n] illegitimate reapportionment factor—namely an intentional effort to create a significant ... partisan advantage.") (internal quotations and citations omitted).

Plaintiffs may prove discriminatory partisan intent using a combination of direct and indirect evidence because "invidious discriminatory purpose may often be inferred from the totality of the relevant facts." *Rucho*, 318 F.Supp.3d at 862 (quoting *Washington*, 426 U.S. at 241, 96 S.Ct. 2040); *see also Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. We scrutinize the map-drawing process to understand what goals motivated the map's architects. Direct evidence of intent may include correspondence between those responsible for the map drawing, floor speeches discussing the redistricting legislation and other contemporaneous statements, and testimony explaining "[t]he historical background of the decision," including the "specific sequence of events leading up to the challenged decisions." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555. Indirect evidence "that improper purposes are playing a role" in map-drawing decisions may

include "[d]epartures from the normal procedural sequence." *Id.*

Indirect evidence also includes statistical evidence that demonstrates "a clear pattern" of partisan bias that would be unlikely to occur without partisan intent or evidence that the supporters of one political party were consistently treated differently than the supporters of another. *See id.* at 266, 97 S.Ct. 555. Suspect and irregular splitting of coherent communities of the disfavored party (cracking) and grouping of members of the disfavored group (packing) also support an inference of partisan intent. *See North Carolina v. Covington*, —— U.S. ——, 138 S.Ct. 2548, 2553, 201 L.Ed.2d 993 (2018) ("[A] plaintiff can rely upon either 'circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose' in proving a racial gerrymandering claim." (quoting *Miller*, 515 U.S. at 913, 115 S.Ct. 2475)). "That is particularly true when demographic evidence reveals that a district's bizarre lines coincide with the historical voting patterns of the precincts included in, or excluded from, the district." *Rucho*, 318 F.Supp.3d at 900. Such irregularities can be also quantified by low compactness scores and unnecessarily high numbers of county and municipality splits. Even though "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts," *Gaffney*, 412 U.S. at 752 n.18, 93 S.Ct. 2321, a lack of compactness or highly irregular district shapes support an inference that partisan intent motivated the line drawing, *Rucho*, 318 F.Supp.3d at 900.

b. Effect

To prove the second prong, discriminatory effect, Plaintiffs must demonstrate that the plan had the effect of diluting the votes of members of the disfavored party by either packing or cracking voters into congressional districts. In *Gill*, the ***1097** Supreme Court noted that the harm of vote dilution "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." 138 S.Ct. at 1931. A plan "packs" voters by creating districts that contain far more supporters of the disfavored party than would be necessary to elect a candidate from that party, causing many votes to be "wasted." *See id.* at 1924. A plan "cracks" voters by creating districts that include carved-off sections of supporters of the disfavored party, dividing them into separate districts in which they do not have sufficient numbers to elect their preferred candidate. *Id.*; *see also Benisek v. Lamone*, 348 F.Supp.3d 493, 514 (2018) ("[A State] can ... contract the value of a citizen's vote by placing the citizen in a district where the citizen's political party makes up a smaller share of the electorate, thereby reducing the citizen's chance to help elect a candidate of choice."). Packing and cracking can be evaluated using partisan-bias metrics, which reveal if, and by how much, the map benefits one party over another by facilitating the more efficient translation of that party's votes into seats.

Plaintiffs may prove discriminatory effect by offering various types of evidence of packing and cracking. Statewide comparisons that demonstrate that the challenged map is an historical outlier in its extreme partisan bias, as measured through the efficiency gap and other related metrics, are indirect proof of packing and cracking. *See Gill*, 138 S.Ct. at 1924 (describing the efficiency gap). Multiple partisan-bias metrics should be used, and consistency of results across metrics and across data sets is key in evaluating this type of evidence. Plaintiffs should also offer comparisons between districts in the enacted plan and the same districts in more competitive hypothetical plans that did not take into account partisan concerns. *See id.* at 1931 (noting that packing and cracking can be demonstrated through a comparison to "another, hypothetical district"); *id.* at 1936 (Kagan, J., concurring) ("Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight."). Such comparisons may support the inference that the partisan bias observed in the enacted map resulted from partisan intent rather than underlying political geography.

Proof of discriminatory effect is bolstered by evidence showing that the partisan bias that the plan engendered was durable—the plan entrenched the favored party in power. *See Ariz. State Legislature*, 135 S.Ct. at 2658 (defining partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival in power"). An entrenched district is impervious to "the potential fluidity of American political life." *Jenness v. Fortson*, 403 U.S. 431, 439, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); *cf. Johnson v. De Grandy*, 512 U.S. 997, 1017, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (explaining that, in the VRA context, "[o]ne may suspect vote dilution from political famine"). Entrenchment makes it potentially impossible to

"throw the rascals out" and freezes the status quo, *see, e.g.*, *Vieth*, 541 U.S. at 356, 124 S.Ct. 1769 (Breyer, J., dissenting), further diluting the votes of individual voters. Plaintiffs may show entrenchment by demonstrating that the partisan bias of the enacted plan persisted over time. Evidence that a map is extremely unresponsive or noncompetitive—that voting patterns can change but the electoral result does not—helps to ***1098** prove durability of the partisan effects and therefore supports an inference of entrenchment.

c. Justification

Next, if Plaintiffs prove these first two prongs (discriminatory intent and discriminatory effect (i.e., packing and cracking)), then the burden switches to Defendants to present evidence that legitimate legislative grounds provide a basis for the way in which each challenged district was drawn. *Rucho*, 318 F.Supp.3d at 867–68; *see also Karcher*, 462 U.S. at 739, 741, 103 S.Ct. 2653 (requiring the State to justify its districting decisions "with particularity"). This type of evidence takes aim at Plaintiffs' intent prong. Defendants may assert that it was not partisan intent that motivated the map drawers' district delineations, but rather a desire to serve other aims. These legitimate justifications may include serving traditional redistricting principles, for example, "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives[,]" and, "[a]s long as the criteria are nondiscriminatory, these are all legitimate objectives that on a proper showing could justify" the drawing of each district. *See Karcher v. Daggett*, 462 U.S. at 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983) (internal citation omitted). Other legitimate justifications include "preserving the integrity of political subdivisions, maintaining communities of interest," *Evenwel*, 136 S.Ct. at 1124, and compliance with the VRA, *see Bethune-Hill v. Va. State Bd. of Elections*, —— U.S. ——, 137 S.Ct. 788, 801, 197 L.Ed.2d 85 (2017) ("As in previous cases, ... the Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act [is] compelling."); *Ala. Legislative Black Caucus*, 135 S.Ct. at 1273–74 (holding that, when a state invokes the VRA to justify the use of race in the districting process, the state must have a "strong basis in evidence" for the position that the state would otherwise be violating the VRA if it failed to take race into account as it did).

Defendants may also argue that some other non-partisan factor caused the map's partisan effects. *Rucho*, 318 F.Supp.3d at 867. For example, Defendants may argue that natural political geography—the patterns in which Democratic and Republican voters are distributed throughout the State—explains why a map favors one party or another. Defendants may also attack the discriminatory effect prong by using evidentiary metrics to show that the challenged map does not actually crack or pack a particular party's voters in a manner that is unusual given non-partisan considerations. For example, Defendants could attempt to show that the challenged map is not an historical outlier or that its partisan effects are in line with the partisan effects of non-partisan simulated or hypothetical maps. Vacillating election outcomes from election cycle to election cycle under the challenged map would also be evidence weighing against a finding of cracking and packing.

We then determine whether the State's proffered legitimate justifications or neutral explanations are credible based on the evidence presented at trial. *See Rucho*, 318 F.Supp.3d at 879 (examining the record and concluding that it did not support Defendants' claim that the General Assembly implicitly relied on certain criteria in making line-drawing decisions); *id.* at 897–98 (rejecting the proffered justification of incumbent protection); *see also Benisek*, 348 F.Supp.3d at 514 (finding one justification incongruent with the "massive shifts of population and the specific targeting of Republicans"); *id.* (rejecting the State's claim ***1099** that a district was drawn due to "an expressed interest in grouping residents along the Interstate 270 corridor" because "there is no evidence that the presence of an interstate highway ... was the reason for the reconfiguration of both the Sixth and Eighth districts, as distinct from a post-hoc rationalization"). In deciding whether to credit Defendants' justifications, we assess "the consistency with which the plan as a whole reflects [the asserted] interests, and the availability [and embrace] of alternatives that might substantially vindicate those interests." *See Karcher*, 462 U.S. at 740–41, 103 S.Ct. 2653. We also weigh the evidence to determine whether any neutral explanation for partisan effect accounts for the partisan effects observed. *See Rucho*, at 896–97, (rejecting the proffered justification of "natural packing" in North Carolina's political geography).

2. Application

Plaintiffs have demonstrated predominant partisan intent and partisan effect to support their First and Fourteenth

Amendment vote-dilution claims. We first discuss evidence that applies broadly across all districts and then delve into the particularities of each district. We next analyze the justifications that Defendants have offered addressing both the intent behind the map and its partisan effects. We conclude that the proffered justifications either are inconsistent with the evidence, simply not credible, or do not meaningfully explain the design or effects of the 2012 map.

a. Statewide evidence of intent

Several different types of evidence come together to tell a cohesive story of a map-drawing process dominated by partisan intent—the invidious desire to disadvantage Democratic voters and advantage Republican voters to achieve a map that was nearly certain consistently to elect twelve Republican Representatives and four Democratic Representatives. *See Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) ("[I]nvidious discriminatory purpose may often be inferred from the totality of the relevant facts."). We examine evidence of the timeline and logistics of the map-drawing process, the map drawers' heavy use of partisan data, contemporaneous statements made by the map drawers about their efforts, the characteristics of the map itself (including the irregular shape of the districts, their lack of compactness, and the high number of county and municipality splits), and finally, the outlier partisan effects that the map has produced since its enactment. When assembled, this evidence paints a convincing picture that partisan intent predominated in the creation of the 2012 congressional map.

i. Map-drawing process

"Departures from the normal procedural sequence" may serve as proof "that improper purposes are playing a role" in the map drawers' work. *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. We conclude that the map-drawing process was rife with procedural irregularities and suspect behavior on the part of the map drawers, all of which support an inference of predominant partisan intent.

There was a severe disconnect between the outward face of the map-drawing process and its true inner workings. Publicly, the House and Senate Subcommittees on Redistricting held regional hearings across Ohio ostensibly to solicit the input of Ohioans on the 2012 map. Yet, no draft maps were presented to the public at these meetings, and the public therefore could not even react to or comment on the drafts. In fact, State Senator Faber, the co-chairman of the Select Committee on ***1100** Redistricting, testified that "the Select Committee on Redistricting didn't do much with regard to the actual redistricting.... I'm not even sure we issued a report." [738] *See Rucho*, 318 F.Supp.3d at 869 (finding a procedural irregularity in the fact that "notwithstanding that the Committee held public hearings and received public input, [the expert who drew the map] never received, much less considered, *any* of that input in drawing the 2016 plan" and finding that procedural irregularity probative of intent).

738 Dkt. 230-13 (Faber Dep. at 21–22).

At the same time, in a room at the DoubleTree Hotel in Columbus, Republican map drawers worked on the map but declined to share drafts of it with the public, Democratic legislators, and most members of their own Party. They finally shared the map with other state legislators immediately prior to its introduction in the House. This late notice was in part necessitated by the fact that national Republicans such as Tom Whatman were requesting changes to the map as late as 9:28 PM on Monday, September 12, 2011, the evening before the bill was introduced. [739] It was also the result of the map drawers' strategic decision to "[h]old it 'in the can' " until the legislature returned in September. [740]

739 Trial Ex. P128 (Sept. 12, 2011 email at LWVOH_00018322).

740 Trial Ex. P112 (Congressional redistricting timeline at DIROSSI_0000140).

The deep involvement of national Republican operatives in the map-drawing process is an additional irregularity that serves as evidence of partisan intent. Ohio Republicans were in contact with national Republican Party operatives well before the map-drawing process began. National Republicans instructed the Ohio map drawers to maintain the plan's secrecy, taught the Ohio map drawers how to use Maptitude, and provided them with additional partisan data and assistance in working with the data they were provided. National Republican operatives repeatedly met with Judy, Mann, and DiRossi, and were in regular communication with them during the map-drawing process.

Importantly, the national Republican operatives did not merely play a supporting role in the map drawing. Rather,

they generated foundational strategies that played key roles in the map. For example, it was Tom Whatman's and Adam Kincaid's idea to create a new Democratic district in the Columbus area (District 3) in order to solidify Republican seats in Districts 12 and 15. Whatman also made the decision that the Republican incumbents to be paired were Congressmen Turner and Austria because that was "the right thing for Republicans for the next decade."[741] The Ohio Republican map drawers displayed deference to their national Republican counterparts in their email correspondence. Mann and DiRossi cleared changes to the map with Whatman prior to implementing them. Whatman requested changes to the map on the eve of its introduction, and the Ohio map drawers accommodated his request. The evidence suggests that many of the big ideas for the 2012 map scheme were generated in Washington, D.C., and then communicated to the Republican consultants in the DoubleTree in Columbus. We conclude that the level of control asserted by national Republican operatives in a redistricting delegated to the State of Ohio's General Assembly raises the inference that pro-Republican partisan intent dominated the process.

741 Trial Ex. P407 (Sept. 7, 2011 email at LWVOH_0052432).

***1101 ii. Heavy use of partisan data**

Plaintiffs introduced testimonial evidence that the map drawers relied heavily on partisan data as they drew the 2012 map. We find the evidence of the heavy reliance on partisan data in the map-drawing process highly persuasive. *See Benisek*, 348 F.Supp.3d at 517–18 (finding partisan intent, noting that "[r]eliance on the [Democratic Performance Index] in finalizing a map was essential to achieving the specific intent to flip the Sixth District from safely Republican to likely Democratic"); *Rucho*, 318 F.Supp.3d at 869–70 (finding the map drawers' creation of a partisan index and use of it in drawing the districts indicative of partisan intent).

First, partisan data, along with other demographic data, was constantly displayed on the map drawers' computer screens as they did their work on Maptitude. As they drew and altered congressional district lines, the partisan leanings of the resulting districts would automatically update in real time.

Second, the Republican map drawers created various partisan indices through which they could measure the likely partisan outcomes of their draft maps, and the compositions of the indices are themselves proof of the map drawers' partisan intent. The Unified Index, upon which they relied heavily, averaged the results of five races, overall reflecting a partisan landscape more favorable to the Democratic Party than an index that would have included a fuller set of elections from the decade preceding the redistricting.[742] The 2008 McCain Index similarly reflected an election in which Democrats had performed very well. Using these indices to predict partisan outcomes of draft maps therefore allowed the map drawers a margin of error—if Republican victories were predicted using the Unified Index and the 2008 McCain Index's Democrat-friendly numbers, they would be likely to withstand Democratic wave years and be sure to elect Republicans in average years. These indices had the added benefit of making draft maps look more competitive than they actually were to the untrained eye. In fact, in public statements defending the competitiveness of the map, Representative Huffman stated that "11 of the 16 races are competitive if you use the 2008 Presidential Race as a guide."[743]

742 Dkt. 247 (Hood Trial Test. at 222–24).

743 Trial Ex. J22 (Rep. Huffman Sponsor Test. at 001).

Third, communications between the Ohio map drawers and their national Republican counterparts demonstrate that partisan outcomes were undoubtedly foremost in their minds when making line-drawing decisions. *See Rucho*, 318 F.Supp.3d at 870 (finding the fact that one map drawer's "appraisal of the various draft plans provided by [the map-drawing expert] focused on such plans' likely partisan performance" probative of partisan intent). For example, DiRossi updated President Niehaus, Senator Faber, and Matt Schuler on his work on the map only days before the introduction of H.B. 319, informing them that the "Index for Latta fell two one hundreds [sic] of a point to 51.33" and the "Index for Jordan rose three one hundredth of a point to 53.26."[744] Later that morning, DiRossi followed up, stating that due to the change he had earlier implemented "a good part of Lucas [County] [Latta] is picking up is [R]epublican territory."[745] DiRossi responded again with more partisan information later the same morning, breaking ***1102** down the partisan leanings of the people in specific sections of Lucas County that DiRossi had just assigned to Latta's new district—"123,289 from Lucas County suburbs (49.13% 08 pres index) and 110,786 from Toledo wards (36.11% 08 pres index)."[746] This series of emails demonstrates the Republican map drawers' acute awareness of and concern about small impacts that line changes had on the map's

partisan score as they tried to finesse the lines to ensure Republican voter majorities for Republican Congressmen Jordan and Latta. They thought it was important to know, for example, that the voters allotted to Latta from the Lucas County suburbs were more Republican leaning, as measured by the 2008 McCain Index than the voters allotted to Latta from the Toledo wards. A related email including "talking points" sent by Whatman to President Niehaus further exemplifies the use of this partisan data in decision making. Whatman explained that one incumbent pairing was chosen over another in part because the rejected pairing "makes it impossible to draw Latta w/ a good index because you can't get enough good to off set [sic] the bad he takes from Lucas County."[747] *See Benisek*, 348 F.Supp.3d at 517 (finding partisan intent where the consultant hired to draw the map "prepared district maps using [a political consulting firm's] proprietary [Democratic Performance Index] metric to assess the likelihood that a district would elect a Democratic candidate").

744 Trial Ex. P126 (Sept. 12, 2011 emails at LVOH_00018298).

745 *Id.*

746 *Id.*

747 Trial Ex. P407 (Sept. 7, 2011 email at LVOH_0052431).

In the days leading up to the introduction of H.B. 319, DiRossi also sent Whatman an update about the effect that changes he had made to Congressman Stivers's district had on partisan scores. He sent Whatman an email in which the entirety of the message read: "Stivers 08 Pres goes from 52.64 to 53.32; Stivers unified index goes from 55.02 to 55.72; Schmidt 08 Pres goes from 54.62 to 53.99; [Schmidt] unified index goes from 57.64 to 56.96; I can send equivalency file if necessary."[748] The presence of entire emails communicating such minute shifts in partisan index scores in the days leading up to the map's introduction supports the conclusion that partisan outcomes were the predominant concern of those behind the map.

748 Trial Ex. P127 (Sept. 12, 2011 email at LWVOH_00018320).

The correspondence between these map drawers is also littered with references to "good" and "bad" territory as well as "improve[ments]" that can be made to certain districts. For example, Whatman wrote to Kincaid, DiRossi, and Mann that one set of changes "looks good on the surface" but highlighted that the "[k]ey is whether we can improve CD1 and CD 14 at the block level."[749] In another email criticizing changes that Kincaid had made to a map, Tom Hofeller wrote that "[t]he area Adam has on his version included ... some of the more 'downtown' area, which I took out of the map I sent—as it was 'dog meat' voting territory." He later referred to the area he had removed as "awful-voting territory in the 15th."[750] "Good" territory clearly meant Republican-leaning territory, "bad" or "awful" territory meant Democratic-leaning territory, and "improv[ing]" a district meant manipulating boundaries, sometimes "at the block level," to make it more likely to elect a Republican representative. The map drawers defined these basic ***1103** classifications of geographic areas based on their partisan leanings and the partisan impact that they would have on the map. The fact that mapmakers considered an area "good" or "bad" based on its partisan composition demonstrates the absolute centrality of partisanship to their map-drawing efforts.

749 Trial Ex. P119 (Sept. 3, 2011 email at LVOH_00018302).

750 Trial Ex. P394 (Sept. 8, 2011 email at REV_00023234).

The Republican map drawers repeatedly emphasized in their testimony that partisan index data was only one category of the many types of demographic data that was displayed in Maptitude as they worked. However, while there is ample evidence that the map drawers were acutely aware of how their mapmaking decisions impacted the partisan leanings of their draft districts, no such evidence suggests that they were nearly as focused on any other type of demographic data. Further, the correspondence includes very little discussion of how contemplated changes would impact core preservation, affect compactness, or minimize county or municipality splits.

iii. Contemporaneous statements

Statements made by the map drawers during and immediately after the map-drawing process also reflect their intent to produce a 2012 map with specific partisan results. *See Benisek*, 348 F.Supp.3d at 518 (considering notes prepared for the Senate President's "remarks to the State House and

Senate Democratic Caucuses about the redistricting plan" as evidence establishing intent). For example, Whatman explained to President Niehaus why certain decisions had to be made about the map: "In losing two seats and trying to *lock down* 12 Republican seats it is unrealistic to think that southwest Ohio can remain the way it is."[751] This is a direct expression of the Republican map drawers' intent to draw a map that guarantees the election of twelve Republicans by minimizing the competitiveness and responsiveness of the districts. The same email explained that pairing senior rather than freshman Republican incumbents was necessary to avoid "an overall worse map for republicans in the state" which was "not the right thing to do."[752] Rather, in Whatman's view, a "tough decision" had to be made that was "the right thing for Republicans for the next decade"—choosing the incumbents to be paired based on which would allow for a more pro-Republican map.[753] This statement, made days before the introduction of H.B. 319 by a chief architect of the 2012 map, is more direct evidence that the map drawers knowingly prioritized partisan impact over other redistricting concerns, such as incumbent protection, and that they understood and intended the map-drawing decisions they were making to affect the electoral outcomes "for the next decade." They could be sure that the impacts would remain for years to come because they relied on carefully chosen indices to predict partisan scores and monitored changes to those partisan scores down to the second decimal place. *See Rucho*, 318 F.Supp.3d at 870 (finding evidence of partisan intent in the map drawers' understandings that the map design would dictate partisan outcomes "*in every subsequent election* ").

751 Trial Ex. P407 (Sept. 7, 2011 email at LWVOH_0052431) (emphasis added).

752 *Id.* at LWVOH_0052432.

753 *Id.*

Kincaid's statements about the Ohio redistricting process following the passage of H.B. 369 provide further proof of the map drawers' partisan intent. In a presentation to the NRCC, he stated his belief that Districts 1, 12, and 15 had been taken "out of play"—they were safe Republican seats that had been designed with sufficient ***1104** partisan insulation from a Democratic challenge.[754] Kincaid provided the PVI numbers to demonstrate significant pro-Republican partisan shifts that the 2012 map had achieved. This is evidence that Republican map drawers relied heavily on and frequently discussed partisan indices because they were understood as the means of monitoring their goal of designing reliably Republican districts. Kincaid also stated his belief that Districts 6 and 16 were "Competitive R Seats Improved"—their designs had been altered to shore up Republican advantage.[755] Kincaid's discussion of the map's achievements emphasized that it should reliably deliver a 12-4 partisan composition, "eliminat[ed] [Representative] Sutton's seat," and "created a new Democratic seat in Franklin County"—all commentary focused on the issue that mattered most to the map drawers: partisan outcomes.[756]

754 Trial Ex. P310 (NRCC Presentation at 5); Dkt. 230-27 (Kincaid Dep. at 115–16).

755 Trial Ex. P310 (NRCC Presentation at 6).

756 Trial Ex. P414 (State-by-State Redistricting Summary at REV_00000001); Dkt. 230-28 (Kincaid Dep. at 519).

iv. Irregular shape of the districts, lack of compactness, high number of splits

A map that fails to include compact districts that follow preexisting county and municipal lines raises questions of intent. The choice to split counties and municipalities and to draw noncompact districts must have been motivated by some other intent that was more important to the map drawers than honoring these traditional districting principles. Where no other motivation is offered, or the motivation offered is unconvincing, and other evidence demonstrates that partisan intent was present, irregularly shaped, noncompact districts and seemingly unnecessary county and municipality splits can support an inference of partisan intent.

Comparing the 2012 map to Mr. Cooper's hypothetical maps (which dealt with the same incumbent-pairing situation as the map drawers in 2011 did) provides some proof of partisan intent. The 2012 map splits two counties four ways, five counties three ways, and sixteen counties two ways.[757] Mr. Cooper's hypothetical maps, in contrast, split no counties four ways, only two counties three ways, and twelve counties in two ways.[758] Mr. Cooper's hypothetical maps also have higher Polsby-Popper and Reock scores than the 2012 map, meaning that their districts are more compact.[759] The hypothetical maps also have core retention rates on par with

that of the 2012 map.[760] The fact that Mr. Cooper was able to draw two hypothetical maps that comport with traditional redistricting principles as well or better than the 2012 map, pair the same configuration of incumbents, and result in more favorable partisan outcomes for Democratic voters suggests that the 2012 map was selected in order to engineer less favorable partisan outcomes for Democratic voters.

757 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).

758 Trial Ex. P093 (Cooper Second Suppl. Decl. at 9, 16).

759 *Id.* at 8, 15.

760 *Id.* at 6, 13.

Further, it does not take an expert or scientific analysis to see that the 2012 map is littered with oddly-shaped districts. It is true that district lines must be drawn somewhere, but even a cursory glance at the 2012 map shows how non-compact some districts are. When coupled with all of the other evidence regarding intent, we find that the irregularity of the boundaries ***1105** is further evidence that the districts' boundaries were drawn with a predominantly partisan intent. *See Rucho*, 318 F.Supp.3d at 883 (finding that the challenged map's " 'bizarre' and 'irregular' shapes" which were "explicable only by the partisan make-up of the precincts the mapdrawers elected to place within and without the districts" supported a finding of predominant partisan intent).

v. Partisan effects as measured by evidentiary metrics

Plaintiffs argue that the extremity of the partisan effects themselves are strong proof of partisan intent. We find the inference of partisan intent well supported by Dr. Warshaw's analysis demonstrating the 2012 map's extreme levels of partisan bias across multiple metrics and data sets and when compared to a large array of historical elections.[761] *See Rucho*, 318 F.Supp.3d at 862 ("In determining whether an 'invidious discriminatory purpose was a motivating factor' behind the challenged action, evidence that the impact of the challenged action falls 'more heavily' on one group than another 'may provide an important starting point.' " (quoting *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555)); *id.* at 870–76 (concluding that mathematical analyses indicating that the challenged map was an extreme statistical outlier in terms of its partisan effects were proof of partisan intent).

Dr. Warshaw's analysis of elections under the 2012 map compared to historical elections in comparable states showed that it is extremely partisan and extremely pro-Republican. All four partisan-bias metrics he employed supported this conclusion, which held true across different elections that have occurred under the 2012 plan. We conclude that such strong and consistent pro-Republican partisan bias would be highly unlikely to occur without intentional manipulation of the district lines to achieve that result.

761 Trial Ex. P571 (Warshaw Rep. at 4).

b. Statewide evidence of effect

For their vote-dilution claims, Plaintiffs offer, in part, statewide evidence to prove partisan effect. As in other gerrymandering cases, "[v]oters, of course, can present statewide *evidence* in order to prove ... gerrymandering in a particular district." *See Ala. Legislative Black Caucus*, 135 S.Ct. at 1265. This evidence complements and strengthens other district-specific evidence.[762] The actual election results and the analyses of Dr. Warshaw and Dr. Cho are particularly relevant here.

762 Plaintiffs' First Amendment associational claim rests on statewide evidence, and we discuss this further in Section V.C.

Before turning to this evidence, it is worth explaining that the reliance on statewide evidence in a partisan-gerrymandering case is slightly distinct from *Shaw* racial-gerrymandering cases. Of course, a *Shaw* claim does not have effect as an element. Rather, the harm under a *Shaw* claim is an "expressive" harm. *See* Richard H. Pildes & Richard H. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–07 (1993) ("An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."). As the Supreme Court recognized in *Miller*:

> *Shaw* recognized a claim "analytically distinct" from a vote dilution claim. Whereas a vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device "to minimize or cancel out the voting potential ***1106** of racial or ethnic minorities," an action disadvantaging voters of a particular race, *the essence of the equal protection claim recognized in Shaw is that the*

State has used race as a basis for separating voters into districts.

Miller, 515 U.S. at 911, 115 S.Ct. 2475 (citations omitted) (emphasis added). Accordingly, "a plaintiff alleging racial gerrymandering bears the burden 'to show ... that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' " *See Bethune-Hill*, 137 S.Ct. at 797. In partisan-gerrymandering cases, however, the harm includes partisan effect, and consequently Plaintiffs may rely on statewide evidence to prove that harm. In this case, a predominant partisan intent drove how the entire map was drawn, so it is logical that Plaintiffs should be able to rely on statewide evidence of effect, as well as district-by-district evidence. Just as a predominant partisan intent infected the whole map, the partisan-effect evidence discussed here shows efficient packing and cracking of Democratic voters across the whole map.

Lastly, the evidence discussed in this section could also be used to prove intent. *See infra* Section V.C.1.b. In future cases, one would expect map drawers not to express clearly their pure partisan intentions, and there likely would be less clear direct evidence of partisan intent. The social-science metrics and simulated maps would then become even more important considerations, for evidence of sufficiently extreme partisan gerrymanders would support the contention that a state was predominantly motivated by partisanship. *See infra* Section V.C.1.b.

Turning now to the evidence, the actual election results show a durable partisan effect across the map and support an inference of packing and cracking districts across the State. Every election has resulted in the election of twelve Republican representatives and four Democratic representatives. Even more alarming is the fact that the Republican candidates have consistently won the exact same districts: Districts 1, 2, 4, 5, 6, 7, 8, 10, 12, 14, 15, and 16; and the Democratic candidates have consistently won the exact same districts: Districts 3, 9, 11, and 13. Thus, in each of these elections, 75% of the representatives elected in the State of Ohio were Republicans—despite fluctuations in the Republican statewide vote share. In the 2012 election, Republicans won only 51% of the statewide vote. In 2014, they won only 59% of the statewide vote. In 2016, they won only 57% of the statewide vote. In 2018, they won only 52% of the statewide vote. From a statewide perspective, then, at least 2012 and 2018 were quite competitive. At the individual district level, however, only four congressional elections—two in 2012 and two in 2018—have been competitive (within a 10% margin of victory, or within 55% to 45%) across the entire decade. Each of those competitive elections was won by Republican candidates; meanwhile, the lowest percentage of the vote that a winning Democratic candidate for Congress received in any election was 61%. Because the scientific evidence shows that such clustering is not the result of natural packing, this strongly suggests that Democratic voters were intentionally packed in large numbers into these four districts. Under the 2002 map, there were several districts that bounced between electing Democratic and Republican representatives—particularly Districts 6, 15, 16, and 18.[763] In short, the ***1107** actual statewide vote share in congressional elections does not suggest that Democratic voters should have expected to suffer from such a "political famine," or such a "political feast" in the four districts that they have won, and, consequently, this raises suspicions of vote dilution. *Cf. De Grandy*, 512 U.S. at 1017, 114 S.Ct. 2647 ("One may suspect vote dilution from political famine").

763 OHIO SEC'Y OF STATE, 2002 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2002-elections-results/; OHIO SEC'Y OF STATE, 2004 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2004-elections-results/; OHIO SEC'Y OF STATE, 2006 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2006-elections-results/; OHIO SEC'Y OF STATE, 2008 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2008-election-results/; OHIO SEC'Y OF STATE, 2010 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2010-elections-results/. The Court takes judicial notice of the 2002-2010 election results. FED. R. EVID. 201.

Further, an array of social-science metrics demonstrates that the 2012 map's significant partisan bias in favor of Republicans in that the Republicans possess a major advantage in the translation of votes to seats compared to Democrats. This partisan bias is durable across the decade. In the 2012 and 2018 elections, the efficiency gap, declination, and partisan symmetry metrics were each more extreme and more pro-Republican than over 90% of previous elections. *See supra* Section II.C.1. The mean-median difference also displays significant partisan bias, though less so than the other three metrics: in 2012, the mean-median difference was more

extreme than "in 83% of previous elections and more pro-Republican than ... in 92% of previous elections." [764] For 2018, the corresponding percentages were 62% and 81%. [765] Although not as strong, we still give weight to the fact that the mean-median difference jumped from 1.7% in 2010 (a successful Republican year) to 7.8% in 2012 and remained much higher, at 5%, in 2018. [766] In 2014 and 2016, these four metrics do not indicate quite as much partisan bias; however, that makes sense given that Republicans performed better in those years. In fact, that just proves the point—when the statewide congressional vote was nearly split between the two parties, the same results were achieved as when Republicans did markedly better.

764 Trial Ex. P571 (Warshaw Rep. at 25).

765 Trial Ex. P476 (Warshaw 2018 Update at 3).

766 Trial Ex. P571 (Warshaw Rep. at 24); Trial Ex. P476 (Warshaw 2018 Update at 3).

The lack of competitive elections compared to what one would expect based on Ohio's natural political geography also indicates that Democratic voters have been packed and cracked. [767] Dr. Cho's analysis showed that under the simulated maps, one would expect at least a handful of competitive elections across the State in each election, with Democratic candidates winning some of those elections and Republican candidates winning others. *See supra* Section II.C.2.b.i. Again, the current map had only two competitive elections in the 2012 cycle, and only two competitive elections in the 2018 cycle—all favoring Republicans. The evidence of packing is perhaps the strongest, as every Democratic candidate who has won an election under the current map has garnered over 60% of the vote—a stark contrast in comparison to the simulated maps in which Democratic candidates are projected to run in several competitive elections. Given the continued dearth of competitive elections for both parties, we credit Dr. Cho's conclusion that the margins of victory "are sufficiently insulating ***1108** to produce an enduring effect" in favor of Republicans. [768]

767 We further discuss individual districts, as well as their election results and lack of competition, *infra*.

768 Trial Ex. P426 (Cho Suppl. Rep. at 6).

Moreover, we conclude that the districts are effectively entrenched to favor Republican candidates overall. We thus credit Dr. Warshaw's conclusion that "Democratic voters in Ohio are efficiently packed and cracked across districts." [769] This conclusion is supported, in part, by the evidence outlined above. Additionally, Dr. Warshaw's first uniform swing analysis shows that "Democrats would win only 37.5% of the seats in Ohio's congressional districts [or 6 out of 16 seats] even if they won 55% of the statewide vote." [770] Incorporating the 2018 election results produced only a slight difference, with Democrats winning half the seats when they achieve 55% of the vote. [771] The swing analysis demonstrates entrenchment because it shows that the 2012 map's design is such that the overall Republican advantage will be maintained, absent a rather seismic shift in the statewide vote share in favor of Democratic candidates. This evidence of entrenchment adds more weight to Plaintiffs' vote-dilution claims and strongly shows that the districts are impervious to "the potential fluidity of American political life." *Jenness*, 403 U.S. at 439, 91 S.Ct. 1970.

769 Trial Ex. P571 (Warshaw Rep. at 43).

770 *Id.* at 15.

771 Trial Ex. P476 (Warshaw 2018 Update at 12–13).

Critically, the evidence shows that the map enacted in H.B. 369 is an outlier in terms of its partisan effects. Dr. Warshaw's findings on the pro-Republican tilt and extreme nature of the partisan-bias metrics provide considerable weight for this conclusion. Dr. Cho's seat-share analysis bolsters the fact that H.B. 369 is an outlier. In her initial analysis, none of the simulated maps produced the same 12-4 seat share as the current map; using updated data, only 0.046% of the simulated maps (1,445 out of over 3 million) produced the same 12-4 seat share. *See supra* Section II.C.2.b.iii. In this case, we are not confronted with a difficult question about the margins of what constitutes an outlier. By almost every measure, H.B. 369 has produced partisan effects that are more extreme than over 90% of prior elections, and several of the measures show that this map is over 95% more extreme.

Defendants contest the usefulness and appropriateness of Dr. Cho's simulated maps as a comparison to the current map because the simulated maps do not factor in incumbent protection. We find these arguments largely unpersuasive. To begin, the simulated maps incorporate only neutral districting criteria, and thus, they serve as useful non-partisan baselines

against which to compare the current map's partisanship. In this case, these non-partisan baselines demonstrate the typical type of maps one would expect based on the State's natural political geography. Second, to the extent that the General Assembly *legitimately* sought to avoid the pairing of incumbents, we find that Dr. Cho's failure to account for this factor partially reduces the strength of her conclusion that the 12-4 map cannot be explained by legitimate redistricting criteria. Even so, we still find Dr. Cho's simulated maps to support an inference of partisan effect and intent due to the overbreadth of Defendants' incumbent-protection explanation, its shaky evidentiary foundation, and the sheer extremity of the pro-Republican or pro-Democratic leanings of the current districts, as demonstrated by Dr. Cho's comparison analysis. We fully address the incumbent-protection justification for H.B. 369 later in this opinion. ***1109** As will be explained, we find that Defendants have stretched the incumbent-protection justification too far in this case, and, in some respects, the justification simply does not hold up based on the facts. We observe that Representative Huffman clearly described incumbent protection as "subservient" to other criteria. *See* Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 19) (statement of Rep. Huffman). Moreover, Dr. Cho's findings on her simulated maps' partisan outcomes so starkly contrast with the current map that, to the extent incumbent protection explains *some* of the current map's partisan effect, Dr. Cho's analyses provide support, along with other evidence in this case, that this justification cannot explain the consistent 12-4 seat share of the current map.

We now turn to an analysis of each individual district.

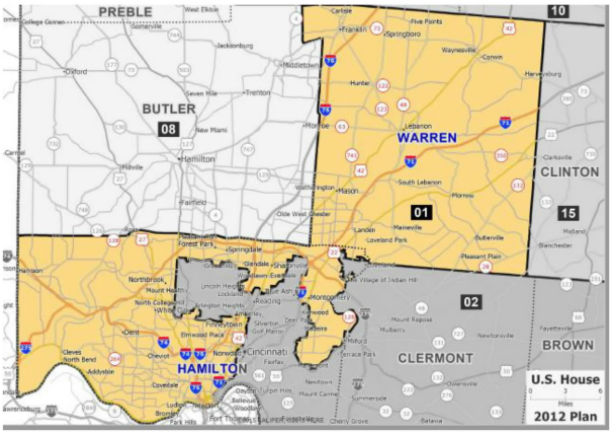
c. District-by-District analysis

In this section, we complement the statewide evidence of intent and effect with evidence specific to each district. We show that each district was drawn with a predominant intent to dilute the votes of Democrats and that each district actually dilutes the votes of Democrats by either packing or cracking Democrats into the district. In doing so, we address and reject herein some of the particular partisan-neutral explanations that Defendants offer for certain districts. In the next section, we explore more fully some of the overarching justifications that Defendants advance.

i. District 1

District 1 encompasses all of Warren County and irregularly shaped and disjointed portions of Hamilton County, including western portions of the City of Cincinnati. The district wraps strangely around the eastern portion of Cincinnati, surrounding it on three sides. [772]

772 Trial Ex. P090 (Cooper Decl. at 12, fig. 5; App. D-3); Dkt. 241 (Cooper Trial Test. at 145).



As Dr. Niven described, rather than leaving intact the City of Cincinnati, an obvious community of interest that leans Democratic, the map drawers made a deliberate choice to split the city in half in an ***1110** irregular shape. One half was paired with heavily Republican Warren County to make a Republican District 1. The other half was paired with Republican rural southern Ohio counties to make a Republican District 2. [773] Dr. Niven's report demonstrated that the Cincinnati neighborhoods that were split were particularly likely to be Democratic strongholds. [774] Thus, the "demographic evidence reveals that [the] district's bizarre lines coincide with the historical voting patterns of the precincts included in, or excluded from, the district." *Rucho*, 318 F.Supp.3d at 900. We therefore conclude that District 1's bizarre lines (wrapping around portions of the City of Cincinnati on three sides) and the fact that it vivisects an obvious community of interest, which together split a Democratic city to create two solidly Republican districts, is evidence that partisan intent dominated the drawing of District 1. *See Covington*, 138 S.Ct. at 2553 (considering "circumstantial evidence of [the] district's shape and demographics" as evidence of racial gerrymandering).

773 Trial Ex. P524 (Niven Rep. at 7).

774 *Id.* at 13.

It is true that Hamilton County has a population larger than the ideal equipopulous district and therefore cannot be entirely contained within a single district; the county must be divided to some extent.[775] However, we reject the argument that the need to split Hamilton County is a neutral explanation for District 1 being drawn as was. Even though Hamilton County needed to be split between two congressional districts, it did not have to be split in such an irregular shape and need not have divided the City of Cincinnati, a clear community of interest, in such a dramatic fashion. For example, Mr. Cooper's hypothetical maps, which were designed as viable alternatives that could have been enacted in 2011, and which match or better the enacted map in terms of their compliance with traditional redistricting principles, maintain the City of Cincinnati intact to a far greater degree than the 2012 map.[776]

775 Dkt. 241 (Cooper Trial Test. at 153).

776 Trial Ex. P093 (Cooper Second Suppl. Decl. at 4, 12).

We can discern no legitimate reason behind the division of the City of Cincinnati other than the desire to crack its Democratic voters, disabling a cohesive center that would likely have elected a Democratic representative and instead facilitating the creation of another Republican district. DiRossi testified that "[t]he intention [in 2011] was to try to have one whole county in [District 1] somehow."[777] DiRossi testified that Warren County was selected to be the whole county, and portions of Hamilton County would be drawn in to reach the ideal population.[778] He stated that the decision to include Warren County "impact[ed] the shape of the district in Hamilton County ... [b]ecause in order to have most of the west side and Cincinnati in the district, but also connect to Warren County ... you had to come across the northern area of places like Evendale and some of the other Springfield Township northern places to connect them."[779]

777 Dkt. 243 (DiRossi Dep. at 186).

778 *Id.*

779 *Id.* at 186–87.

We find this explanation for District 1's shape and the division of the City of Cincinnati entirely unconvincing, false, and indicative of partisan intent. In fact, DiRossi's explanation of the contours of District 1 provokes more questions than it answers. ***1111** Why was Warren County, rather than Butler County or Clermont County selected as the county to pair with Hamilton County? Why was the intention to try to have one whole county in District 1? This did not appear to be a pressing concern elsewhere—Districts 13 and 9 are composed entirely of partial counties. Why did the map drawers want to have the *west side* of Hamilton County in the district, requiring them "to come across the northern area"? What was wrong with the east side? Most importantly, DiRossi's explanation of the shape of the district fails to explain why the City of Cincinnati was split as it is and why keeping Warren County whole was more important than preserving the obvious community of interest embodied in the City of Cincinnati. *See Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555 ("Substantive departures [from normal procedure] may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."). We reject this justification and conclude that it was merely an attempt to obfuscate. *See Benisek*, 348 F.Supp.3d at 520 (rejecting a proffered post hoc rationalization for a district's design as unsupported by the evidence). Rather, given the substantial evidence of partisan intent discussed above, we conclude that the more plausible explanation for District 1's configuration was the predominant desire to crack Democratic voters in Cincinnati, a cohesive center that would likely have elected a Democratic representative. Instead, the design of District 1 facilitated the dilution of these Cincinnati Democrats' votes by splitting them between two majority-Republican districts—Districts 1 and 2.

Further, we conclude that the 2012 map did crack Democratic voters in Hamilton County in District 1. We first note that District 1 has elected Republican representatives in every election that followed the redistricting. This durability in and of itself is some evidence of cracking in District 1. *See id.* at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting").

Second, the partisan effects of District 1 were durable because the district was drawn in a way to ensure the election of a Republican representative. Evidence proves that entrenchment resulted in this case. In 2012, Republican Representative Steve Chabot was elected with 57.73% of the vote. In 2014, he won with 63.22% of the vote. In 2016, he won with 59.19% of the vote. In 2018, he won with

51.32% of the vote. Thus, only one of these elections was competitive—the last, which occurred during a significant Democratic swing election year. Democratic candidate Aftab Pureval challenged Representative Chabot in District 1 in 2018. Pureval spent $ 4,059,690.53 on his campaign while Representative Chabot only spent $ 2,991,573.88. [780] Even under those conditions, however, the composition of the district allowed Representative Chabot to hold off his Democratic challenger. District 1's election results under the 2012 map are evidence of its lack of competitiveness and responsiveness (i.e., entrenchment), achieved through cracking. Indeed, Kincaid stated that he understood District 1 would result in entrenchment. Immediately after the redistricting, Kincaid expressed his belief that District 1 had moved seven PVI points in favor of Republicans and had thus been taken "out of play." [781] Mapmaking that takes a district "out of play" certainly has ***1112** partisan effects —it converts a district that could previously be won by a candidate from either party into one that will consistently elect a member of the favored party. *See Benisek*, 348 F.Supp.3d at 519 (finding partisan effect where the design of the district resulted in a large swing in PVI).

780 Trial Ex. P426 (Cho Suppl. Rep. at 5–6).

781 Trial Ex. P310 (NRCC presentation at 5); Dkt. 230-27 (Kincaid Dep. at 115–16).

District 1's consistent election of a Republican Congressman under the 2012 plan stands in stark contrast to former District 1's status as a swing district under the 2002 plan. In 2006, District 1 elected Republican Representative Chabot, who won with 52.25% of the vote. In 2008, District 1 elected Democratic Representative Steve Driehaus with 52.47% of the vote. In 2010, District 1 flipped back to elect Republican Representative Chabot, this time winning by an even narrower margin with 51.49% of the vote. The 2012 map redrew District 1 in a fashion that diluted Democratic support by cracking the Democratic City of Cincinnati and paired those portions of Cincinnati with rural Republican strongholds, thereby eliminating the threat that District 1 would flip Democratic. *See Benisek*, 348 F.Supp.3d at 519 (finding partisan effect where "Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting, and, in *absolute* terms, they had no real chance of doing so"). District 1's consistent election of a Republican representative under the 2012 map is evidence of the durability of its partisan bias and its facilitation of Republican entrenchment.

Dr. Niven's report provides further proof of the cracking of District 1. It demonstrates the pronounced partisan divergence between Democratic Cincinnati and Republican Warren County, which combined with the cracked part of Cincinnati to form the new District 1. [782] Niven also demonstrated that the pre-2012 version of District 1 elected President Barack Obama in 2008 with 55.17% of the vote, but predicted that had that election been held with District 1 composed as it is under the current map, Obama would have lost the district, securing only 47.7% of the vote. [783] This evidence is highly suggestive of the effect that the design of the new District 1 had on Democratic voters' ability to elect Democratic representatives in the District.

782 Trial Ex. P524 (Niven Rep. at 7).

783 *Id.* at 8.

Finally, Dr. Cho's report also serves as proof of a partisan effect of cracking in District 1. In 95.68% of Dr. Cho's simulated maps Plaintiff Linda Goldenhar, currently a voter in District 1, would reside in a district where she would have a better chance of electing a Democrat. [784] We find that the divergence between the partisan leaning of the current District 1 and the vast majority of the non-partisan simulated districts supports the conclusion that the 2012 map cracked Democratic voters in District 1.

784 Trial Ex. P087 (Cho Rep. at 13).

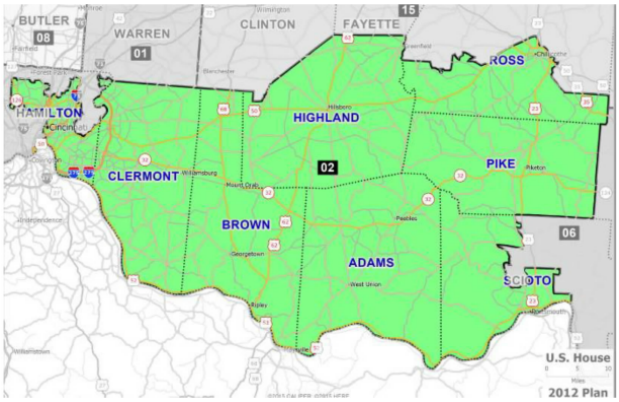
ii. District 2

District 2 encompasses part of Hamilton County, including highly irregularly shaped portions of the City of Cincinnati, [785] as well as all of Clermont, Brown, Adams, Highland, and Pike Counties and portions of Scioto and Ross Counties. [786] District 2 was drawn as the complement of District 1—it took on the other half of the City of Cincinnati to enable the cracking of its Democratic voting power. Therefore, much of the same partisan-intent analysis that corresponds to District 1 also applies to District 2. *See* ***1113** *Benson*, 373 F.Supp.3d at 945 n.39, 2019 WL 1856625, at *57 n.39 (explaining that "[t]he Court will evaluate several of the Senate and House Districts in groups.... The way that each district in a group was drawn had profound consequences on the partisanship of the other districts in that same group. One cannot fully grasp the partisan implications of the design of

an individual district in each group without simultaneously evaluating the partisanship of the other districts in that group."). We conclude that the unnecessary and irregular splitting of Hamilton County and the Democratic City of Cincinnati provides ample proof of a predominant partisan intent to crack District 2. This evidence is supplemented by the general evidence of partisan intent in crafting the 2012 map, discussed above.

785 Dkt. 241 (Cooper Trial Test. at 145).

786 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).



We also conclude that the 2012 map had the effect of cracking Democratic voters from the Cincinnati area in District 2. The historical election results are evidence of this cracking. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Republican Representative Brad Wenstrup was elected to Congress with 58.63% of the vote. In 2014, he won with 65.96% of the vote. In 2016, he won with 65.00% of the vote. In 2018, he won with 57.55% of the vote. None of these elections was competitive because the design of District 2 tempered Democratic support from the Cincinnati area with sufficient Republican territory to ensure a Republican victory. The consistent election of a Republican representative by "safe" margins is evidence of cracking in District 2. It also supports the conclusion that the 2012 map's partisan effects were durable and facilitated Republican entrenchment in District 2.

Dr. Niven's report provides additional evidence that District 2 cracked voters from Hamilton County. Under the pre-2012 map, District 2 had been solidly Republican, with only 40.60% of voters supporting President Obama in the 2008 election. Had the same election occurred with District 2 as it is currently composed, 44.98% of voters would have supported President Obama. [787] This evidence demonstrates that the redistricting decreased the district's considerable partisan margin as ***1114** Democratic voters from the Cincinnati area were absorbed by the new District 2. Yet the map maintained a sufficiently pro-Republican partisan makeup to allow District 2 to elect Republican representatives consistently after the redistricting. This is an example of efficient cracking at work.

787 Trial Ex. P524 (Niven Rep. at 9).

Dr. Cho's simulated maps provide additional evidence of the cracking effect in District 2. 99.87% of Dr. Cho's non-partisan maps would have placed Plaintiff Burks, who lives in current District 2, in a district that would have had a better chance of electing a Democrat. [788] This evidence further suggests that the design of District 2 under the 2012 map is at least partially responsible for Democratic voters' difficulty electing a Democratic representative in that district.

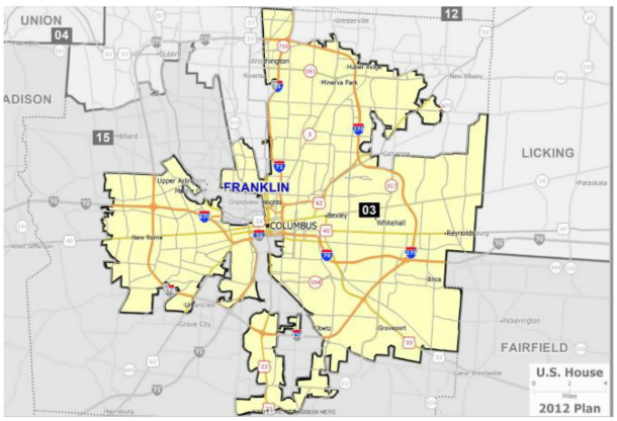
788 Trial Ex. P087 (Cho Rep. at 14).

iii. District 3

District 3 encompasses an irregularly shaped portion of Franklin County, including portions of the City of Columbus. [789] It is involved in the three-way split of Franklin County and the City of Columbus. [790] We conclude that the map drawers' predominant intent in the creation of District 3 was to pack Democratic voters in the Columbus area, allowing them to shore up Republican support in the surrounding Districts 12 and 15. *See Benson*, 373 F.Supp.3d at 945 n.39, 2019 WL 1856625, at *57 n.39.

789 Dkt. 241 (Cooper Trial Test. at 146).

790 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).



First, the irregular shape of District 3 supports an inference of partisan intent. Mr. Cooper testified that the shape of the "[p]resent day District 3 is a mess," and we too find that the bizarre shape of the district is evidence of partisan intent. [791] Mr. Cooper's hypothetical maps, while also drawing districts in the Columbus area, managed to draw those districts with far more regular boundaries. [792] Second, evidence in the record referring to the newly created district as the "Franklin County Sinkhole" supports our finding that the map drawers created District 3 as a vehicle to pack Democratic voters. Related evidence demonstrates that national Republican ***1115** consultants used descriptors such as "awful" or "dog meat" voting territory to describe "downtown" areas that they wanted carved out of District 15 and placed into District 3, which further supports our finding that partisan intent predominated in the design of District 3. *See Benisek*, 348 F.Supp.3d at 518–19 (finding invidious partisan intent where "the State intentionally moved Republican voters out of the Sixth District en masse, based on precinct-level data"). Third, national Republicans Whatman and Kincaid testified that they conceived of the idea to create the new, Democratic District 3. Their primary role in its creation is further proof that the predominant reason for the district's design was to facilitate Republican advantage. Fourth, since the 2012 map was enacted, District 3 has consistently elected the Democratic candidate by large margins—64.06–73.61% of the vote. Meanwhile, adjacent Districts 12 and 15 have consistently elected Republican representatives, despite Democratic swing years such as 2018. The consistency and durability of the partisan results in this constellation of districts and the lack of competitiveness in District 3 are strong evidence that District 3 was designed to pack Democrats and waste significant numbers of Democratic votes.

791 Dkt. 241 (Cooper Trial Test. at 154).

792 Trial Ex. P093 (Cooper Second Suppl. Decl. at 4, 12).

We evaluate other explanations of the district put forth by Defendants and conclude that while each of these considerations may have played a role in the shaping of District 3, none was the primary force behind its creation. Rather, all other considerations were secondary to the predominant aim of packing Democratic voters into a highly saturated new Democratic district, thus allowing map drawers to shore up Republican advantage in Districts 12 and 15.

Defendants argue first that they created the new District 3 because of Columbus's growing population. It is true that Ohio's population was shifting and that the Columbus area was one of the few areas in the State that was experiencing population growth. On the one hand, without more, there is nothing inherently suspect or partisan about creating a new congressional district to encompass a coherent community of interest (the City of Columbus) in a growing population center. On the other hand, population growth in a metropolitan area does not necessitate the drawing of a new district around that area. We conclude, based on the evidence discussed above, that the reason the Republican map drawers chose to allocate Columbus's growing population to the new District 3 was because of the partisan advantage that strategy conferred to them.

Defendants next argue that District 3 "was drawn the way it was" because Speaker Batchelder's "relationship with Congresswoman Beatty and her husband Otto Beatty led him to have a priority to create a central district in Franklin County encompassing Columbus and having representation specifically for Congressman [sic] Joyce Beatty." [793] We conclude that although Republican map drawers drew District 3 with Joyce Beatty (a former member of the Ohio House of Representatives who had never served in Congress at the time of the map drawing) in mind, supporting her prospects as a candidate was only a secondary consideration. Once Kincaid and Whatman decided to draw a new Democratic seat to pack Democratic votes in Franklin County, that Democratic seat would have to be filled. [794] ***1116** The fact that Batchelder's relationship with the Beattys eventually led Republican map drawers to draw District 3 with Joyce Beatty in mind does not disturb our finding that partisan intent predominated in its creation.

793 Dkt. 246 (Judy Trial Test. at 71).

794 Speaker Batchelder explained that the decision to draw District 3 with Beatty in mind arose because "[w]e had a situation here in Franklin County where the Republican Party didn't have a candidate." Dkt. 230-3 (Batchelder Dep. at 50). He went on: "I wasn't out campaigning for a Democrat for Congress, but I had known her and her husband. *My first problem was figuring out if they lived in the district*, but it was—of course, she has emerged as a leader in the Federal House." *Id.* at 50–51 (emphasis added). That Speaker Batchelder's "first problem was figuring out if they lived in the district" suggests that District 3 was first created as Whatman and Kincaid's partisan brainchild, and later tweaked to support Beatty's candidacy.

Defendants also argue that District 3 was drawn to create a minority-opportunity district, but we do not find that this aim played a significant role in the creation of District 3. The Republican map drawers were simultaneously seriously considering an alternative plan to split Franklin County and Columbus into four congressional districts. Had Franklin County been split in four ways, the African-American voter population would have been split rather than included in a coherent minority-opportunity district. Despite now professing the creation of a minority-opportunity district as a motivation behind District 3's design, the evidence shows that the map drawers seriously considered adopting an alternative plan which would have undermined that very goal. We accordingly question the sincerity and veracity of this proffered justification. We further analyze this justification in conjunction with a similar justification offered for District 11 below, after considering each individual district. *See infra* Section V.A.2.d.iii. We note now, however, that a district could still have been drawn with a nearly identical BVAP, [795] but with a more regular shape, fewer county splits, [796] and a considerably less severe partisan bias. [797] It was not, and we infer from the fact that the chosen design contributes to the partisan bias of the map that its creators intended it to do so.

795 Dkt. 241(Cooper Trial Test. at 161).

796 Trial Ex. P090 (Cooper Decl. at 14, 17).

797 Trial Ex. P476 (Warshaw 2018 Update at 14–15).

Defendants argue that national Republicans advanced the idea for the four-way split of Columbus and that Ohio Republicans, who had different goals and intentions, firmly rejected that idea. That portrayal contradicts the evidence of the collaborative relationship between the national and state-level Republicans as well as the content of specific communications discussing the reason the four-way split, which would have resulted in 13-3 map, was rejected. It was the desire to "put the most number of seats in the safety zone given the political geography of the state, our media markets, and how best to allocate caucus resources" that led to the rejection of the four-way split idea. [798] We therefore conclude that the four-way split was rejected not because it conflicted with state-level Republicans' goals for the map, but rather because the Republican seat advantage that it would have conferred would have been too tenuous. The reasons for the rejection of the proposed four-way split of Franklin County is additional proof supporting our conclusion that partisan intent was the predominant factor in drawing District 3.

798 Trial Ex. P385 (Congressional Redistricting Talking Points at LWVOH_0052438).

In sum, even accepting all of Defendants' proffered justifications for drawing District 3, we conclude that they were secondary to the map drawers' predominant intent: conferring Republican advantage ***1117** by packing District 3 and facilitating the cracking of Districts 12 and 15.

We also conclude that District 3 actually packed Democratic voters. The historical election results provide proof of the packing effect—a Democratic candidate has won every election under the 2012 map. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting").

The margin by which that candidate has won shows that Democratic voters are packed into the district in a way that renders the district noncompetitive. In 2012, Democratic candidate Joyce Beatty was elected to Congress with 68.29% of the vote. In 2014, she won with 64.06% of the vote. In 2016, she won with 68.57% of the vote. In 2018, she won with 73.61% of the vote. None of these elections were even close to competitive; they were all landslide victories for Beatty. Beatty's consistent election also demonstrates the durability of the 2012 map's partisan effect in District 3.

Dr. Niven also demonstrated a stark difference in the political leanings of voters within Franklin County who were placed in District 3 and voters within Franklin County who were placed in Districts 12 and 15. Franklin County voters within District 3 had pro-Democratic partisan index score of .3268.

Meanwhile, Franklin County voters within Districts 12 and 15 had pro-Republican partisan index scores of 0.5105 and 0.5237, respectively.[799] This demonstrates both the intent to pack voters and the effect of concentrating the most Democratic sections of Franklin County within District 3 while allotting the less Democratic sections to Districts 12 and 15 to facilitate their overall Republican compositions.

799 Trial Ex. P524 (Niven Rep. at 27).

Finally, Dr. Cho's simulated maps also provide proof of the packing effect in District 3. Zero percent of Dr. Cho's simulated maps would place Plaintiff Inskeep, a current resident of District 3, in a district where she would have a better chance of electing a Democratic representative.[800] The map drawers managed to draw a map that maximized the concentration of Democratic voters in Plaintiff Inskeep's area —a highly efficient packing job.

800 Trial Ex. P087 (Cho Rep. at 15).

iv. District 4

District 4 encompasses all of Allen, Auglaize, Shelby, Logan, Union, Champaign, Crawford, Seneca, and Sandusky Counties. It makes a small intrusion into Mercer County that is a part of a three-way split of Mercer County. Additionally, it is involved in the three-way split of Lorain County.[801] It also includes parts of Marion, Huron, and Erie Counties.

801 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).

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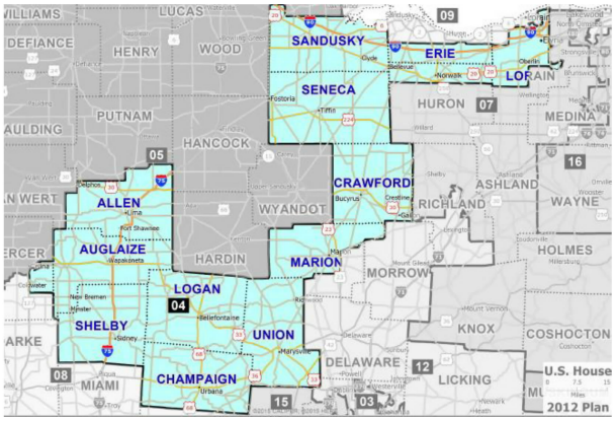

The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to pack District 4. We also conclude that the 2012 map actually cracked Democratic voters in District 4. First, historical election results support this finding as District 4 has been won by a Republican in every election under the 2012 map. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). Second, the wide margins by which the Republican candidate won each election under the 2012 map show its entrenchment effect, a biproduct of efficient cracking. The map entrenched Republicans in power by drawing District 4 as a "safe" Republican seat. None of these elections that have occurred in District 4 since the enactment of the 2012 map have been competitive. In 2012, Republican Representative Jim Jordan was elected to Congress with 58.35% of the vote. In 2014 he won with 67.67% of the vote. In 2016 he won with 67.99% of the vote. In 2018 he won with 65.26% of the vote.

Finally, Dr. Cho's simulated maps provide further evidence that District 4 was cracked. In 98.25% of Dr. Cho's simulated non-partisan maps Plaintiff Libster, who lives in current District 4, would have had a better chance of electing a Democratic representative.[802] This evidence supports the inference that the pro-Republican design of the 2012 map had an impact on Democratic voters such as Plaintiff Libster.

802 Trial Ex. P087 (Cho Rep. at 16).

v. District 5

District 5 encompasses all of Williams, Fulton, Defiance, Henry, Paulding, Putnam, Hancock, Van Wert, Hardin, Wyandot, and Wood Counties. It also contains the northern half of Mercer County, the western half of Ottawa County, and the western half of Lucas County. It is involved in the three-way split of Mercer County.

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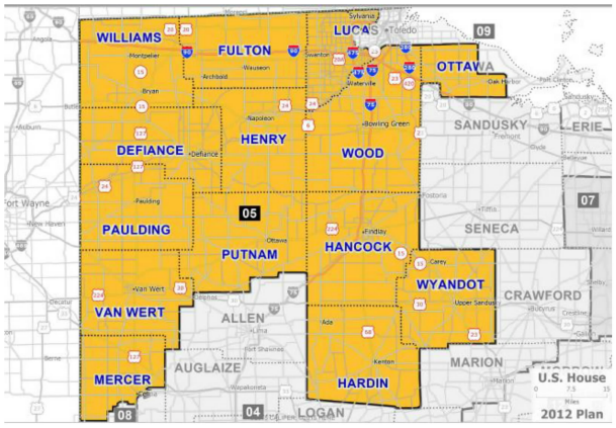

The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to pack District 5.

Additionally, we conclude that the 2012 map had a partisan effect on District 5 by cracking Democratic voters there. Historical election results provide support for this finding. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Republican Representative Bob Latta was elected to Congress with 57.27% of the vote. In 2014, he won with 66.46% of the vote. In 2016, he won with 70.90% of the vote. In 2018, he won with 62.26% of the vote. None of these elections was competitive because District 5 was designed such that Democratic voters would be outnumbered by Republican voters by sufficient margins to ensure that a Republican candidate would be elected consistently. The election results are thus evidence of the durability of the 2012 map's partisan effects in District 5 and its tendency to entrench the favored party in power.

Finally, Dr. Cho's simulated maps provide further proof of the cracking of District 5. In 95.47% of Dr. Cho's simulated non-partisan maps, Plaintiff Deitsch, who lives in current District 5, would have a better chance of electing a Democratic representative. That evidence supports an inference that the partisan manner in which District 5 was drawn had a negative effect on the ability of voters within the district such as Plaintiff Deitsch to elect Democratic representatives.

vi. District 6

District 6 includes territory along the southeastern border of Ohio. It encompasses all of Columbiana, Carroll, Jefferson, Harrison, Guernsey, Belmont, Monroe, Noble, Washington, Meigs, Gallia, Jackson, and Lawrence Counties. It also includes an irregularly shaped eastern half of Scioto County, the northern half of Muskingum County, the southern half of Tuscarawas County, the southern half of Mahoning County, and the southeast corner of Athens County. [803]

803 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).

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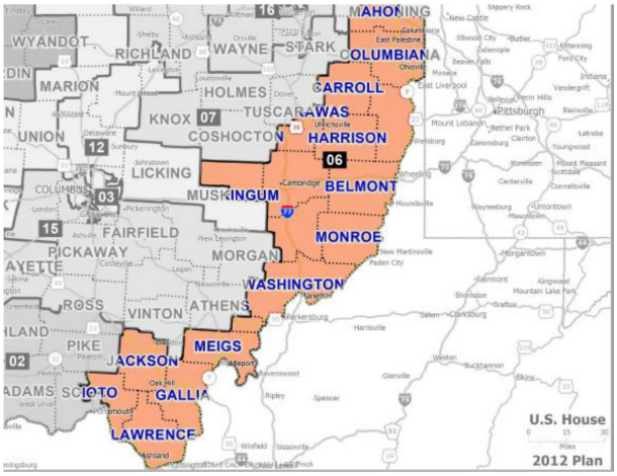


The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to crack District 6.

We also conclude that the 2012 map cracked voters in District 6. The historical electoral results since the enactment of the 2012 map provide support for this conclusion. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Republican Representative Bill Johnson was elected to Congress with 53.25% of the vote. In 2014, he won with 58.23% of the vote. In 2016, he won with 70.68% of the vote. In 2018, he won with 69.25% of the vote. Only the first of these elections was competitive, likely because Representative Johnson's opponent in that election, Democratic Representative Charlie Wilson, had previously served as Congressman for District 6 prior to Representative Johnson's first congressional win in 2010. Wilson did not run again after losing the 2012 race, after which Representative Johnson faced less competitive Democratic challengers and won with considerable margins. The lack of competition in most of these elections as well as the consistent Republican wins are evidence of the durability of the 2012 map's pro-Republican effect and its tendency to entrench Republicans in power.

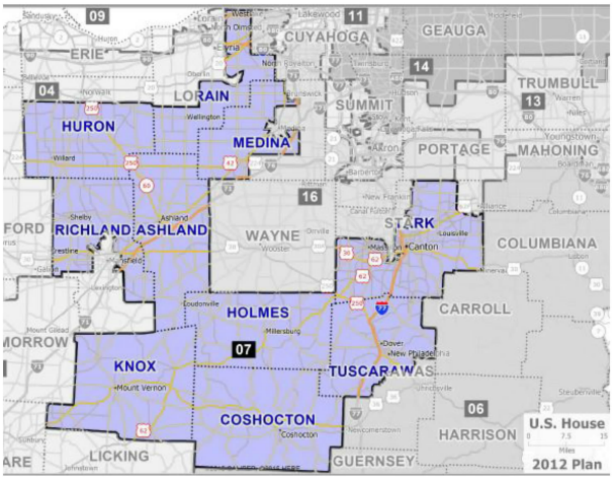
Finally, Dr. Cho's simulated maps provide further proof of cracking in District 6. In 100% of Dr. Cho's simulated maps, Plaintiff Boothe, a voter in current District 6, would have a better chance of electing a Democratic representative. [804] This evidence supports the conclusion that the partisan design of the 2012 map had the effect of minimizing Democratic voters' chances of electing Democratic representatives in District 6.

804 Trial Ex. P087 (Cho Rep. at 18).

vii. District 7

District 7 encompasses all of Knox, Coshocton, Holmes, and Ashland Counties. It also includes the northern portion of Tuscarawas County, an irregularly shaped portion of Stark County, an irregularly shaped portion of Richland County, the southern portion of Huron County, and irregularly shaped portions of ***1121** Lorain and Medina Counties. It is involved in the three-way splits of Stark County and Lorain County. [805]

805 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).



The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to crack District 7.

Additionally, we conclude that the 2012 map cracked Democratic voters in District 7. The historical election results provide some evidence of the cracking. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Republican Representative Bob Gibbs was elected to Congress with 56.40% of the vote. In 2014, he won with 100% of the vote. In 2016, he won with 64.03% of the vote. In 2018, he won with 58.74% of the vote. The lack of competition in these elections and the Republican candidate's victory in each are also evidence of the durability of the partisan effects of the 2012 map on District 7 and the map's tendency to entrench Republican representatives in office.

Finally, Dr. Cho's simulated non-partisan maps provide further evidence of the cracking of voters in District 7. In 100% of Dr. Cho's simulated maps Plaintiff Griffiths, who lives in current District 7, would have had a better chance of electing a Democratic representative. [806] This evidence supports the conclusion that the partisan design of the 2012 map diminished Democratic voters' opportunity of electing a Democratic representative in that district.

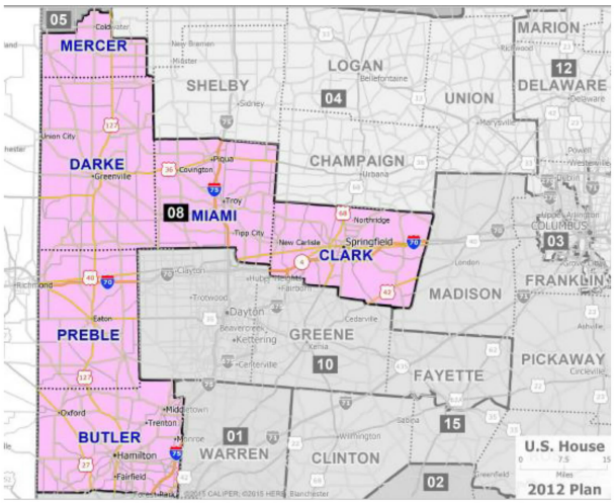
806 Trial Ex. P087 (Cho Rep. at 19).

viii. District 8

District 8 rests along the southwestern border of Ohio, with a portion jutting into the heart of the State. It includes the entireties of Darke, Miami, Clark, Preble, and Butler Counties and includes the southern half of Mercer County. It is involved in the three-way split of Mercer County. [807]

807 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).

***1122**



The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to crack District 8.

We also conclude that the 2012 map cracked Democratic voters in District 8. Historical election results under the 2012 map provide some proof of this cracking. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Republican Representative John Boehner was elected to Congress with 99.88% of the vote. In 2014, he won with 67.19% of the vote. In 2016, Republican Warren Davidson succeeded Representative Boehner as the Republican congressional candidate in District 8. He won the election with 68.76% of the vote. In 2018, Representative Davidson won with 66.58% of the vote. None of these elections were even close to competitive. We find the lack of competition and the consistent election of Republican candidates to be evidence of the durability of the 2012 map's partisan effects in this district and the map's tendency to entrench Republican representatives in office by constructing "safe" districts.

Finally, Dr. Cho's simulated non-partisan maps provide further evidence of the cracking of Democratic voters in District 8. In 100% of Dr. Cho's simulated maps, Plaintiff Nadler, who resides in the current District 8, would have had a better opportunity to elect a Democratic representative. [808] This supports the conclusion that the partisan design of the 2012 map impacted the ability of Democratic voters in District 8 to elect their candidate of choice.

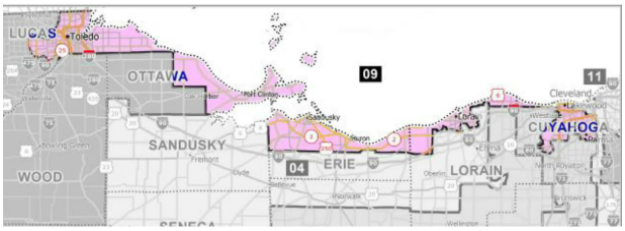
808 Trial Ex. P087 (Cho Rep. at 20).

ix. District 9

District 9 is a thin strip along the southern coast of Lake Erie, stretching from Toledo in Lucas County in the west to Cleveland in Cuyahoga County in the east. Its narrow, long footprint has earned it the nickname "the Snake on the Lake." [809] The district includes portions of ***1123** Lucas, Ottawa, Erie, Lorain, and Cuyahoga Counties; it does not include a single county in its entirety. It is involved in the four-way split of Cuyahoga County and the three-way split of Lorain County. [810]

809 Dkt. 241 (Cooper Trial Test. at 145–46).

810 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).



We conclude that the map drawers intentionally packed Democratic voters into District 9, splitting up communities of interest along the way. We agree with Mr. Cooper's analysis that District 9 severed communities of interest. [811] Despite all the territory in District 9 being adjacent to Lake Erie, in order to create District 9 "you've got to split about five counties which in and of themselves are communities of interest." [812] Mr. Cooper's hypothetical maps demonstrate that it is possible to draw a far more coherent District 9 that respects county boundaries while still complying with all traditional redistricting principles and pairing the same amount of incumbents from the same political parties as the 2012 map did. [813] The presence of such an alternative and the map drawers' decision instead to split counties and draw a bizarrely shaped district support our conclusion that partisan intent predominated in drawing of District 9.

811 Dkt. 241 (Cooper Trial Test. at 149).

812 *Id.*

813 Trial Ex. P093 (Cooper Second Suppl. Decl. at 4–19).

In concluding that the predominant intent behind the design of District 9 was partisan packing of Democratic voters, we reject Defendants' argument that bipartisan incumbent protection efforts and Democratic desires dictated its shape. There is no admissible record evidence suggesting that Democratic leaders desired the pairing of Representatives Kaptur and Kucinich. Representative Kaptur testified that she did not discover that she was being paired with Representative Kucinich until very close to the legislative introduction of the bill. She learned of the map's design from a newspaper and was "astonished" by the shape of her new district. [814] She did not request to be paired with Representative Kucinich and, in fact, was outraged at the prospect because she believed that the new district "hack[ed] towns apart" and showed "no respect for counties" and "no respect for communities." [815]

Kaptur's involvement in shaping the district began only after the Ohio General Assembly passed the initial H.B. 319. She then attempted to negotiate so that the Republican map drawers would make some alterations to the district in which she was paired with Kucinich. The heart of the plan for District 9, however, remained the same. Representative Kaptur's ability to secure minor concessions following the ***1124** passage of H.B. 319 does not amount to her designing the district and does not overcome the partisan intent that motivated the drawing of District 9 in the first place. We therefore reject as unsupported by admissible evidence the Defendants' contention that District 9 was the result of the Democratic desire that Representatives Kaptur and Kucinich be paired.

814 Dkt. 249 (Kaptur Trial Test. at 70).

815 *Id.* at 71–72.

To the extent that Defendants claim that the shape of District 9 was preordained by the cluster of Democratic incumbent residences in northern Ohio, their argument is undermined by the evidence. Mr. Cooper, a redistricting expert, stated that "it made no sense to create a Snake on the Lake just to pair [Kaptur and Kucinich]. It just baffles me as to why that was done."[816] Mr. Cooper demonstrated that this pairing was unnecessary by drawing two hypothetical maps that could have been drawn in 2011 that avoided drawing the elongated District 9 either by pairing Representatives Kucinich and Fudge or pairing Kucinich and Sutton, all while honoring the other traditional districting principles.[817] Both of these hypothetical maps would actually have facilitated the avoidance of one incumbent pairing because they leave a version of District 10 in western Cuyahoga County and Lorain County with no Democratic incumbent —Representative Kucinich could have avoided his pairing with either Representative Sutton or Representative Fudge by running in that district instead.[818] This argument therefore does not disturb our conclusion that the predominant intent was securing Republican partisan advantage in the creation of the long, snaking District 9.

816 Dkt. 241 (Cooper Trial Test. at 176).

817 Trial Ex. P093 (Cooper Second Suppl. Decl. at 4–18).

818 *Id.* at 5–6, 13.

We also conclude that the 2012 map had the effect of packing Democratic voters in District 9. Historical election results support this conclusion. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Democratic Representative Marcy Kaptur was elected to Congress with 73.04% of the vote. In 2014, she won with 67.74% of the vote. In 2016, she won with 68.69% of the vote. In 2018, she won with 67.79% of the vote. None of these elections were even close to competitive; Representative Kaptur consistently won with 15–20% of the vote more than necessary to carry the district. The extreme lack of competition and the consistent election of a Democratic representative in District 9 by large margins are evidence of the durability of the 2012 map's partisan effects.

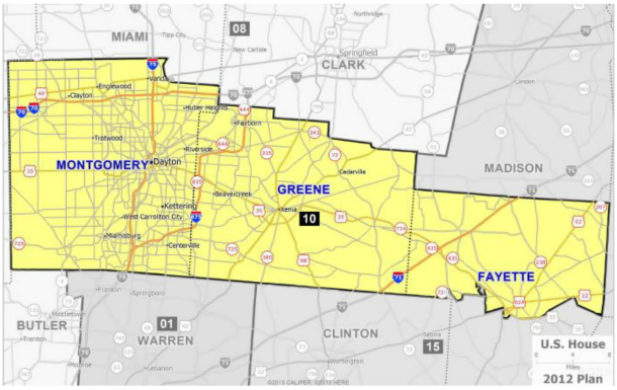
Finally, Dr. Cho's simulated non-partisan maps are further proof of this packing in District 9. Only 15.91% of the simulated maps would have given Plaintiff Walker a better chance of electing a Democratic representative. In 13.55% of the simulated maps, Plaintiff Rader would have had a better opportunity to elect a Democratic representative.[819] Although these figures are not quite as extreme as those in other districts, they are still proof that the partisan design of the 2012 map packed Democratic voters into District 9, targeting them because of their political preferences and artificially diluting the power of their votes.

819 Trial Ex. P087 (Cho Rep. at 21–22).

x. District 10

District 10 includes all of Montgomery and Greene Counties and the ***1125** northern half of Fayette County.[820]

820 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).



The overall evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to crack District 10.

We also conclude that the 2012 map cracked Democratic voters in District 10. Historical election results provide some proof of this cracking. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Republican Representative Mike Turner was elected to Congress with 59.54% of the vote. In 2014, he won with 65.18% of the vote. In 2016, he won with 64.09% of the vote. In 2018, he won with 55.92% of the vote. None of these elections, even that occurring during the 2018 Democratic swing year, were competitive. We consider the consistent election of the Republican candidate by large margins to be evidence of the durability of the 2012 map's partisan effects in District 10. It is also evidence that the map entrenches a Republican representative in office by creating a "safe" Republican District 10.

Finally, Dr. Cho's simulated non-partisan maps provide further proof of the cracking in District 10. In 99.75% of Dr. Cho's simulated maps, Plaintiff Megnin, who lives in current District 10, would have had a better opportunity of electing a Democratic representative.[821] This figure supports the conclusion that the partisan design of District 10 negatively impacted Megnin's ability to elect a Democratic representative.

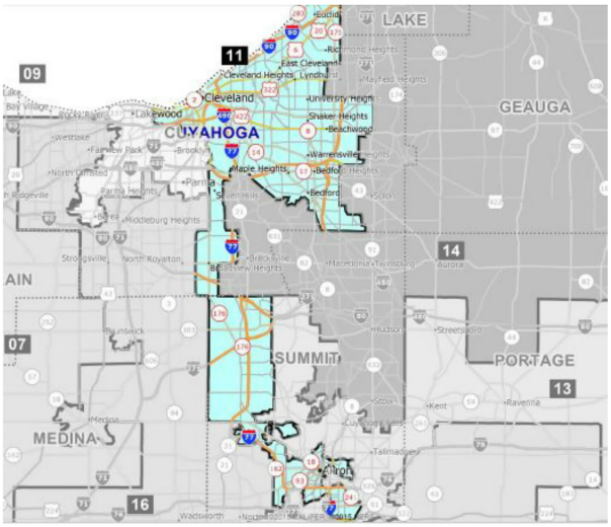
821 Trial Ex. P087 (Cho Rep. at 23).

xi. District 11

District 11 includes highly irregularly shaped portions of Cuyahoga County and Summit County. It is involved in the four-way split of Summit County and the four-way split of Cuyahoga County.[822]

822 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).

***1126**



We conclude that District 11 was intentionally drawn both to pack voters into the district and to siphon Democratic voters off from the new District 16, in which Republican incumbent Representative Renacci and Democratic incumbent Representative Sutton were paired. District 11 was designed to absorb Democratic voters who were formerly Representative Sutton's constituents so that the new District 16 could be weighted to produce the victory of Republican Representative Renacci. *See Benson*, 373 F.Supp.3d at 945 n.39, 2019 WL 1856625, at *57 n.39.

The decision to depart from District 11's historical territory and to drop down into Summit County and pick up additional Democratic voters from the City of Akron under the 2012 map is strong proof of the intent to pack District 11 and facilitate the cracking of District 16.[823] The historical boundaries of District 11, contained entirely within Cuyahoga County, make the decision to extend the district into Summit County suspect. Mr. Cooper's hypothetical plans contain District 11 entirely within Cuyahoga, in line with its historical location, while respecting other traditional redistricting concerns.[824] The fact that it was possible to draw District 11 fully within Cuyahoga is some evidence that the jaunt downward into Summit County was drawn for partisan reasons. We conclude that the predominant reason that District 11 ventured for the first time out of Cuyahoga County in the 2012 map was as

a result of the map drawers' partisan intent to pack voters in District 11 and crack voters in District 16.

823 Dkt. 241 (Cooper Trial Test. at 155).

824 Trial Ex. P093 (Cooper Second Suppl. Decl. at 4, 12).

The historical election results in the years that followed the redistricting are proof of the map drawers' intent. Representative Fudge in the packed District 11 has won each election by huge margins. Her *lowest* portion of the vote in an election since the redistricting has been 79.45%. Meanwhile, in District 16, incumbent Republican Representative Renacci narrowly defeated incumbent Democratic ***1127** Representative Sutton in 2012. Once he had vanquished the opposing incumbent, Renacci proceeded to win his successive elections by large margins. *See infra* Section V.A.2.c.xvi. (discussing District 16). It was no coincidence that District 16 went Republican; the packing of District 11 facilitated the result. The day after the introduction of H.B. 319 in committee, Mann sent an email to Renacci informing him that, under the proposed bill, 16.98% of Representative Sutton's former district would be included within the new District 11, while only 25.79% of her former district would carry over into the new District 16, in which she was expected to run. [825] This evidence supports our conclusion that partisan intent predominated in the drawing of District 11.

825 Trial Ex. P130 (Sept. 14, 2011 email at LWVOH_00018321).

In concluding the intent to pack District 11 to dilute Democratic voting power predominated in crafting District 11, we reject or find secondary several alternative explanations for its shape. First, Defendants claim that District 11 was drawn by Republican map drawers with the intention of creating a majority-minority district. They argue that even if their implementation of this goal was flawed, so long as the map drawers honestly believed that the way in which they drew the district would aid minority electoral opportunity, they cannot be found at fault. *See* Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 21–22) (citing employment discrimination cases). There was no proof that such an extension of the District was made for any legitimate reason, and we reject Defendants' assertion that uninformed guesswork about VRA compliance is sufficient to justify the packing of African-American voters into a Democratic district. *See infra* Section V.A.2.d.iii. (discussing compliance with the VRA).

Second, no admissible evidence supports Defendants' assertion that Democratic leaders in the African-American community approved of and desired District 11's current shape. Defendants offered Judy, DiRossi, and Speaker Batchelder's testimony about conversations that allegedly occurred with African-American Democratic leaders solely for the effect that those conversations purportedly had on the map drawers. However, in the next breath, they offer the testimony about those conversations for their truth—to prove their assertion that the design of District 11 and its concentration of African-American voters and Democratic voters was a shared bipartisan goal. But this assertion relies on the truth of out-of-court statements of since deceased Democrats from Northern Ohio. The hearsay rules prevent us from taking Judy, DiRossi, and Speaker Batchelder's word for what those individuals actually wanted.

Third, we conclude that any input that Representative Fudge herself had on the shape of her district occurred well after the unveiling and passage of H.B. 319, in the scramble to secure Democratic support for a new bill that occurred in the shadow of the referendum. This input amounted to securing small tweaks and concessions, but the overarching contours of the map were already fixed and did not change. Fudge stated that she had no input in the drawing of her district's lines prior to the legislative unveiling and that she was quite displeased with the shape of the district and the way that it reached down into Summit County. [826]

826 This contradicts the testimony of DiRossi, who stated that prior to the introduction of H.B. 319 "it had been relayed to [him] by a number of people that she did not want to be paired with Dennis Kucinich in a district" and therefore that she elected to have District 11 drawn dropping south into Summit County rather than be paired against Representative Kucinich in a district entirely contained within Cuyahoga County. Dkt. 230-12 (DiRossi Dep. at 186–87). DiRossi, however, admitted that he never spoke to Congresswoman Fudge himself. Explaining the source of this information, he stated: "I was working with Bob Bennett and I know that other members, I believe Speaker Batchelder—or I know Speaker Batchelder was talking to a number of folks and contacts that he had in Northern Ohio about what Congresswoman Fudge wanted." *Id.* at 187. To the extent that Defendants offer DiRossi's testimony

about what Congresswoman Fudge wanted for the truth—to prove that she actually desired that District 11 drop down into Summit County or that she did not want to be paired with Representative Kucinich—we find that it is inadmissible multi-layer hearsay.

***1128** Finally, we do not find that Defendants' argument that declining population in Northeastern Ohio necessitated stretching District 11 southward adequately explains the shape of District 11. There were myriad ways that these population constraints could have been handled. It is no coincidence that the way chosen by Republican map drawers resulted in packing Democratic voters in District 11 and cracking Democratic support for Representative Sutton in the new District 16. Mr. Cooper's alternative hypothetical maps also dealt with the population shifts in Ohio but managed to produce two different equipopulous versions of District 11 that do not extend the district south into Summit County. [827] Having considered Defendants' alternative explanations for the shape of District 11, we conclude that the predominant intent that motivated the drawing of the district in its current form was the desire to pack Democratic voters in District 11 and crack Democratic voters elsewhere.

827 Trial Ex. P093 (Cooper Second Suppl. Del. at 4, 12).

We also conclude that the 2012 map had the effect of packing Democratic voters into District 11 in a dramatic fashion. Historical election results provide some proof of this packing. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Democratic Representative Marcia Fudge was elected to Congress with 100% of the vote. In 2014, she won with 79.45% of the vote. In 2016, she won with 80.25% of the vote. In 2018, she won with 82.24% of the vote. None of these elections were even close to competitive—Representative Fudge, when challenged, consistently won with around 30% more of the vote than would have been actually needed to carry the district. The extreme margins by which Fudge won her seat provide some evidence of packing in District 11.

Dr. Niven's report helps illustrate why the addition of portions of Summit County to District 11 facilitated its packing. In the 2008 election 75.70% of the voters in Summit County who were included in District 11 voted for President Obama. [828] This means that the sections of Summit County that the map drawers chose to include in District 11 were overwhelmingly Democratic. Allotting these Democratic Summit County voters to District 11, which was already destined to deliver a Democratic representative, meant that there were fewer Democratic voters in the area of Summit County that could potentially be assigned to neighboring Districts such as District 16, which were intended to deliver Republican victories. The subsequent election results, in which Representative Fudge repeatedly won District 11 by a landslide and Republican candidates consistently won District 16, are clear evidence of a packing effect in District 11.

828 Trial Ex. P524 (Niven Rep. at 31).

***1129** Finally, Dr. Cho's simulated maps provide further evidence of packing in District 11. In 0% of the simulated non-partisan maps would Plaintiff Harris, who lives in current District 11, have a better chance of electing a Democratic candidate. [829] The fact that the pro-Democratic outcome in District 11 is so extreme compared to the outcomes in a non-partisan map supports the conclusion that the partisan design of the 2012 map impacted the composition of District 11, packing in Democratic voters and thereby diluting their votes.

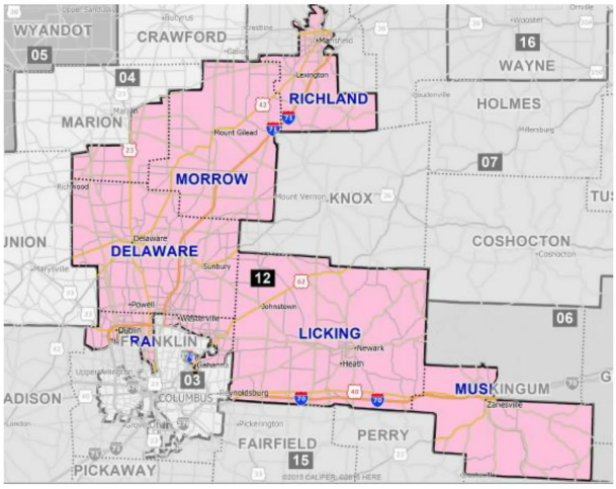
829 Trial Ex. P087 (Cho Rep. at 24).

xii. District 12

District 12 includes all of Morrow, Delaware, and Licking Counties. It also includes the southern half of Muskingum County, the southeastern corner of Marion County, and the southern half of Richland County. Finally, District 12 includes irregularly shaped and noncontiguous portions of Franklin County, which jut into the City of Columbus. [830] It is involved in the three-way split of Franklin County and the City of Columbus. [831]

830 Dkt. 241 (Cooper Trial Test. at 146).

831 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).



The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to crack District 12. Additionally, the evidence of partisan intent in creating the "Franklin County Sinkhole" in District 3 is also evidence of partisan intent to crack District 12 because District 12 benefitted from the high concentration of Democratic voters in District 3. *See Benson*, 373 F.Supp.3d at 945 n.39, 2019 WL 1856625, at *57 n.39. Kincaid's statements immediately after the redistricting are further evidence of partisan intent in drawing District 12. Kincaid expressed his belief that, under the 2012 map, District 12 had moved nine PVI points in favor of Republicans and had thus been taken "out of play." [832] Designing a district to take it "out of play," resulting in the consistent election of a member of one party rather than true competition between the parties, shows partisan intent.

832 Trial Ex. P310 (NRCC Presentation at 5); Dkt. 230-27 (Kincaid Dep. at 115–16).

***1130** We also conclude that the 2012 map had the effect of cracking Democratic voters in District 12. Historical election results under the 2012 map support this conclusion. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Republican Representative Pat Tiberi was elected to Congress with 63.47% of the vote. In 2014, he won with 68.11% of the vote. In 2016, he won with 66.55% of the vote. In 2018, Troy Balderson replaced Representative Tiberi as the Republican candidate. He won the election with 51.42% of the vote, defeating Democratic candidate Danny O'Connor. Only one of these elections in District 12 was competitive—the last. District 12 had been drawn to be sufficiently pro-Republican, however, such that Balderson, was able to defeat O'Connor even in a Democratic swing year. [833] This result is particularly impressive considering the fact that O'Connor spent $ 8,452,028.09 on his campaign while Balderson spent only $ 2,496,185.71. [834]

833 Trial Ex. P426 (Cho Rep. at 6).

834 *Id.*

Dr. Niven's report provides further proof that the 2012 map shored up District 12 as a Republican seat. Under the pre-redistricting map, District 12 supported President Obama in the 2008 election with 55.03% of the vote. Had the District taken the form that it does under the current map, President Obama would have lost the district with only 45.43% of the vote. [835] The increased Republican leaning of the new District 12 is evidence of the effect of the cracking of Democratic voters in that district. *See Benisek*, 348 F.Supp.3d at 519 (finding partisan effect where the design of the district resulted in a large swing in PVI).

835 Trial Ex. P524 (Niven Rep. at 25).

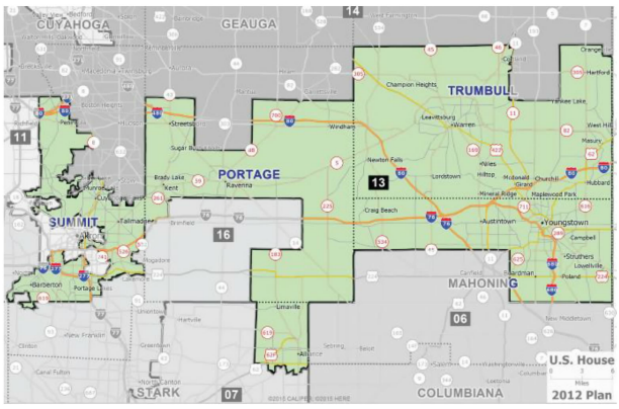
Finally, Dr. Cho's simulated maps also lend support to the conclusion that Democratic voters in District 12 were cracked. In 100% of Dr. Cho's simulated non-partisan maps, Plaintiff Dagres, who resides in current District 12, would have a better chance of electing a Democratic representative. [836] This fact supports the conclusion that the pro-Republican cracking of District 12 diminished the ability of Democratic voters in that district to elect their candidate of choice.

836 Trial Ex. P087 (Cho Rep. at 25).

xiii. District 13

District 13 includes the southern half of Trumbull County, the northern half of Mahoning County, and highly irregularly shaped portions of Portage and Summit Counties. In Summit County, the district includes much of the City of Akron. District 13 does not encompass the entirety of any one County. It is involved in the four-way split of Summit County and the three-way splits of Stark County and Portage County.

***1131**



The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to pack District 13. Further, the strange shape of District 13 under the 2012 map and the manner in which it splits many counties and the City of Akron support an inference of partisan intent. [837] *See Benson*, 373 F.Supp.3d at 945 n.39, 2019 WL 1856625, at *57 n.39.

837 *See* Dkt. 241 (Cooper Trial Test. at 155–56).

We also conclude that the 2012 map had the effect of packing Democratic voters into District 13. Historical election results provide some evidence of the packing. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Democratic Representative Tim Ryan was elected to Congress with 72.77% of the vote. In 2014, he won with 68.49% of the vote. In 2016, he won with 67.73% of the vote. In 2018, he won with 60.99% of the vote. None of these elections were even close to competitive; the huge margins are some evidence of packing.

Finally, Dr. Cho's simulated maps provide additional evidence of the packing of District 13. In 0% of Dr. Cho's simulated non-partisan maps would Plaintiff Myer, who lives in current District 13, have a better chance of electing a Democratic representative. [838] The fact that the pro-Democratic leaning of District 13 is so extreme compared to the simulated maps supports the conclusion that the current map has a partisan effect that packs Democratic voters into the district and thereby dilutes the power of their votes for Democratic candidates.

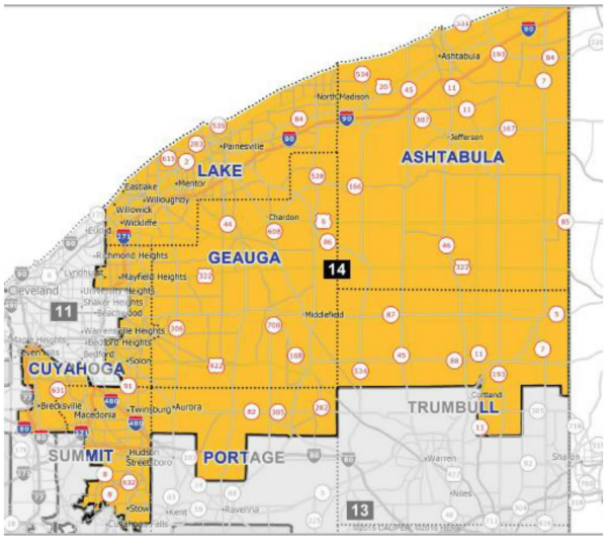
838 Trial Ex. P087 (Cho Rep. at 26).

xiv. District 14

District 14 lies in the northeastern corner of Ohio. It includes the entirety of Ashtabula, Lake, and Geauga Counties. It also includes the northern portions of Trumbull and Portage Counties, the northeastern corner of Summit County, and an irregularly shaped section jutting into Cuyahoga County. It is involved in the three-way split of Portage County and the four-way splits of Summit and Cuyahoga Counties. [839]

839 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).

***1132**



The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to crack District 14.

We also conclude that the 2012 map had the effect of cracking Democratic voters in District 14. Historical election results provide some proof of the cracking. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Republican Representative David Joyce was elected to Congress with 54.03% of the vote. In 2014, he won with 63.26% of the vote. In 2016, he won with 62.58% of the vote. In 2018, he won with 55.25% of the vote. Only one of these elections was competitive—the first, which was Joyce's first congressional campaign. The consistent election of the Republican candidate in District 14 is evidence of the durability of the 2012 map's partisan effects and its entrenchment of Republican representatives in office.

Finally, Dr. Cho's simulated maps provide further evidence that Democratic voters were cracked in District 14. In 100% of her simulated non-partisan maps, Plaintiff Hutton, who lives in current District 14, would have a better chance to elect a Democratic representative.[840] The fact that the current District 14 is extremely pro-Republican compared to the non-partisan simulated maps supports the conclusion that it had the effect of cracking Democratic voters and weakening their ability to elect Democratic candidates in the district.

840 Trial Ex. P087 (Cho Rep. at 27).

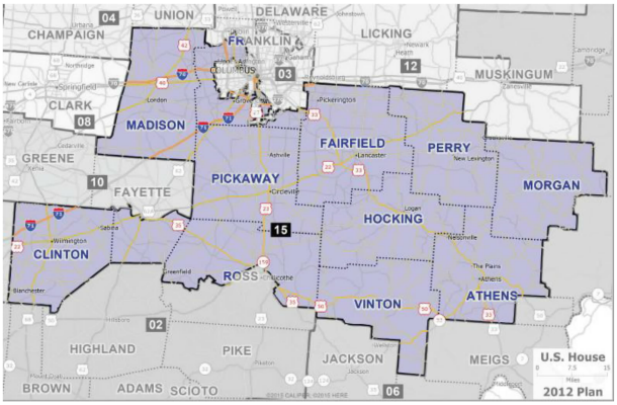
xv. District 15

District 15 includes all of Morgan, Perry, Hocking, Vinton, Fairfield, Pickaway, Madison, and Clinton Counties, as well as the southern half of Fayette County, the northern half of Ross County, and most of Athens County. It also includes a highly irregularly-shaped portion of Franklin County, part of which includes pieces of the City of Columbus.[841] It is involved in the three-way splits of Franklin County and the City of Columbus.[842]

841 Dkt. 241 (Cooper Trial Test. at 146).

842 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).

***1133**



The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of partisan intent to crack District 15. Additionally, the evidence of partisan intent specific to District 3 is also suggestive of partisan intent in the creation of District 15. District 3 was designed to efficiently pack voters to enable the reliable election of Republican representatives in Districts 12 and 15. *See Benson*, 373 F.Supp.3d at 945 n.39, 2019 WL 1856625, at *57 n.39. Finally, Kincaid's comments about the 2012 map following its enactment are further proof of partisan intent in drawing District 15. Kincaid expressed his belief that District 15 had moved seven PVI points in favor of Republicans and had thus been taken "out of play."[843] These comments are evidence of the map drawers' intent to crack Democratic voters in District 15 by drawing the District to lean so strongly Republican that Democratic voters would have little chance of electing a Democratic candidate to represent them.

843 Trial Ex. P310 (NRCC Presentation at 5); Dkt. 230-27 (Kincaid Dep. at 115–16); *see also* Trial Ex. P556 (Stivers Email at STIVERS_007519); Dkt. 230-46 (Stivers Dep. at 77–78); *supra* Section I.A.8.

We also conclude that the 2012 map had the effect of cracking Democratic voters in District 15. Historical election results provide some proof of their cracking. *See Benisek*, 348 F.Supp.3d at 519–20 (finding proof of partisan effect in "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting"). In 2012, Republican Representative Steve Stivers was elected to Congress with 61.56% of the vote. In 2014, he won with 66.02% of the vote. In 2016, he won with 66.16% of the vote. In 2018, he won with 58.33% of the vote. None of these elections were competitive. The consistent election of the Republican candidate in District 15 in non-competitive elections is evidence of the durability of the 2012 map's pro-Republican effects. It is also evidence of the 2012 map's entrenchment of Republican representatives in office by creating a "safe" pro-Republican District 15 by cracking Democratic voters.

This consistent, strong pro-Republican lean of the district contrasts with its pre-redistricting leanings, evidence that the 2012 map altered the configuration of District 15, making it more pro-Republican. Dr. Niven's report demonstrates that President Obama won the 2008 election in ***1134** District 15 with 54.61% of the vote. Had that election occurred with the new composition of District 15, however, President Obama would have lost the district with only 46.85% of the vote.[844] The pieces of Franklin County that map drawers included in the new District 15 were considerably more pro-Republican than the pieces of those counties that were allocated to other districts in the scheme.[845] Democratic voters in Franklin County appear to have been specifically targeted to be removed from District 15 while Republican

voters in Franklin County were intentionally added to District 15.[846] This allowed District 15 to shift to be more solidly pro-Republican with the help of a packed District 3. *See Benisek*, 348 F.Supp.3d at 519 (finding partisan effect where the design of the district resulted in a large swing in PVI).

844 Trial Ex. P524 (Niven Rep. at 22).

845 *Id.* at 22–23.

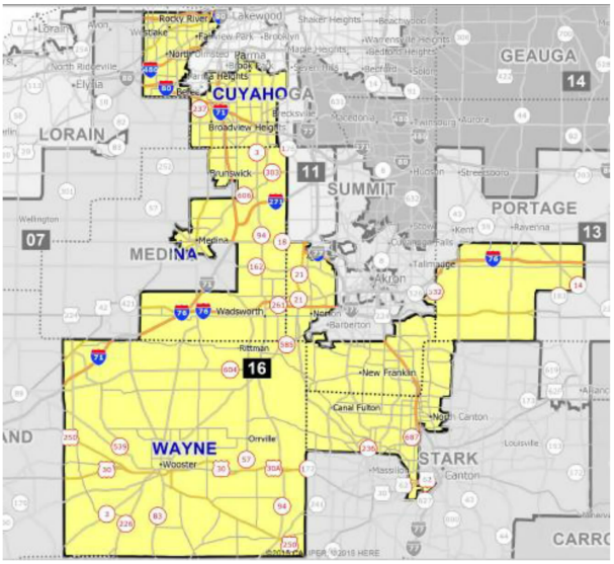
846 *Id.* at 24.

Finally, Dr. Cho's simulated maps provide further proof of the cracking effect. In 79.28% of Dr. Cho's non-partisan simulated maps, Plaintiff Thobaben, who lives in current District 15, would have a better chance of electing a Democratic representative. This supports the conclusion that the partisan design of the 2012 map resulted in her decreased ability to elect a Democratic candidate.

xvi. District 16

District 16 includes all of Wayne County as well as irregularly shaped portions of Cuyahoga, Medina, Summit, and Portage Counties. It is involved in the four-way split of Summit County, the four-way split of Cuyahoga County, and the three-way splits of Stark County and Portage County.[847]

847 Trial Ex. P090 (Cooper Decl. at 12, fig. 5).



The statewide evidence of partisan intent in the map-drawing process, discussed above, supports a finding of predominant partisan intent to crack District 16. Furthermore, District 16 intentionally cracked Democratic voters from Akron in order to enable Republican incumbent Representative ***1135** Renacci to win his pairing against Democratic incumbent Representative Sutton in the 2012 election. *See Benson*, 373 F.Supp.3d at 945 n.39, 2019 WL 1856625, at *57 n.39.

We conclude that the 2012 map had the effect of cracking Democratic voters in District 16. Historical election results support this conclusion. In 2012, Republican Representative Jim Renacci defeated Democratic Representative Betty Sutton, winning a close race with 52.05% of the vote. In 2014, he won with 63.74% of the vote. In 2016, he won with 65.33% of the vote. In 2018, Anthony Gonzalez was the Republican candidate for Congress in District 16; he won with 56.73% of the vote. The only competitive election in this set of four elections following the 2012 redistricting was the first—in which two incumbents were paired. The uncompetitive elections and consistent election of the Republican candidate are also evidence of the durability of the 2012 map's partisan effects and its effectiveness in entrenching Republican representatives in office.

Furthermore, the Republican map drawers succeeded in their efforts to "eliminat[e] Ms. Sutton's seat"[848] by drawing a new Republican-leaning District 16 that they understood to include only 25.79% of her former district.[849] The new District 16 then elected Representative Renacci by significant margins in the two elections that followed and was sufficiently pro-Republican to elect non-incumbent Gonzalez in a Democratic swing year, albeit by a much tighter margin.

848 Trial Ex. P414 (State-by-State Redistricting Summary at REV_00000001); Dkt. 230-28 (Kincaid Dep. at 519).

849 Trial Ex. P130 (Sept. 14, 2011 email at LWVOH_00018321).

Finally, Dr. Cho's simulated maps provide additional proof that the design of the 2012 map cracked Democratic voters in District 16. In 100% of Dr. Cho's simulated non-partisan maps Plaintiff Rubin, who lives in current District 16, would have a better opportunity to elect a Democratic representative.[850] The pro-Republican skew of the current District 16 compared to the non-partisan simulated maps supports the conclusion that the 2012 map design cracked Democratic voters in District 16, negatively impacting their ability to elect Democratic representatives.

850 Trial Ex. P087 (Cho Rep. at 29).

d. Justification

Defendants tell an entirely different tale of the redistricting process, offering several justifications for the 2012 map, none of which includes the intent to lock in Republican advantage or dilute the voting power of Democratic voters through packing and cracking. Defendants argue that incumbent protection, bipartisan negotiations and input, Voting Rights Act compliance and advancing minority representation, and natural political geography explain the design and partisan effects of the 2012 map. We address and reject each justification in turn.

i. Incumbent protection and *Gaffney v. Cummings*

Defendants' arguments on their incumbent-protection and "bipartisanship" justifications seem to blend together at times. They contend that these arguments "find[ ] dispositive support in *Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973)." *See* Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 1). As a legal matter, we disagree. Factually, as we will explain, the "bipartisanship" justification simply does not hold up.

Because Defendants rely so heavily on *Gaffney*, we start with what that case actually ***1136** concerned—a so-called bipartisan gerrymander, or "sweetheart gerrymander." *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 628 (2002). In *Gaffney*, "[r]ather than focusing on party membership in the respective districts, the [State Apportionment] Board took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats." 412 U.S. at 738, 93 S.Ct. 2321. Put another way, the State "attempted to reflect the relative strength of the parties in locating and defining election districts." *Id.* at 752, 93 S.Ct. 2321. Therefore, although the Constitution may not require proportional representation, the proportional representation of political parties is a permissible State interest. *See Vieth*, 541 U.S. at 338, 124 S.Ct. 1769 (Stevens, J., dissenting); *Gaffney*, 412 U.S. at 754, 93 S.Ct. 2321 ("[The] 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.").

The Supreme Court, however, also reasoned that "[w]hat is done ... to achieve political ends or allocate political power[ ] is not wholly exempt from judicial scrutiny under the Fourteenth Amendment." *Gaffney*, 412 U.S. at 754, 93 S.Ct. 2321. Accordingly, we will examine whether, in fact, the State fairly "allocate[d] political power to the parties in accordance with their voting strength ...." It is clear that the State of Ohio did not do so.

To be sure, in 2010 the Republicans experienced a wave election and gained a thirteen-to-five advantage in the Ohio congressional delegation, but Democratic candidates still received approximately 42% of the vote. That was the Democrats' worst year in congressional elections in the prior decade. Even taking note of the strong Republican performance that year, the argument that allocating 25% of the congressional seats to Democrats fairly allocates political power in accordance with that Party's voting strength falls apart. Thus, *Gaffney* is far from dispositive, and we find it completely distinguishable from this case.

In fact, even despite their argument that *Gaffney* is dispositive, Defendants also admit that the State "focused on preserving the *status quo* incumbency-constituent relationship rather than on creating the 'proportional representation' sought in *Gaffney*." *See* Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 6). First, this argument seems to contradict their initial argument about *Gaffney*. Second, Defendants basically admit that their goal was a 12-4 map. *See id.* at 8 ("Because of the pre-reapportionment 13–5 partisan split, divvying up the lost seats [after the census] fairly meant a 12–4 split."). They say that "*Gaffney* ratifies the legislature's choice ...." *Id.* at 7. For the reasons articulated above, we disagree.

At bottom, Defendants' arguments on this score are aimed at trying to justify entrenchment and incumbent *insulation* from political challenges, not incumbent protection as understood by Supreme Court precedent. *See infra* (collecting cases in which the Supreme Court has been skeptical of the argument of preserving the status quo for incumbents). Finally, we note that this present line of defense—that the primary goal of the map was to preserve the status quo for all incumbents—contradicts statements made by the redistricting plan's sponsor in the Ohio State House. Representative Huffman clearly described incumbent protection as "a subservient [goal] to the other ones that [he] listed" and further explained

***1137** that, "[n]obody has a district.... There's nobody that owns a piece of land in Congress. People elect them." [851] *See Benisek*, 348 F.Supp.3d at 518 (considering notes prepared for the Senate President's "remarks to the State House and Senate Democratic Caucuses about the redistricting plan" as evidence establishing intent); *see also Arlington Heights*, 429 U.S. at 268, 97 S.Ct. 555 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports.").

851 Trial Ex. J01 (House Session, Sept. 15, 2011 at 19, 21) (statement of Rep. Huffman).

Legal arguments about *Gaffney* aside, by Defendants' account, protecting incumbents was the sine qua non of the map-drawing process, and the incumbent-protection concern was bipartisan in nature. Defendants' argument goes like this: the 2010 congressional election left Ohio with 13 Republican representatives and 5 Democratic Representatives. The decision to pair one set of Republican incumbents and one set of Democratic incumbents, a politically fair decision, would lead to a 12-4 map. The enacted map is a 12-4 map; ergo the redistricting process was fair. But this argument obscures complexities and nuances that significantly undermine Defendants' version of events.

First, to say that the redistricting process simply transformed a 13-5 map into a 12-4 map ignores two key considerations, which are intimately related with one another: competitiveness and responsiveness. Yes, the pre-redistricting map was a 13-5 map in that 13 Republican representatives and 5 Democratic representatives had been elected under it in 2010. But it had not consistently been a 13-5 map over the course of its life. It contained competitive districts and was responsive to shifts in voter preference and turnout over the years. In contrast, the 12-4 map created in the redistricting process is a 12-4 map through and through. It minimized competitive districts and responsiveness to changes in voter preferences. It is no coincidence that correspondence between the insiders crafting the map refer to "lock[ing] in" the 12-4 division and ensuring "safe seats." *See Benisek*, 348 F.Supp.3d at 518 (finding unconstitutional partisan gerrymandering where "Democratic officials ... worked to craft a map that would specifically transform the Sixth District into one that would *predictably* elect a Democrat by removing Republicans from the District and adding Democrats in their place"). The redistricting meant that the parties suffered an equal reduction in seats between the 2010 election and the 2012 election, as Defendants emphasize. However, Defendants minimize the fact that the redistricting also effectively guaranteed that the most seats that Democratic voters could secure for their party in any future election under that map was four, and the fewest seats that Republican voters could secure for their party in any future election was twelve.

Second, the map drawers paired more sets of incumbents than Ohio's population stagnation required. [852] Not only did the map drawers pair a set of Republican incumbents and a set of Democratic incumbents, they also paired an extra set: one Democratic incumbent, Betty Sutton, against one Republican incumbent, Jim Renacci. They then drew the district in ***1138** which Sutton and Renacci were paired, the new District 16, to include far more of Renacci's former constituents than Sutton's, which gave him a considerable advantage in the race that ensued. [853] This undermines Defendants' claim that a bipartisan desire for incumbent protection dominated the map-drawing process.

852 Defendants' own expert, Dr. Hood, admitted that "if the legislature wanted to pair the fewest number of incumbents in enacting the 2012 plan, that would have been two sets of incumbents for four total congressional representatives." Dkt. 247 (Hood. Trial Test. at 192).

853 Dr. Hood also acknowledged that "someone that retained more of their ... constituents from their previous district probably had an advantage over the other incumbent," and "the incumbent who retained more of their constituents," Representative Renacci, was "favored by the map." Dkt. 247 (Hood Trial Test. at 194–95). On September 14, 2011, Mann emailed Congressman Renacci responding to his request to see "the population numbers and percentages of Congresswoman Sutton's current district that would be contained in the proposed districts." It stated that "New CD 16 (Renacci)" would include only 25.79% of Congresswoman Sutton's former district. Trial Ex. P130 (Sept. 14, 2011 email at LWVOH_00018321).

Third, Defendants repeatedly emphasize that the reason that incumbent protection is a legitimate motivation in redistricting is because incumbents, particularly those with considerable experience serving in their elected office, wield

that seniority for the benefit of their constituents. Yet, the map drawers chose to pair two senior Republican incumbents, Representatives Turner and Austria, after considering and rejecting the possibility of pairing two freshmen Republican incumbents, Representatives Gibbs and Johnson.[854] Evidence demonstrates that partisan intent motivated that decision. In "talking points" that Whatman sent to President Niehaus, Whatman wrote:

> A Gibbs/Johnson map results in 3 districts with a base Republican vote under 50 percent. A Turner/Austria map only has one district under 50.... Putting two members together in another region of the state merely because they are freshmen that results in an overall worse map for republicans in the state is simply not the right thing to do. Boehner is not happy about this but it is the tough decision that is the right thing for Republicans for the next decade.[855]

This correspondence demonstrates that when the map-drawing process pitted the competing concerns of incumbent-advantage protection against partisan-advantage protection, partisan-advantage protection dominated. The decision to pair senior Republican incumbents thus undermines the credibility of Defendants' assertion that incumbent protection was the primary consideration in the redistricting.

854 Dkt. 230-52 (Whatman Dep. at 34–35) ("There were early discussions, given the fact that we had two freshmen members of the delegation at that time, whether based on seniority it made sense that the two freshmen would have to run against each other, or whether some other consideration would come into play.").

855 Trial Ex. P407 (Sept. 07, 2011 email at LWVOH_0052431).

Fourth, Ohio Republican map drawers themselves claimed at the time that incumbent protection was not their primary concern. When presenting the bill in the Ohio House of Representatives, Representative Huffman detailed the competing concerns that the creators of the bill had considered when drafting the H.B. 319 map. He characterized equipopulation as "the lodestone," called VRA compliance an "important precept[ ]," and then listed "several other traditional redistricting principles ...: compactness, contiguity, preservation of political subdivisions, preservation of communities of interest, preservation of cores of prior districts, and protection of incumbents." He then made a point of stating that protection of incumbents was "subservient ... to the other ones that I ***1139** listed."[856] Representative Huffman went on:

> You know, we talked—a year ago someone came up to me and said, "Are we going to get rid of Kucinich's district?" And I said, "Look, Kucinich doesn't have a district. Nobody has a district. Every two years, there's an election, and that's how it works. That's how the system works. There's nobody that owns a piece of land in Congress. People elected them."[857]

We acknowledge that politicians may make representations on the floor of the House that diverge from the true account of their priorities in creating a bill. We must, however, note the tension between the post-hoc justification that Defendants offer for the bill—incumbent protection as the primary motivation—and Representative Huffman's express minimization of the incumbent-protection concern on the floor of the House.

856 Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 16–19) (statement of Rep. Huffman).

857 *Id.* at 21.

Additionally, Defendants' portrayal of the incumbent-protection goal as bipartisan mischaracterizes the facts. Only hazy, inadmissible multi-level hearsay testimony was offered to support their claim that Democratic leaders wanted Kucinich and Kaptur to be the paired Democratic incumbents. The evidence indicates that the Republican and Democratic Caucuses did their map drawing entirely separately, particularly in the early stages when major decisions such as the pairing of incumbents were being made. Both Congresswoman Kaptur and Congresswoman Fudge insisted that they had no say whatsoever in the design of the map prior to its introduction as H.B. 319, and the incumbent pairings were not altered between H.B. 319 and the passage of H.B. 369.

Finally, we reject what seems to be Defendants' argument that because the Supreme Court has sanctioned incumbent protection as a legitimate concern in the redistricting process in some instances, any kind of incumbent-protecting behavior is legitimate and may be used to justify the drawing of district lines. The Supreme Court has expressed its acceptance of districting "that minimizes the number of contests between present incumbents," which in its view "does not in and of itself establish invidiousness." *Burns v. Richardson*, 384 U.S. 73, 89 n.16, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *see also White v. Weiser*, 412 U.S. 783, 791, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973) (quoting *Burns* and expressing tolerance for districting plans that "maintain[ ] existing relationships between incumbent congress[people] and their constituents and preserv[e] the seniority the members of the State's delegation have achieved in the United States House of Representatives"). In *Gaffney*, the Supreme Court accepted a politically conscious bipartisan gerrymander, noting that "[r]edistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator." 412 U.S. at 753, 93 S.Ct. 2321. In *Karcher*, the incumbent protection that the Supreme Court endorsed as legitimate was simply "avoiding contests between incumbent Representatives." 462 U.S. at 740, 103 S.Ct. 2653. These cases uniformly identify one legitimate form of incumbent protection—avoiding a districting scheme that pairs two current incumbents and forces them to face one another in an election. They offer no endorsement of incumbent protection in the form of a districting scheme that insulates incumbents from any future challenge.

***1140** We conclude that the incumbent protection effectuated by the 2012 map is of the latter, unprotected kind. The map drawers drew one more incumbent pairing than the bare minimum in a state that had its congressional delegation reduced by two. But the majority of its line-drawing decisions were motivated not by the legitimate incumbent-protection goal of "avoiding contests between incumbent Representatives," but rather by the goal of avoiding contests between Democrats and Republicans in general. The Republican map drawers drew noncompetitive, nonresponsive districts by grouping bodies of voters who would elect a Democrat—any Democrat—or a Republican—any Republican. This is not the incumbent protection that the Supreme Court has endorsed. In fact, the Supreme Court has repeatedly cast aspersions on this type of incumbent insulation. *See Randall v. Sorrell*, 548 U.S. 230, 248, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (holding that, when assessing contribution limits on political donations, courts must determine "whether [the contribution limits] magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage"); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 306, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (Kennedy, J., concurring in part and dissenting in part) (finding a campaign finance provision problematic because it "look[ed] very much like an incumbency protection plan."); *id.* at 263, 124 S.Ct. 619 (Scalia, J., concurring in part and dissenting in part) (arguing that a portion of the Bipartisan Campaign Reform Act was an attempt by Members of Congress "to mute criticism of their records and facilitate reelection."); *see also Elrod v. Burns*, 427 U.S. 347, 356, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality) ("Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant."); *Jenness*, 403 U.S. at 439, 91 S.Ct. 1970 (concluding that an election law was constitutional in part because the State "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life."). The incumbent-protection justification does not encompass incumbent insulation through the drawing of favorable districts. Rather, it only allows the prevention of excessive incumbent-versus-incumbent pairings.

Furthermore, even if this kind of incumbent-insulation strategy were sanctioned by the Supreme Court's cases, the Republican map drawers did not create four Democratic districts because they had united in a bipartisan anti-competitive scheme with Democratic legislators. Rather, they created four Democratic districts because Ohio has Democratic voters and the map drawers had to allocate them in some fashion. The map drawers contemplated packing Democratic voters into three districts and cracking them among the remaining thirteen. The map drawers, however, did not feel that that strategy would guarantee sufficiently predictable pro-Republican outcomes; it allowed for too much competition and responsiveness. They decided twelve Republican seats in the hand was better than thirteen in the bush, and so four Democratic districts were born. This behavior constitutes invidious partisan gerrymandering and is unconstitutional as proved district by district.

ii. Bipartisan negotiations and input

Defendants also argue that some of the lines of the 2012 map resulted from honoring requests from Democratic representatives and operatives. We conclude that the

Democrats had no role in the drawing of H.B. 319 and were able to secure only minor concessions from the Republicans in the passage of H.B. 369, none of which significantly changed the earlier version of ***1141** the map. These findings do not undermine our conclusion that invidious partisan intent predominated in the creation of the 2012 map. *See Rucho*, 318 F.Supp.3d at 868–69 (finding partisan intent where "Republicans had exclusive control over the drawing and enactment of the 2016 plan" and "with the exception of one small change to prevent the pairing of Democratic incumbents, [the expert map drawer] finished drawing the 2016 plan before Democrats had an opportunity to participate in the legislative process").

First, we assess Defendants' assertion that the map drawers were taking and incorporating requests from Democratic legislators prior to the introduction of H.B. 319. We do not credit this assertion. The map drawers themselves testified that they did not share draft maps of H.B. 319 with Democratic legislators or staffers until very close to its introduction in the General Assembly. Both Representatives Kaptur and Fudge testified that they did not have input into the design of H.B. 319. Finally, all Defendant testimony offered to prove that that Democratic leaders themselves actually wanted particular map designs was vague, unconvincing, and most importantly, hearsay. There is no evidence to support Defendants' assertions that, prior to the introduction of H.B. 319, certain Democrats actually made the requests that the map drawers say they eventually accommodated.

Second, we assess Defendants' assertion that the map drawers took and incorporated requests from Democratic legislators after the introduction of H.B. 319 and prior to the final enactment of H.B. 369. We credit this assertion, but it is not determinative. The changes made between H.B. 319 and the enacted H.B. 369 were de minimis. *See Benisek*, 348 F.Supp.3d at 520 (concluding that "while there may have been other causes that could have marginally altered the [challenged] district, the striking actions complained of are not explained by the State's proffers"). They reflect small concessions made by the Republican legislators when faced with a voter referendum to challenge H.B. 319. None of these concessions meaningfully impacted the central intent of H.B. 319—the enactment of a map that was nearly certain to allow for the election of twelve Republican congressional representatives and four Democratic congressional representatives.[858] Speaker Batchelder himself testified that while some negotiations occurred, there was never a chance that the Republicans in the majority would permit a map that altered the partisan balance of H.B. 369.[859] The testimony offered by Defendants' witnesses to prove that that Democratic leaders themselves actually wanted particular map designs was vague, speculative, not credible, and most importantly, hearsay.

858 Dkt. 241 (Cooper Trial Test. at 179) ("If you look at the election data in terms of partisan performance, there's really not very much different in the two plans."); *see also* Trial Ex. P090 (Cooper Decl. at 22, fig. 9); Trial Ex. P454 (Cooper Decl. Apps. at Ex. I).

859 Dkt. 230-3 (Batchelder Dep. at 130–31).

Next, Defendants assert that partisan intent to discriminate against Democratic voters could not have motivated the enactment of the 2012 map because Democratic members of the Ohio House of Representatives and State Senate voted in support of it. The argument is that Democratic legislators would not intend to electorally disadvantage their own party, and a bill enacted with their partial support could therefore not have been motivated by invidious partisan intent.

We do not find this argument convincing as it fails to acknowledge the reality of ***1142** legislative politics. The Republicans commanded majorities in the Ohio House of Representatives and the State Senate, and they held the governorship. They could force through a bill that Democratic legislators did not support. Speaker Batchelder himself acknowledged this, commenting that the Republicans "could have simply done what [they] wanted to," in the redistricting process.[860] The fact that some Democratic legislators voted in support of H.B. 369, perhaps to secure the small concessions that were made between H.B. 319 and H.B. 369 or to avoid the costly split primary, therefore is not evidence of a lack of partisan intent behind the enacted map. Of course, this does not mean that proof that one party controlled both legislative houses and the governorship is sufficient to demonstrate partisan intent. However, we are unconvinced by the Defendants' argument that some Democratic votes neutralize pro-Republican partisan intent.

860 *Id.* at 25.

Finally, Defendants' argument that the Republican map drawers could have drawn a 13-3 map but did not, and therefore that they did not have a partisan intent is unconvincing. Drawing a 13-3 map would have been a

riskier choice because it would have required Republican support to be spread more thinly throughout the Republican-leaning districts. Such a map would have been more vulnerable in Democratic swing years; more seats could have potentially fallen into Democratic hands. The map drawers prioritized maximizing safe seats for their candidates throughout the decade over maximizing the number of seats in a single election, some of which would have then been vulnerable in Democratic swing years. Thus, rather than cut against partisan intent, this strategic choice is further evidence of the predominantly partisan intent. The Republicans successfully avoided the purported self-limitation on partisan gerrymandering—"an over ambitious gerrymander ...." *See Bandemer*, 478 U.S. at 152, 106 S.Ct. 2797 (O'Connor, J., concurring in the judgment); *see also id.* ("[A]n overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious.").

iii. Voting Rights Act compliance and advancing minority representation

Defendants assert that one "principal goal" was "to preserve and advance minority electoral prospects both in northeast Ohio and in Franklin County," Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 20), and that "the alleged [partisan] bias is justified by the Voting Rights Act and minority-protection goals ...." *Id.* at 30; *see also id.* at 20–27, 38–40. This proffered justification applies specifically to Districts 3 and 11.

Normally, invoking VRA compliance as a state interest in redistricting arises in the racial-gerrymandering context. *See, e.g.*, *Cooper v. Harris*, —— U.S. ——, 137 S.Ct. 1455, 1465, 197 L.Ed.2d 837 (2017); *Ala. Legislative Black Caucus*, 135 S.Ct. at 1274. As the Supreme Court recently explained:

> When a State invokes the VRA to justify race-based districting, it must show (to meet the "narrow tailoring" requirement) that it had "a strong basis in evidence" for concluding that the statute required its action. Or said otherwise, the State must establish that it had "good reasons" to think that it would transgress the Act if it did *not* draw race-based district lines. That "strong ***1143** basis" (or "good reasons") standard gives States "breathing room" to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed.

Cooper, 137 S.Ct. at 1464 (internal citations omitted). This case, however, does not involve a racial-gerrymandering claim; this is, of course, a partisan-gerrymandering case. In this context, we will still assume that compliance with the VRA can serve as a legitimate state justification. *See Bethune-Hill*, 137 S.Ct. at 801 ("As in previous cases, ... the Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act [is] compelling."). In addition, when the State seeks to use the VRA as a shield to justify an alleged partisan-gerrymandered district, the State must still establish that it had a basis in evidence for concluding that the VRA required the sort of district that it drew. We will not accept a blanket assertion that the State sought to comply with the VRA in cases where the State misinterpreted the law and did no work to show that it had some reason to believe that a particular percentage of minority voters was required for a district.

To establish a vote-dilution claim under § 2, a party must satisfy three threshold conditions, known as the *Gingles* preconditions.[861] *See Gingles*, 478 U.S. at 50–51, 106 S.Ct. 2752. These preconditions are: (1) the minority group must be large enough and geographically compact to constitute a majority in a single-member district; (2) the minority group must be politically cohesive; and (3) there must be evidence of racial bloc voting such that a white majority could usually defeat the minority's preferred candidate. *See id.* "If a State has good reason to think that *all* the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district." *Cooper*, 137 S.Ct. at 1470 (emphasis added).

861 As Ohio was never a covered jurisdiction under § 5 of the VRA, only § 2 compliance could be at issue for the State.

Although we do not find that *racial* considerations predominated, we nonetheless see it as entirely appropriate to put the burden on the State to show that it had good

reasons for believing § 2 required drawing District 11 as a majority-minority district. As an initial matter, we would not engage in this inquiry if Plaintiffs had failed to carry their burden on partisan intent and effect, but Plaintiffs have carried that burden. Furthermore, Defendants' argument here essentially amounts to: "we interpreted the VRA and properly considered race (instead of partisanship); even if we were mistaken in our interpretation or mistaken about what BVAP was appropriate, a goal to aid minority electoral opportunities is still a legitimate justification for the design of District 11." For the reasons explained below, we do not find Defendants' argument persuasive. Moreover, although we acknowledge that some evidence suggests that the State had a good-faith belief that it drew districts in a way to comply with the VRA, other evidence cuts against finding a good-faith belief, and no evidence suggests that this belief was an informed one. First, we will address District 11, and then we will turn to District 3.

For District 11 (which was unchanged between H.B. 319 and H.B. 369), statements from the legislative record illuminate the General Assembly's thinking and its "legal mistake." *See Cooper*, 137 S.Ct. at 1472. Representative Huffman, H.B. 319's sponsor in the State House, said:

> ***1144** The significant application [of the VRA] in this particular case is that ... we are required to draw a majority/minority district in the State of Ohio when that can be done. And in fact, the map that you see before you today in this legislation ... does that. So that's one of the significant requirements by federal law that we have met when we've drawn this map. [862]

Likewise, in the State Senate, Senator Faber (the bill's sponsor in that chamber) stated that District 11 "was also going to be required to comply with the Voting Rights Act. And the Voting Rights Act says, essentially, where you can draw a continuity [sic] of interest minority district you need to do that." [863] Senator Faber further cited *Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009), to support how District 11 was drawn. [864] Other legislators echoed this view. [865] In short, legislators articulated concern about a VRA § 2 violation, and they thought that "whenever a legislature *can* draw a majority-minority district, it must do so ...." *See Cooper*, 137 S.Ct. at 1472.

862 Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 17–18) (statement of Rep. Huffman).

863 Trial Ex. J03 (Ohio Senate Session, Sept. 21 2011 at 10) (statement of Sen. Faber).

864 *Id.* at 44 (statement of Sen. Faber) ("[T]he Supreme Court held that a majority-minority district that is drawn to remedy a [VRA § 2 violation], must be made up of a numerical majority of the voting age population in the district.... Minority population totals that are less than 50 percent of the district's voting age population do not fulfill the mandate of the Voting Rights Act.").

865 *See id.* at 58 (statement of Sen. Coley); *id.* at 60 (statement of Sen. Tavares); Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 39) (statement of Rep. Gerberry). Defendants cite statements from some members on the Democratic side of the aisle who also referenced the VRA. True enough, however, even though some referenced the VRA, not all agreed with how the Act was used in this case. *See, e.g.*, Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 40) (statement of Rep. Gerberry) ("[L]et's be honest. If you look at that map, this isn't about fairness. This is about finding a way to get the most Republican districts with the most Republicans so they're non-contestable in general elections."); *id.* at 59–60 (statement of Rep. Yuko) ("We now have Marcia Fudge representing us and [District 11 has not] missed a beat. This map puts it all at risk."). To the extent that Defendants rely on bipartisanship in this context, we address that justification elsewhere. *See supra* Section V.A.2.d.ii.

As the Supreme Court explained, "[t]hat idea, though, is at war with our § 2 jurisprudence—*Strickland* included." *Id.* Instead, *Strickland* "turn[ed] on whether the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district." 556 U.S. at 12, 129 S.Ct. 1231. The Court answered no. *See id.* at 26, 129 S.Ct. 1231 ("Only when a geographically compact group of minority voters could form a majority in a single-member district

has the first *Gingles* requirement been met."). *Strickland* also clarified that, "[m]ajority-minority districts are only required if *all three Gingles* factors are met and if § 2 applies based on a totality of circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority [white] voters." *Id.* at 24, 129 S.Ct. 1231 (emphasis added). In this case, no credible evidence suggests that this third requirement (racial bloc voting in congressional elections) was present, which could trigger § 2 concerns. "Thus, [Ohio's] belief that it was compelled to [ ]draw District [11] ... as a majority-minority district rested not ***1145** on a 'strong basis in evidence,' but instead on a pure error of law." *See Cooper*, 137 S.Ct. at 1472 (citation omitted).

In response, Defendants note that "[t]he legislature had good reasons to fear Voting Rights Act liability in northeast Ohio because the City of Euclid was the subject of successful Section 2 claims immediately prior to the redistricting, due to polarized voting in the city and its history of racial discrimination and animus." Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 38); *see also, e.g.*, *City of Euclid*, 580 F.Supp.2d 584. This argument is not credible.

The cases concerning Euclid involved nonpartisan, local elections and do not support any suggestion that District 11's partisan, federal congressional elections were polarized. In fact, District 11 included the City of Euclid under the 2002 plan, and in the closest election under that plan (the 2002 election), then-Representative Stephanie Tubbs Jones won by a margin of about 76% to 24%, or 116,590 votes to 36,146.[866] In the prior decade, the State drew District 11 with a BVAP at 52.3%, and the District was an extraordinarily safe district for African-American candidates (including Congresswoman Fudge); under the current plan, the BVAP is 52.4%.[867] Put simply, the "electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite—effective white bloc-voting, ... [s]o experience gave the State no reason to think that the VRA required it to" maintain District 11 as a district with a BVAP of just over 52%. *See Cooper*, 137 S.Ct. at 1470.

866 *See* OHIO SEC'Y OF STATE, 2002 ELECTION RESULTS, https://www.sos.state.oh.us/elections/election-results-and-data/2002-elections-results/u.s.-representative/; *see supra* Section II.C.4 (discussing Dr. Handley's testimony and report).

867 District 11's BVAP increased over the course of the decade to about 57%, but this does not alter the analysis. Again, the closest election was the 2002 election—which Stephanie Tubbs Jones won by over 50%—and the BVAP in that year was 52.3%.

Plaintiffs present Dr. Handley's report as evidence affirmatively to rebut the contention that the third *Gingles* precondition could be met, and her analysis provides some further evidence against finding that the State had a good-faith belief that the VRA required District 11 to be drawn as it was. Dr. Handley's finding that a 45% BVAP would be sufficient to elect the Black-preferred candidate by a comfortable margin is merely additional evidence to support the conclusion that District 11 did not need to be drawn as a majority-minority district. (Dr. Handley even suggests a 40% BVAP may be sufficient, though the elections would be tighter.) We need not, however, rely on Dr. Handley. The real problem for the State is, again, that it drew District 11 based on a pure misinterpretation of the VRA. This means that it had neither "good reasons" nor any "basis in evidence" to draw District 11 as a majority-minority district. *Cooper*, 137 S.Ct. at 1464.

To be sure, as with § 5 of the VRA, "[t]he law cannot insist that a state legislature, when redistricting, determine *precisely* what percent minority population § [2] demands." *See Ala. Legislative Black Caucus*, 135 S.Ct. at 1273; *see also Cooper*, 137 S.Ct. at 1472. But the State needs to show its work, so to speak, and if the State happens to be wrong, it enjoys some leeway. Defendants assert that legislators here "conducted a functional analysis of [District 11] to conclude that a 50% target was appropriate." *See* Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 38–39). This assertion is surprising, given that such a "functional analysis" is completely absent ***1146** from this record. This is not a case where the State "relied on data from its statisticians and Voting Rights Act expert to create districts tailored to achieve" VRA compliance. *See Harris*, 136 S.Ct. at 1310. (This lack of analysis also cuts against finding a good-faith belief that the VRA required District 11 to be drawn as such.) For these reasons, the leeway given to States that have done their homework in this context cannot rescue District 11. *See Cooper*, 137 S.Ct. at 1472.

A question then arises as to whether a state's mistake of law on the VRA, even if in good faith, can serve as a legitimate justification for a partisan gerrymander. In the context of District 11, the argument essentially amounts to: The State can draw a majority-minority district if it wants, even if the State was mistaken in its belief that the VRA required such a district. Accepting such a justification

could be constitutionally problematic. *See Strickland*, 556 U.S. at 23–24, 129 S.Ct. 1231 ("Our holding also should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns."). Accordingly, we decline to accept this argument here.

Importantly, we also conclude that Plaintiffs carried their burden in proving partisan intent, not a desire to comply with the VRA (even if based on an entirely mistaken interpretation of the VRA), *predominantly* influenced District 11. In *Harris*, the Supreme Court explained that the appellants in that case did not show that the districts "result[ed] from the predominance of ... illegitimate factors ...." 136 S.Ct. at 1310. The opposite is true here. As discussed above, the reason for dropping District 11 down into Summit County was to carve voting territory away from then-Representative Betty Sutton to disadvantage her in her race against Representative Renacci—a partisan motivation. *See Benson*, 373 F.Supp.3d at 945 n.39, 2019 WL 1856625, at *57 n.39. To the extent that the State legitimately wanted to maintain District 11 as a majority-minority district, it sought to accomplish that goal in a way that would achieve an ultimately partisan aim—to lock in a 12-4 map. That is, even if the goal of advancing minority interests in District 11 was a secondary goal, it was just that: secondary. At bottom, partisanship was the predominant and controlling intent behind the district.

The argument for District 3 is slightly different, but the difference is important. In District 3, the argument goes, the State sought to advance minority electoral prospects in Franklin County. Defendants rely on *Strickland*'s statement about "the permissibility of [crossover districts that enhance a minority's electoral opportunities] as a matter of legislative choice or discretion." *Strickland*, 556 U.S. at 23, 129 S.Ct. 1231. In the next sentence, the Supreme Court explained that "[a]ssuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal." *Id.* There is no evidence to suggest that this specific situation applied to Franklin County—i.e., that it contained a possible majority-minority district that could be split into two minority-influence or crossover districts. The Court continued that "States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts." *Id.* at 24, 129 S.Ct. 1231. This scenario is also not at play in this case. In other words, Defendants place too much weight on *Strickland*. That said, we will accept that a state ***1147** may, as a matter of legislative discretion, rely on creating minority-opportunity or crossover districts as a legitimate justification. The problem for this justification here is that there is a competing narrative for District 3.

The competing narrative, and the one that we consider more credible, is that Franklin County served as the center piece to help secure a 12-4 map in that Democratic voters could be packed into District 3 in order to shore up other neighboring districts for Republicans. Although some feedback throughout the map-drawing process included a desire for a minority-opportunity district in Franklin County,[868] the actual map-drawing process focused on only partisan factors and political data. As we detailed previously, for example, the map drawers considered splitting Franklin County into four districts, but then they realized that split would result in more competitive elections for Republican candidates; only then did the map drawers decide to draw what is now District 3. That the Democratic voters in this district were referred to by Hofeller as "dog meat" and that downtown Columbus was referred to as "awful voting territory" for Republicans (and thus needed to be removed from District 15) bolsters this finding. Therefore, disentangling the purported racial considerations from the political ones, we find that political considerations predominantly motivated the drawing of District 3. As explained, when partisanship predominates, partisan considerations are not a legitimate redistricting factor.

868 Trial Ex. P070 (Testimony of Ray Miller to the Senate Select Committee on Redistricting). Notably, this request for a minority-opportunity district seems premised on a mistaken view of the VRA, too (i.e., that the VRA required such a district). Moreover, Miller's definition of a "minority opportunity district," included both a majority-minority district and a crossover district. *See id.*

We also note that District 3 could still have been drawn with a nearly identical BVAP,[869] but with a more regular shape, fewer county splits,[870] and with considerably less partisan bias.[871] It was not, and consequently we infer that the map drawers intended District 3's design to result in the partisan bias we have seen.

869 Dkt. 241(Cooper Trial Test. at 161).

870 Trial Ex. P093 (Cooper Second Suppl. Decl. at 10, 17).

871 Trial Ex. P476 (Warshaw Rep. at 14–15).

Finally, although District 1 in Hamilton County is not central to the dispute of whether the map drawers were motivated by an intent to advance minority electoral opportunity in Districts 3 and 11, we find the treatment of that district instructive in evaluating claims about the map drawers' commitment to advancing minority representation. In evaluating a justification, we may look to see "the consistency with which the plan as a whole reflects [that] interest[ ]." *Karcher*, 462 U.S. at 740–41, 103 S.Ct. 2653. The Supreme Court has also instructed that in determining whether invidious intent was present "[s]ubstantive departures [from normal procedure] may be relevant, particularly if the factors [purportedly] considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267, 97 S.Ct. 555. Here, we find that the motivation offered for the shape of Districts 3 and 11 was dishonored in the creation of Districts 1 and 2, which work together to crack the City of Cincinnati. Cincinnati in Hamilton County also has a considerable African-American population. The map drawers' ***1148** decision to carve the City of Cincinnati in two resulted in a District 1 with a 21.30% BVAP.[872] In contrast, when Mr. Cooper left Cincinnati intact in his Proposed Remedial Plan, it maintained a BVAP of 26.74%.[873] When he did so in his hypothetical maps, drawn to demonstrate the possibilities when contemplating the incumbents in 2011, he maintained this same higher BVAP in each.[874] When Cincinnati could be cracked, the map drawers' asserted concern for advancing minority voting interests seems to have fallen to the wayside. This gives us further reason to doubt the veracity of their assertion that this concern drove the creation of Districts 3 and 11.

872 Trial Ex. P454 (Cooper Decl. Apps. at D-2); Dkt. 241 (Cooper Trial Test. at 160).

873 Dkt. 241 (Cooper Trial Test. at 161); Trial Ex. P454 (Cooper Decl. Apps. at E-2).

874 Trial Ex. P093 (Cooper Second Suppl. Decl. at 10 & n.8, 17 & n.16).

iv. Natural political geography

Defendants also argue that some of the partisan effects that have resulted under the 2012 map are due to natural political geography—the way that the supporters of the two parties are distributed and clustered throughout the State. While we acknowledge that some credible evidence was presented at trial of partisan clustering in Ohio and a natural political geography that gives a slight advantage to the Republican Party, we find that Ohio's natural political geography in no way accounts for the extreme Republican advantage observed in the 2012 map. We therefore conclude that this justification fails as a neutral explanation for the 2012 map's partisan effects.

Dr. Hood's report and analysis demonstrated that in Ohio Democratic voters tend to cluster near other Democratic voters, and Republican voters tend to cluster near other Republican voters.[875] However, it did not show that Democratic voters do so at higher rates than Republican voters—the key comparison that might help explain why the 2012 map favors the election of Republican representatives over Democratic representatives.[876]

875 Dkt. 247 (Hood Trial Test. at 155).

876 *Id.* at 199–200.

Dr. Hood's analysis also showed that in Ohio Democratic voters are more likely to be located in urban areas than Republican voters are.[877] The concentration of Democratic voters in cities could support a finding of natural packing in those cities if the boundaries of those cities were respected and they were allowed to remain intact within districts. That is not the case here. Under the 2012 plan, Democratic cities were routinely split in order to facilitate the packing and cracking of districts. For example, Cincinnati in Hamilton County was dramatically and nonsensically divided to produce Republican Districts 1 and 2, Akron was divided to facilitate the packing of District 11 and the cracking of District 16, and Toledo was divided between Districts 5 and 9. We cannot take seriously the argument that Democratic voters' tendency to cluster in cities supports a finding of natural packing when under this map those cities were often cracked rather than packed.

877 *Id.* at 156.

Evidence presented at trial demonstrated that Ohio's natural political geography slightly favors the election of Republican representatives. Dr. Warshaw stated that "[p]artisan bias usually is caused by gerrymandering, but it could be caused by other ***1149** factors as well."[878] For example, Dr. Warshaw's analysis of the partisan-bias metrics of the Proposed Remedial Plan indicated that that plan, which was drawn by Mr. Cooper with no partisan intent, had a *slight* bias toward Republicans.[879] Likewise, Dr. Cho's simulated maps, which were all drawn in accordance with only traditional redistricting principles and no partisan intent, also showed a natural *slight* Republican advantage, most often resulting in a 9-7 map.[880] At least a handful of the races under the simulated maps are competitive, with each party winning some of those competitive races—this data is in stark contrast with elections under the current map.[881] Thus, when only natural political geography serves as the baseline, we find that H.B. 369 significantly deviates from that baseline.

878 Dkt. 240 (Warshaw Trial Test. at 196).

879 Trial Ex. P571 (Warshaw Rep. at 32).

880 *See* Trial Ex. P426 (Cho Supp. Rep. at 3).

881 *Id.* at 4.

Dr. Warshaw expressed considerable doubt that the partisan bias observed in the 2012 map was the result of natural political geography or non-political factors, however. First, "the sharpness of the change in the efficiency gap between 2010 and 2012 makes it unlikely to have been caused by geographic changes or non-political factors."[882] In order to believe that the strong partisan bias observed under the 2012 map was caused by natural political geography, we would need some evidence to explain why that same natural political geography did not cause such extreme partisan bias figures under the previous plan.[883] The sudden uptick in partisan bias after the implementation of the 2012 map belies the claim that Ohio's natural political geography accounts for the pro-Republican results, particularly without any proof that the political geography changed between 2010 and 2012. The independent variable was the map; the dependent variable was the partisan effect. This analysis supports the conclusion that Ohio's natural political geography is not responsible for the considerable partisan effect observed since the implementation of the 2012 map.

882 Trial Ex. P571 (Warshaw Rep. at 21).

883 "From about 2002 through 2010 Republicans had a modest advantage in the efficiency gap in Ohio, perhaps because they controlled the redistricting in 2001." *Id.* at 22.

Although Dr. Cho did not consider incumbent protection, Mr. Cooper created hypothetical alternative maps that did, and those maps score better on various traditional redistricting principles and result in a more responsive and competitive map. Mr. Cooper's hypothetical alternative maps pair the same number of incumbents as the current map, score higher on compactness, are equal to the current map on core retention, and split fewer municipalities and counties.[884] Importantly, these hypothetical alternative maps also satisfy the equal-population requirement.[885] As for advancing minority opportunity, these maps contain a District 11 with a BVAP of over 47%, a district in Franklin County with a BVAP of just above 30%, and a Cincinnati-based district with a BVAP of 26.74%.[886] Accordingly, these maps take into account Ohio's natural political geography as well as all of Defendants' purported main goals in redistricting, and they still produce more responsive and ***1150** competitive elections than H.B. 369. This is strong evidence that Ohio's natural political geography does not explain the extreme partisan effects of the 2012 map.

884 *See generally* Trial Ex. P093 (Cooper Second Suppl. Decl. at 4–18); *see also* Ex. P598 (Cooper Third Suppl. Decl. at 5–6).

885 Trial Ex. P093 (Cooper Second Suppl. Decl. at 7, 15).

886 *Id.* at 10, 17.

* * *

In sum, we conclude that (1) partisan discrimination against Democratic voters was the predominant intent in the creation of each congressional district in the 2012 map as well as the map as a whole, (2) the partisan effect of this discrimination was a dilution of Democratic votes, impinging on Democratic voters' Fourteenth Amendment rights, and (3) no legitimate justification offered by Defendants to explain either the intent behind the map or its partisan effects undermines our conclusion that invidious partisanship dominated the process

and the result. We therefore conclude that Plaintiffs have proved their Fourteenth Amendment vote-dilution claims.

B. First Amendment Vote-Dilution Claim

Plaintiffs may prove their First Amendment vote-dilution claim by showing:

> (1) that the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party, (2) that the districting plan in fact burdened the political speech or associational rights of such individuals or entities, and (3) that a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan.

Rucho, 318 F.Supp.3d at 929, *see also Benson*, 373 F.Supp.3d at 913–14, 2019 WL 1856625, at *28.

This test essentially mirrors the intent, effect, and lack-of-justification test that applies to the equal-protection claim analyzed above. The similarity between the elements of the two claims makes sense because the claims are theoretically and analytically linked—when the government purposefully dilutes an individual's vote (by packing or cracking voters into particular districts) in the partisan-gerrymandering context, it does so "*because of* the political views" expressed by voters. *See Shapiro*, 203 F.Supp.3d at 595 (citing *Vieth*, 541 U.S. at 314–15, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment)). In the partisan-gerrymandering context, the Equal Protection Clause's concern about vote dilution is related to the First Amendment concerns about viewpoint discrimination, "laws that disfavor a particular group or class of speakers[,]" and retaliation. *See Rucho*, 318 F.Supp.3d at 924–26; *see also Benisek*, 348 F.Supp.3d at 514 (concluding that citizens "have a right under the First Amendment not to have the value of their vote diminished because of the political views they have expressed through their party affiliation and voting history. Put simply, partisan vote dilution, when intentionally imposed, involves the State penalizing voters for expressing a viewpoint while, at the same time, rewarding voters for expressing the opposite viewpoint."). Accordingly, Plaintiffs call upon the same evidence to prove the elements of this claim as the elements of the Fourteenth Amendment claim.

For the reasons we outlined previously, we conclude that Plaintiffs have proved this vote-dilution claim. *See supra* Section V.A.2. The State relied predominantly on partisanship in drawing the current map and penalized Democratic voters because of their political viewpoint. In brief, the map drawers' controlling intent was to lock in a 12-4 map in favor of Republicans, that goal was accomplished, and no other causes or justifications explain the extreme partisan effects exhibited ***1151** by the current map. Therefore, in the context of partisan vote dilution under the First Amendment, the analysis is no different than vote dilution under the Equal Protection Clause.

The "associational harm of a partisan gerrymander," however, "is distinct from vote dilution." *See Gill*, 138 S.Ct. at 1938 (Kagan, J., concurring). We now turn to this separate analysis.

C. Associational Claim

1. Legal standard

a. Background legal principles

The First Amendment protects the associational choices of voters. *See Calif. Democratic Party*, 530 U.S. at 574, 120 S.Ct. 2402 ("[T]he First Amendment protects 'the freedom to join together in furtherance of common political beliefs,' " (quoting *Tashjian*, 479 U.S. at 214–15, 107 S.Ct. 544)); *Anderson v. Celebrezze*, 460 U.S. 780, 793–94, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); *Williams*, 393 U.S. at 30–31, 89 S.Ct. 5. This associational right is linked with the right to vote. *See Williams*, 393 U.S. at 30, 89 S.Ct. 5. Accordingly, state laws can "place burdens on [these] two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id.* Undoubtedly, these rights are fundamental and "rank among our most precious freedoms." *Id.*; *see also Anderson*, 460 U.S. at 788, 103 S.Ct. 1564.

The associational rights of parties and their voters have been rightly recognized and protected by the courts, even though the Framers tried to design the Constitution against political

parties. *See* Levinson & Pildes, *supra* at 2320. As the Supreme Court has acknowledged, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Calif. Democratic Party*, 530 U.S. at 574, 120 S.Ct. 2402. Moreover, as Defendants repeatedly note, the Framers gave to states general authority to prescribe "The Times, Places and Manner of holding Elections" and to Congress the power to "make or alter" such laws. U.S. CONST. Art. I, § 4. But neither the State's authority nor Congress's power under the Elections Clause "extinguish[es] the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens," or the courts' ability to vindicate constitutional rights. *See Tashjian*, 479 U.S. at 217, 107 S.Ct. 544. "The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or ... the freedom of political association." *Id.* (citing *Wesberry*, 376 U.S. at 6–7, 84 S.Ct. 526).

"Although these rights of voters are fundamental, not all" state election laws "impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Anderson*, 460 U.S. at 788, 103 S.Ct. 1564. Every election law, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Id.* As the Supreme Court explained in *Burdick v. Takushi*,

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the ***1152** precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564). The Supreme Court has employed this *Anderson-Burdick* balancing standard and found it workable in evaluating a variety of election laws. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (upholding a voter ID law); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (upholding Washington's blanket primary law); *Calif. Democratic Party*, 530 U.S. 567, 120 S.Ct. 2402 (striking down California's blanket primary law); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (upholding a ban on "fusion" candidates); *Burdick*, 504 U.S. at 434–38, 112 S.Ct. 2059 (upholding a prohibition on write-in voting); *Anderson*, 460 U.S. at 788–90, 103 S.Ct. 1564 (striking down an early filing deadline for independent candidates); *cf. Doe v. Reed*, 561 U.S. 186, 197–202, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010) (weighing the State's interests against the alleged First Amendment burdens and upholding a state law that made referendum petitions, which include the names and addresses of the signers, available in response to a public-records request by a private party).

b. Partisan gerrymandering burdens associational and representational rights

In the context of partisan-gerrymandering cases, Justice Kennedy first recognized that the "allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment) (citing *Elrod*, 427 U.S. 347, 96 S.Ct. 2673 (plurality)). Justice Kennedy further reasoned that Supreme Court precedents showed that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Id.* Specifically, the disfavored treatment results in a burden on "voters' representational rights." *See id.* Later, the Supreme Court, "[w]ithout expressing any view on the merits," reversed the dismissal of a case in which the plaintiffs pursued a First Amendment theory on the narrow ground that the "plea for relief [was] based on a legal theory put forward by a Justice of this Court and uncontradicted by the majority in any of our cases." *See Shapiro v. McManus*, —— U.S. ——, 136 S.Ct. 450, 456, 193 L.Ed.2d 279 (2015).

In *Gill*, four justices framed the associational harm as a burden on "the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects." *See Gill*, 138 S.Ct. at 1939 (Kagan, J., concurring). "By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." *Id.* at 1938. Thus, five justices have

expressed support for applying First Amendment association principles in the partisan-gerrymandering context, but, like other theories, the associational-rights framework has not been adopted as a majority opinion of the Supreme Court. At the same time, the Supreme Court has not foreclosed this framework, and other three-judge district courts have found it helpful to address partisan-gerrymandering ***1153** claims. *See, e.g.*, *Rucho*, 318 F.Supp.3d at 926–927; *Whitford*, 218 F.Supp.3d at 880–83; *Shapiro*, 203 F.Supp.3d at 594–95.

If the whole point of partisan gerrymandering is to subordinate a disfavored *group* of voters and entrench the dominant party, then it is sensible to assess an alleged partisan gerrymander under an associational-rights framework and look at the plan as a whole. The ability of the people to associate through parties is critical to our representative democracy, *Calif. Democratic Party*, 530 U.S. at 574, 120 S.Ct. 2402, and "[t]he revolutionary intent of the First Amendment is ... to deny [the government] authority to abridge the freedom of the electoral power of the people." *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254 (1961). In extreme cases, a party in power may "freeze[ ] the status quo" in a redistricting law and render districts impervious to "the potential fluidity of American political life." *See Jenness*, 403 U.S. at 439, 91 S.Ct. 1970. Indeed, the Supreme Court has already acknowledged the link between associational rights and the functioning of the democratic process. *See Elrod v. Burns*, 427 U.S. at 356–57, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality) ("It is not only belief and association which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers.... Patronage thus tips the electoral process in favor of the incumbent party, and where the practice's scope is substantial relative to the size of the electorate, the impact on the process can be significant."). The Supreme Court extended *Elrod*'s concerns about the right to association and the electoral process in the patronage context to the right to vote in *Williams v. Rhodes*. There, the Court explained that the law at issue "place[d] substantially unequal burdens on both the right to vote and the right to associate." *Williams*, 393 U.S. at 31, 89 S.Ct. 5; *see also Tashjian*, 479 U.S. at 216, 107 S.Ct. 544 ("The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to *political power* in the community.") (emphasis added). These same concerns apply to partisan gerrymandering. *See Ariz. State Legislature*, 135 S.Ct. at 2658 (defining partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.").

The First Amendment and the *Anderson*-*Burdick* standard are well suited to address these concerns in the partisan-gerrymandering context. This framework sensibly places the focus on a law's alleged "substantially unequal burdens" and effects, *see Williams*, 393 U.S. at 31, 89 S.Ct. 5, rather than partisan intent, *see Crawford*, 553 U.S. at 203–04, 128 S.Ct. 1610 ("[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators."). On the one hand, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129, 106 S.Ct. 2797. On the other hand, if courts determine that some plans are unconstitutional partisan gerrymanders, then we would expect legislators to act like normal people and, therefore, not express their pure partisan intentions; that is, there will be less clear, direct evidence of map drawers' partisan intent. The evidence of *effects*, then, becomes the most important consideration because evidence of sufficiently ***1154** extreme partisan effects will support the assertion that a state was motivated by partisanship, at the expense of all other purported justifications, in drawing a map. If such evidence exists, then a reasonable inference would be that partisanship was the controlling justification for a map, and any other legitimate purported justifications would not hold up against the severe burdens placed on a disfavored party's voters. Conversely, if the evidence of partisan effect is lacking or does not reveal a sufficiently significant burden, then it becomes more likely that other legitimate justifications can explain the map, even though "partisan interests may have provided one motivation for the votes of individual legislators." *See Crawford*, 553 U.S. at 204, 128 S.Ct. 1610.

Of course, to some extent, to the victor of an election go the spoils. But "[t]o the victor belong only those spoils that may be constitutionally obtained." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). "The [First Amendment] analysis allows a pragmatic or functional assessment that accords some latitude to the States," *Vieth*, 541 U.S. at 315, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment), and, consequently, latitude for some partisan effects. At the same time, a map that "freezes the status quo" for the incumbent party despite fluctuating vote totals, *Jenness*, 403 U.S. at 439, 91 S.Ct.

1970, substantially "tips the electoral process in favor of the incumbent party," *Elrod*, 427 U.S. at 356, 96 S.Ct. 2673 (plurality), or "unfairly or unnecessarily burdens the availability of political opportunity," for the disfavored party, *Anderson*, 460 U.S. at 793, 103 S.Ct. 1564 (citations and internal quotation marks omitted), should be subject to judicial scrutiny and, depending on the evidence, struck down as unconstitutional. In other settings, courts have thus employed the *Anderson*-*Burdick* standard to pick out the worst of the worst—cases in which legitimate state justifications and the states' general power to regulate elections simply do not outweigh the burdens placed on individuals' right to associate and right to vote. Likewise, reining in the worst-of-the-worst gerrymanders is the courts' task in this setting.

* * *

We conclude that the associational-rights framework provides a workable standard to evaluate an alleged partisan gerrymander. *See Benson*, 373 F.Supp.3d at 934–38, 953–56, 2019 WL 1856625, at *48–50, 65–66 (concluding that the plaintiffs could pursue this claim and that the challenged map burdened associational rights). First, no matter how relevant partisan intent is to this particular analysis, Plaintiffs have proven intent under the predominant-factor standard. *See supra* Sections V.A.1.a., V.A.2.a. More importantly for purposes of the associational claim, courts must weigh the burden imposed on a group of voters' associational rights against the precise interests put forward by the State as justifications for the burden imposed by the challenged map. *See Gill*, 138 S.Ct. at 1938–39 (Kagan, J., concurring); *Vieth*, 541 U.S. at 314, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment); *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564).

2. Application

For the following reasons, we find that Plaintiffs have proved their associational-rights claim. Many of these facts overlap with our discussion of the vote-dilution claim. *See, e.g., supra* Section V.A.2.b. (discussing statewide evidence of effect). This makes sense given the overlap between individuals' right "to associate for the advancement of political beliefs" and ***1155** their right "to cast their votes effectively." *See Williams*, 393 U.S. at 30, 89 S.Ct. 5. In this sense, partisan gerrymandering is a double-barreled constitutional issue. We will first discuss the burden that the redistricting plan imposes on Democratic voters' and organizations' right to associate and then weigh that burden against the State's interests that it proffers as justifications.

a. Burden

For a group of voters to associate effectively for the advancement of their political beliefs, the group must be able to mobilize in the electorate to have a real chance at translating their votes into electoral success. If a disfavored party's voters in the electorate are "deprived of their natural political strength by a partisan gerrymander" drawn by the dominant party in government, then the disfavored party may be sapped of its ability to mobilize effectively, win elections, and thereby accomplish its policy objectives. *See Gill*, 138 S.Ct. at 1938 (Kagan, J., concurring). Here, several pieces of evidence reveal that the redistricting plan enacted in H.B. 369 attempts to "freeze[ ] the status quo" in favor of the incumbent Republican Party, *Jenness*, 403 U.S. at 439, 91 S.Ct. 1970, substantially "tips the electoral process in favor of" the Republican Party, *Elrod*, 427 U.S. at 356, 96 S.Ct. 2673 (plurality), and "unfairly or unnecessarily burdens the availability of political opportunity," for the Democratic Party and the individuals and organizations that support the Party, *Anderson*, 460 U.S. at 793, 103 S.Ct. 1564 (citations and internal quotation marks omitted).

The partisan-bias metrics employed by Plaintiffs show that the Democratic Party is placed "at an enduring electoral disadvantage," and the simulated maps indicate that Democratic voters are indeed "deprived of the[ ] natural political strength" that they otherwise would have based on political geography. *See Gill*, 138 S.Ct. at 1938 (Kagan, J., concurring). As detailed previously, by almost any measure, H.B. 369 is more extremely partisan and more pro-Republican than over 90% (and under several metrics over 95%) of previous comparable elections throughout the country. This was true in 2012, the first election held under the current map, and in the most recent 2018 election cycle. Indeed, these findings should not be surprising given the fact that, although the Republican statewide vote share in congressional elections has fluctuated between 51% and 59%, Republican candidates have nonetheless won the same twelve seats (75% of the seats) in every election. The Democratic vote share in that same time has ranged from 41% to 47%, but Democratic candidates have won the same four seats in every election—and by considerably large margins (again,

in the closest election for the four seats, the Democratic candidate still won 61% of the vote). The data support Dr. Warshaw's conclusion that "Ohio's 2011 redistricting plan had one of the largest pro-Republican biases in history." [887] The simulated maps, which integrate only neutral redistricting criteria, reveal what the typical outcomes would be based on the natural political geography of the State. Over the course of this decade, by far the most expected outcome would be a 9-7 map. [888] As a whole, this evidence shows that the current redistricting plan contains a substantial amount of bias against Democratic voters as compared to a neutral baseline (or, in fact, millions of neutral ***1156** baselines) based on natural political geography, as well as historical baselines. Indeed, we can comfortably say that the current redistricting plan is an outlier. But this evidence is only part of the story.

887 Trial Ex. P571 (Warshaw Rep. at 42).

888 *See* Trial Ex. P426 (Cho Suppl. Rep. at 3). An 8-8 map was also rather common, though by 2018, an 8-8 map occurred at about an equal rate as a 10-6 map. *See id.*

The lack of competitive elections supports the conclusion that Democratic voters' electoral opportunities are unfairly burdened. *See Anderson*, 460 U.S. at 793, 103 S.Ct. 1564. The simulated maps typically produced at least a handful of competitive races. Democratic and Republican candidates win roughly an equal number of those competitive elections, but Democratic candidates tend to have a slight edge in competitive elections under the simulated maps. [889] Combined with the data on the typical seat shares, this evidence shows that by 2018, a 9-7 map in favor of Republicans was common and that Democratic candidates would win three or four of their seats in competitive elections. [890] These findings stand in stark contrast to the current 12-4 map, in which a winning Democratic candidate has never come close to facing a competitive election. The logical conclusion is that the map drawers fenced in Democratic voters in significant numbers into four districts and, conversely, fenced out Democratic voters from the other districts in order to "freeze[ ] the status quo" from the 2010 elections, which favored Republicans. *Jenness*, 403 U.S. at 439, 91 S.Ct. 1970. The result is a burden on Democratic voters' overall electoral opportunity.

889 *See generally id.* at 4.

890 *Id.* at 3–4.

Of course, this is not to say that competitive elections must be maximized at the expense of other legitimate goals. The point is that the evidence indicates that in a State as competitive as Ohio, and considering its natural political geography, one would expect more competitive elections—some won by Democratic candidates, and others won by Republican candidates. The absence of competitive elections raises concerns that the dominant party in government, through partisan manipulation, is seeking to "dictate electoral outcomes" and "disfavor a class of candidates" and the voters who support them. *See Thornton*, 514 U.S. at 833–34, 115 S.Ct. 1842. In a similar vein, as Justice Scalia noted, "[t]he first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech." *See McConnell*, 540 U.S. at 263, 124 S.Ct. 619 (Scalia, J., concurring in part and dissenting in part). Both restrictions on election-time speech and partisan gerrymandering aim to suppress electoral competition, and both are partly rooted in viewpoint discrimination. *See Benson*, 373 F.Supp.3d at 954–56, 2019 WL 1856625, at *66; *Rucho*, 318 F.Supp.3d at 841, 924–25. And some degree of competition is healthy because it "support[s] in the members [of Congress] an habitual recollection of their dependence on the people." *See* THE FEDERALIST NO. 57, at 511 (James Madison), *reprinted in* THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND SELECTED WRITINGS OF THE FOUNDING FATHERS (2012).

The evidence of extreme partisan bias and lack of competitive elections are consistent with the intentions of the map drawers. As detailed previously, for a time, the map drawers considered splitting Franklin County into four districts, which might have secured a 13-3 map in favor of Republicans. *See supra* Section I.A.4. They abandoned this option because the margins of victory would have been tighter and thus exposed Republican incumbents to the risk of losing competitive elections. *See supra* Section I.A.4. Importantly, according ***1157** to talking points in an email from Heather Mann to Michael Lenzo, the 12-4 map "put the most number of seats in the safety zone given the political geography of the state, [the] media markets, and how to best allocate caucus resources." [891] By the Republicans' own admission, then, the number of safe seats, and thus the number of competitive elections, influence how the parties and campaigns expend their resources. In other words, how district lines are drawn affects "the ability of citizens to band together in promoting

among the electorate candidates who espouse their political views." *Calif. Democratic Party*, 530 U.S. at 574, 120 S.Ct. 2402.

891 Trial Ex. P385 (Congressional Redistricting Talking Points at LWVOH_0052438).

When a partisan gerrymander maximizes the number of safe seats for the dominant party in government and, relatedly, packs as many of the disfavored party's voters into an optimal number of districts so that the dominant party's overall advantage is not at risk, there are consequences beyond entrenchment. An efficient partisan gerrymander can reduce campaign activity and expenditures and thereby inhibit "the constitutional interest of like-minded voters to gather in pursuit of common political ends ...." *See Norman*, 502 U.S. at 288, 112 S.Ct. 698. The evidence surveyed thus far supports the conclusion that H.B. 369 is, in fact, an efficient partisan gerrymander that exhibits substantial and extreme bias against Democratic voters, while optimizing the advantage in favor of the party in power.

Other evidence further demonstrates that the current redistricting plan limits Democratic voters' and organizations' "associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *See Tashjian*, 479 U.S. at 216, 107 S.Ct. 544. Here, that critical juncture is the general election. In his report and trial testimony, Dr. Niven spoke to the political science literature that shows how the splitting of neighborhoods, cities, and counties makes campaigning more difficult in those areas and therefore results in a demobilizing effect. *See supra* Section II.C.3. As we explained previously, he found that splits of localities affected Democratic voters more than Republican voters. Dr. Niven also elaborated on how Democratic voters were shuffled between districts and how that shuffling would have altered the political makeup of districts and the outcomes of prior elections in those districts. *Supra* Section II.C.3. Of course, the lines must be drawn somewhere, but it is suspect when considering the findings that the divisions affected Democratic voters more than Republicans alongside the findings of the extreme partisan effects exhibited in this map. Dr. Niven's analysis focused on Hamilton County, District 9, Franklin County, and Summit County, which all together covers ten of the sixteen congressional districts. *Cf. Benson*, 373 F.Supp.3d at 945 n.39, 2019 WL 1856625, at *57 n.39 ("One cannot fully grasp the partisan implications of the design of an individual district in each group without simultaneously evaluating the partisanship of the other districts in that group.").

The evidence presented by the individual and organizational Plaintiffs is consistent with the notion that a partisan gerrymander can have a demobilizing effect. A core concern with gerrymandering is that the party in power manipulates district lines to choose their preferred partisans and thereby render election results a foregone conclusion. Plaintiffs testified that they themselves have felt like election results were indeed preordained, that their candidate recruitment efforts have been ***1158** hindered, and that they have experienced fundraising difficulties. *See supra* Sections II.A.1.–2. In Hamilton County and on The Ohio State University's campus in particular, the HCYD's and OSU College Democrats' representatives testified that they have seen campaign signs for certain candidates in the wrong district and that people have been mistaken as to which district they should be voting in. *See supra* Section II.A.2. Dr. Niven also found that in Franklin County, the lines even caused problems for the professional election administrators keeping track of which voters should be assigned to which districts. *See supra* Section II.C.3.c. These mobilization difficulties are consistent with the social-science data outlined above that demonstrate an asymmetric burden in translating votes into seats. The actual election results compared to the statewide congressional vote share, the partisan-bias metrics, and the simulated maps all support a reasonable inference that Democratic voters and organizations, such as Plaintiffs in this case, would feel that they do not have a real chance at similar electoral success, even if their Party received a higher percentage of the vote. Even when the Democratic Party as a whole did better, the Republican advantage remained. [892] The current redistricting plan distributes voters in such a way that, even though the Democratic and Republican Parties are running in the same races, Democratic candidates must run a significantly longer distance to get to the same finish line. Thus, Democratic voters and supporters are burdened by this demobilizing effect and are limited in their opportunities to translate their efforts in the electorate into "political power in the community." *See Tashjian*, 479 U.S. at 216, 107 S.Ct. 544.

892 *See, e.g.*, Trial Ex. P426 (Cho Suppl. Rep. at 6) (comparing the fundraising numbers of Democratic candidates in Districts 1 and 12 in the 2018 elections to the Republican incumbents).

The remaining question is how much more successful the Democratic Party would need to be to turn the electoral tides

in their favor. Again, Dr. Warshaw's initial findings were that, even with 55% of the statewide vote, Democratic candidates would win only 6 out of 16 seats.[893] Updating his analysis with the 2018 data slightly modified this finding; Democratic candidates would win half the seats with 55% of the vote.[894] The asymmetry is stark. Republican candidates comfortably won twelve seats with a similar percentage of the vote, and at 51% of the vote, they still comfortably won twelve seats. Again, this bears out what the map drawers themselves recognized: the way that they drew the map allowed for the best allocation of Republican resources.[895] On the other hand, Democratic campaigners and organizations need to expend more resources to garner more votes, but even if they were successful in that effort, Democratic candidates still win fewer elections. Such use of State "power to starve political opposition" is generally disfavored in First Amendment jurisprudence. *See Elrod*, 427 U.S. at 356, 96 S.Ct. 2673 (plurality); *see also* Kang, *supra* at 376–83.

893 Trial Ex. P571 (Warshaw Rep. at 15).

894 Trial Ex. P476 (Warshaw 2018 Update at 12–13).

895 Trial Ex. P385 (Congressional Redistricting Talking Points at LWVOH_0052438).

The ultimate result of this substantial asymmetry is that Plaintiffs are hindered in their ability to mobilize effectively, win elections, and accomplish their policy objectives. These results come with representational costs. Dr. Warshaw's analysis demonstrates the growing polarization among Ohio's Republican and Democratic ***1159** Members of Congress.[896] Accordingly, given the large asymmetry in elections and polarization in Congress, it is less likely that the Ohio congressional delegation fairly reflects voters in congressional elections across the State. As Dr. Warshaw concludes, "[t]he pro-Republican advantage in congressional elections in Ohio causes Democratic voters to be effectively shut out of the political process in Congress."[897] Partisan gerrymandering, therefore, cuts against "the basic aim of legislative reapportionment" to "achiev[e] fair and effective representation for all citizens ...." *See Reynolds*, 377 U.S. at 565–66, 84 S.Ct. 1362.

896 Trial Ex. P571 (Warshaw Rep. at 36–37). This finding is consistent with what scholars and commentators started observing decades ago. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311–12 & n.262 (2001) (observing that although bipartisan cooperation remains possible, "the difficulty of the task has increased because congressional parties have grown more ideologically coherent and partisan as legislative districts have become more homogeneous and primaries have become the dominant means of candidate selection.") (collecting sources). To be clear, we do not find or conclude that partisan gerrymandering causes this polarization.

897 Trial Ex. P571 (Warshaw Rep. at 43); *see also id.* at 39–41; *cf.* 41 CONG. GLOBE, 41st Cong., 2d Sess., 4737 (June 23, 1870) (statement of Rep. James A. Garfield) (then-Representative Garfield speaking out against malapportionment in Ohio, stating, "There are about ten thousand Democratic voters in my district, and they have been voting there ... without any more hope of having a Representative on this floor than of having one in the Commons of Great Britain.... The Democratic voters in the nineteenth district of Ohio ought not by any system to be absolutely and permanently disenfranchised."); *supra* Section IV.C.

In sum, the redistricting plan enacted in H.B. 369 burdens Plaintiffs' ability "to associate for the advancement of [their] political beliefs ... [and] to cast their votes effectively," *Williams*, 393 U.S. at 30, 89 S.Ct. 5, such that Plaintiffs' associational and representational rights are burdened. All the evidence points to the same conclusion that Democratic voters and organizations are significantly disadvantaged, and we can comfortably call H.B. 369 an outlier. We therefore conclude that this burden is of a substantial magnitude.

b. State interests and justifications

To be sure, every redistricting law will have some effect on "the individual's right to vote and his right to associate with others for political ends." *See Anderson*, 460 U.S. at 788, 103 S.Ct. 1564. As we have explained, "[t]he [First Amendment] analysis allows a pragmatic or functional assessment that accords some latitude to the States," *Vieth*, 541 U.S. at 315, 124 S.Ct. 1769 (Kennedy, J., concurring in the judgment), and thus some latitude for partisan effects. We now turn to weighing the substantial burden on Plaintiffs' associational rights against "the precise interests put forward by the State as justifications for the burden imposed" by the redistricting

plan. *See Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564).

Because the burden on Plaintiffs' First and Fourteenth Amendment rights is substantial, the corresponding justifications must be "sufficiently weighty" to explain the burden. *See Norman*, 502 U.S. at 288–89, 112 S.Ct. 698. A court "must not only determine the legitimacy and strength of each [justification]; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564. If the burden on Plaintiffs' rights were not so severe, or if the partisan effects did not indicate that a challenged map was an outlier, we would ***1160** not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *See Timmons*, 520 U.S. at 364, 117 S.Ct. 1364. In this case, however, Plaintiffs have put forward a substantial amount of evidence demonstrating an extreme degree of partisan bias. Consequently, we will not accept Defendants' justifications at face value. Instead, we will seriously test the "legitimacy and strength" of the proffered justifications, *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564, and decide whether they are "narrowly tailored to serve a compelling state interest." *See Calif. Democratic Party*, 530 U.S. at 582, 120 S.Ct. 2402.

We addressed Defendants' justifications above and explained that they simply do not hold water in the case before us. *See supra* Section V.A.2.d. We will nonetheless review these asserted State interests briefly.

i. Incumbent protection and bipartisanship

There is a line between "avoiding contests *between* incumbent Representatives," *Karcher*, 462 U.S. at 740, 103 S.Ct. 2653 (emphasis added), and drawing district lines to insulate incumbents from competition. *See also Burns*, 384 U.S. at 89 n.16, 86 S.Ct. 1286 (framing incumbent protection as "minimiz[ing] the number of contests *between present* incumbents") (emphasis added). The former is a legitimate interest, and the latter is not. The insulation of incumbents from political competition raises entrenchment concerns. As detailed above, we find that the current map's purpose and effect was to entrench the 12-4 Republican majority and subordinate disfavored Democratic voters. For example, the decisions to split Franklin County three ways instead of four (thus creating the "Franklin County Sinkhole") and the general checking of political indices when various changes were proposed were all done with an eye toward putting as many Republican incumbents in the safety zone as possible. *See supra* Sections I.A.4, V.A.2.a.ii. This manipulation of the lines, in turn, allowed for a more efficient use of Republican Caucus resources. H.B. 369 falls on the incumbent-insulation and entrenchment side of the line.

Neither Article I nor *Gaffney v. Cummings* can save Defendants' arguments. First, the Elections Clause "act[s] as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Ariz. State Legislature*, 135 S.Ct. at 2672. As explained, the Supreme Court has also expressed skepticism about attempts to insulate incumbents from political competition in other areas of First Amendment law. *See, e.g.*, *Randall*, 548 U.S. at 248, 126 S.Ct. 2479; *McConnell*, 540 U.S. at 263, 124 S.Ct. 619 (Scalia, J., concurring in part and dissenting in part); *id.* at 306, 124 S.Ct. 619 (Kennedy, J., concurring in part and dissenting in part); *Elrod*, 427 U.S. at 356, 96 S.Ct. 2673; *see also Jenness*, 403 U.S. at 439, 91 S.Ct. 1970. Second, for the reasons we articulated before, *Gaffney* is entirely distinguishable, mainly because there is no serious argument that H.B. 369 fairly "allocate[s] political power to the parties in accordance with their voting strength ...." *Gaffney*, 412 U.S. at 754, 93 S.Ct. 2321.

Even if we viewed this incumbent-protection argument in the light most favorable to the State—that the State truly needed to draw the map the way it did to avoid contests between existing incumbents—we would not conclude that this justification holds up to scrutiny. Again, the sponsor of the initial H.B. 319 (to which H.B. 369 is materially identical) clearly described incumbent protection as "subservient" to other redistricting ***1161** goals.[898] And the instance in which incumbent protection was not pursued, i.e., the pairing of Representative Renacci with Representative Sutton, the map drawers drew the district to advantage the incumbent Republican over the Democratic incumbent. Lastly, if incumbent protection, properly understood, is meant to maintain Representative-constituent relationships and seniority in Congress, it makes little sense to pair the most senior member of the State's congressional delegation against another incumbent, as was done in H.B. 369. As one of Mr. Cooper's hypothetical alternative maps demonstrates, Representative Kaptur did not need to be paired; instead, Representatives Sutton and Kucinich (who were each paired anyway) could have been drawn against one another.[899]

898 Trial Ex. J01 (Ohio House Session, Sept. 15, 2011 at 19) (statement of Rep. Huffman).

899 *See* Trial Ex. P093 (Cooper Second Suppl. Decl. at 12–18).

The argument that the current map resulted from bipartisan input and negotiations, which at times blends with Defendants' arguments about incumbent protection and *Gaffney*, is also unpersuasive. *See supra* Section V.A.2.d.ii. The partisan outcomes of this map were locked in once the General Assembly passed H.B. 319, which was the work product of only Republicans. The General Assembly incorporated some minor Democratic requests into H.B. 369; however, Speaker Batchelder himself acknowledged that the partisan balance of the map was non-negotiable. *See supra* Section V.A.2.d.ii. Although Democratic legislators secured some small geographic concessions, the Republicans also secured their large 12-4 partisan advantage in H.B. 369. The material terms of negotiation were ultimately dictated by the fact that the Republican Party controlled both the General Assembly and the governorship. *See, e.g.*, Dkt. 230-3 (Batchelder Dep. at 25) (stating that the Republicans "could have simply done what [they] wanted to" in the redistricting process). As a practical matter, Democratic legislators could not alter the expected partisan outcomes of this map, and, therefore, this justification does not cure the substantial burdens on Plaintiffs' rights.

ii. Voting Rights Act compliance and advancing representation

We accept that compliance with the VRA is a compelling State interest. *See Bethune-Hill*, 137 S.Ct. at 801. If the State properly considered the VRA, then this interest may well justify the drawing of District 11. A proper consideration of the VRA would involve having some basis in evidence or good reasons to believe that § 2 requires a particular district. Statements from legislators that the VRA was an important consideration, without more, will not suffice—especially when the State is mistaken on the law.

The problem with this justification in this case is that the State had no basis in evidence to believe that District 11 needed to be drawn as it was. *See supra* Section V.A.2.d.iii. Instead, Ohio's belief that it was compelled to draw District 11 as a majority-minority district rested "on a pure error of law." *See Cooper*, 137 S.Ct. at 1472. Furthermore, the State's argument that it can draw a majority-minority district, even if it mistakenly interpreted the VRA, could be problematic. *See Strickland*, 556 U.S. at 23–24, 129 S.Ct. 1231. Again, no evidence suggests that the State conducted any analysis that the VRA required the current District 11 to have a nearly identical BVAP as the prior District 11. We therefore cannot say that the State had "good reason to believe that § 2 requires drawing a majority-minority district." *See* ***1162** *Cooper*, 137 S.Ct. at 1470. In fact, based on the prior success of African-American candidates in District 11 (none of whom faced a competitive election in the prior decade), nothing supports this belief. *See supra* Section V.A.2.d.iii. Moreover, even if the State wanted to advance minority electoral opportunities in District 11, we nonetheless find that such a goal was secondary to the predominant and controlling partisan intent.

Again, Defendants' asserted interest for District 3 is slightly distinct. For the sake of argument, we accept that the State may, as a matter of legislative discretion, rely on creating minority-opportunity or crossover districts as a legitimate justification. As explained previously, however, based on the evidence in this case, we credit the competing narrative for District 3: map drawers carefully packed Franklin County Democrats into District 3, facilitating the creation of two solidly Republican seats in Districts 12 and 15. This constellation of districts was key in their efforts to lock in a 12-4 map.

iii. Natural political geography

Finally, we also accept that a state's natural political geography could potentially explain partisan effects, but again, this justification does not hold up against the evidence in this case. *See supra* Section V.A.2.d.iv. Although Plaintiffs' experts acknowledge that Ohio's political geography provides a *slight* advantage to Republicans, the advantage is far from 12-4. First, the same geography did not cause such extreme bias under the prior redistricting plan, and under that plan, the State's congressional delegation majority shifted between Democrats and Republicans. *See supra* Section V.A.2.d.iv. Second, as mentioned above, the simulated maps provide a baseline to compare maps that incorporate only neutral districting criteria to H.B. 369. Dr. Cho's seat-share analysis demonstrates that a 9-7 map in favor of Republicans is the most common outcome, and one would expect at least a handful of competitive races. The current map has produced a combined total of only four competitive races across all four election cycles. When Dr. Cho incorporated 2018 data into

her analysis, only 0.046% of over 3-million simulated maps produced a 12-4 outcome. If someone stated that they were flipping a fair coin but then that coin turned up tails in only 0.046% of 100,000 coin tosses, one would start to suspect that the coin was not, in fact, fair—here we have over 3 million coin tosses. Either the Republicans were exceedingly lucky, or their map drawers made exceedingly expert use of political data to manipulate district lines to secure the most seats and the least amount of competition possible. The evidence in this case points to the latter conclusion. Third, Mr. Cooper's hypothetical alternative maps pair the same number of incumbents as the current map, score higher on compactness, are equal to the current map on core retention, split fewer municipalities and counties, and produce more responsive and competitive elections.[900] As we outlined previously, these maps also satisfy the equal-population requirement, and they advance minority electoral opportunities more than H.B. 369. *See supra* Section V.A.2.d.iv. The upshot is that natural political geography cannot explain away the extreme partisan effects of the current redistricting plan, even when other factors ***1163** that were supposedly important to the State are also considered.

900 *See generally* Trial Ex. P093 (Cooper Second Suppl. Decl. at 4–18); Trial Ex. P598 (Cooper Third Suppl. Decl. at 5–6). For example, the second hypothetical alternative map produces the following outcomes for 2012-2018, respectively: 10-6, 11-5, 11-5, and 8-8, and the number of competitive races range from three to five. *See* Trial Ex. P093 (Cooper Second Suppl. Decl. at 18); Trial Ex. P598 (Cooper Third Suppl. Decl. at 6).

* * *

We conclude that the burdens H.B. 369 imposes on Plaintiffs' associational rights are not outweighed by any of the asserted justifications. This redistricting plan substantially burdens the overlapping "right of individuals to associate for the advancement of their political beliefs[ ] and the right of qualified voters ... to cast their votes effectively." *Williams*, 393 U.S. at 30, 89 S.Ct. 5. Critically, our primary concern is not the interests of Democratic candidates, but rather, the interests of the voters and organizations who choose to associate together, express their support for, and cast their votes for those candidates. *See Anderson*, 460 U.S. at 806, 103 S.Ct. 1564. In this case, the bottom line is that the dominant party in State government manipulated district lines in an attempt to control electoral outcomes and thus direct the political ideology of the State's congressional delegation. "In a free society the State is directed by political doctrine, not the other way around." *Calif. Democratic Party*, 530 U.S. at 590, 120 S.Ct. 2402 (Kennedy, J., concurring).

For these reasons, H.B. 369 is an unconstitutional partisan gerrymander.

D. Article I Claim

Two provisions of Article I of the United States Constitution are relevant to this case—Article I, § 4 and Article I, § 2. As explained by the three-judge panel in *Rucho*, "the two provisions are closely intertwined." 318 F.Supp.3d at 936; *see also id.* at 935–41. Plaintiffs claim that the State has exceeded its powers under Article I because the alleged partisan gerrymander is a non-neutral regulation that constrains the free choice of the people to elect their representatives.

Again, under Article I, § 4, states generally have the authority to draw district lines. U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections ... shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations ...."). And again, Defendants place too much weight on their argument that this clause immunizes the State's redistricting law from judicial scrutiny. "The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, or ... the freedom of political association." *Tashjian*, 479 U.S. at 217, 107 S.Ct. 544 (citing *Wesberry*, 376 U.S. at 6–7, 84 S.Ct. 526); *see also Thornton*, 514 U.S. at 834, 115 S.Ct. 1842. In *Thornton*, the Supreme Court further explained that, at the Founding, "proponents of the Constitution noted: '[T]he power over the manner only enables them to determine *how* these electors shall elect ....' " and that "[t]he constitution expressly provides that the choice shall be by the people, which cuts off both from the general and state Legislatures the power of so regulating the mode of election, as to deprive the people of a fair choice." *Thornton*, 514 U.S. at 833 & n.47, 115 S.Ct. 1842 (citations omitted) (first alteration in original). The Elections Clause in Article I, § 4, therefore, does not hinder the people's ability to ensure that they "choose their representatives, not the other way around," *Ariz. State Legislature*, 135 S.Ct. at 2677 (citation omitted), and neither does it hinder the courts' ability to police the states' power to regulate elections under Article I, *see, e.g.*, *Thornton*, 514 U.S. at 828–29, 115 S.Ct. 1842.

Article I, § 2 provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States ...." In the ***1164** original text of the Constitution, Article I, § 2 provided the people's sole right to choose directly their elected representatives; the electoral college elects the president, U.S. CONST. art. II, § 1, and, at that time, the state legislatures chose senators, U.S. CONST. art. I, § 3, *amended by* U.S. CONST. amend. XVII (providing the people with the right directly to elect their senators, as the people do today). Accordingly, in the original text of the Constitution, the members of the House of Representatives were the only elected federal officials *directly* responsive to the people. As James Madison emphasized, "the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people." THE FEDERALIST NO. 57, at 511 (James Madison), *reprinted in* THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND SELECTED WRITINGS OF THE FOUNDING FATHERS (2012).

This provision is referred to as "the Great Compromise," and the Supreme Court has held that "principle solemnly embodied in" that compromise—the one-person, one-vote equal-population requirement—would be defeated if "within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman [or Congresswoman] than others." *Wesberry*, 376 U.S. at 14, 84 S.Ct. 526. As the Supreme Court has recognized, "[a] fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' " *Powell*, 395 U.S. at 547, 89 S.Ct. 1944 (citation omitted). In the partisan-gerrymandering cases, "[t]he problem ... is that the will of the cartographers rather than the will of the people will govern." *Vieth*, 541 U.S. at 331, 124 S.Ct. 1769 (Stevens, J., dissenting). More specifically, the map drawers "give [the dominant party's] voters a greater voice in choosing a Congressman [or Congresswoman] than [the disfavored party's voters]." *See Wesberry*, 376 U.S. at 14, 84 S.Ct. 526.

"To be sure, the Elections Clause grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 523, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001) (citation omitted). But the Supreme Court "made clear" in *Thornton* that "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.* (quoting *Thornton*, 514 U.S. at 833–34, 115 S.Ct. 1842). Using this line of reasoning, the three-judge panel in *Rucho* concluded that the redistricting plan at issue exceeded the State's authority under the Elections Clause for three reasons: "(1) the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts"; (2) the plan violated the First Amendment, the Fourteenth Amendment Equal Protection Clause, and Article I, § 2; and (3) the plan "represents an impermissible effort to 'dictate electoral outcomes' and 'disfavor a class of candidates.' " *Rucho*, 318 F.Supp.3d at 937 (quoting *Thornton*, 514 U.S. at 833–34, 115 S.Ct. 1842).

We conclude that a state necessarily exceeds its authority under the Elections Clause if the State violates the First and/or Fourteenth Amendments, *see Tashjian*, 479 U.S. at 217, 107 S.Ct. 544, and we find that the State did so here, *see supra* Sections V.A.–C. Simply put, the Elections Clause does not give the states a license to engage in unconstitutional partisan gerrymandering. The Elections Clause ***1165** and Article I, § 2, taken together, "act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *See Ariz. State Legislature*, 135 S.Ct. at 2672. Article I § 2 contains the principle that representatives should be dependent on and responsive to the will of the voters—rather than dependent on and responsive to state legislators and their map drawers (some of whom may even include agents of the representatives themselves). We further agree that a redistricting law may, in certain circumstances, be so extreme that it "amounts to a successful effort by the [State] to 'disfavor a class of candidates' and 'dictate electoral outcomes.' " *See Rucho*, 318 F.Supp.3d at 940 (quoting *Thornton*, 514 U.S. at 833–34, 115 S.Ct. 1842).

As a general matter, then, Article I provides useful background principles for evaluating the problem of partisan gerrymandering. As a functional matter, however, the analysis under this claim is the same as the analysis under the First and Fourteenth Amendments. If a redistricting plan violates Article I, it does so because the plan unconstitutionally dilutes votes because of partisan affiliation or because the plan impermissibly infringes on the associational rights of voters. The one key caveat is that Article I, § 2 applies only to congressional elections. *See* U.S. CONST. art. I, § 2 ("*The House of Representatives* shall be composed of Members chosen every second Year by the People of the several States ....") (emphasis added). That specific section, therefore,

would be inapplicable if a challenge to state legislative districts were before us (and there is no such challenge here).

For the reasons we have already articulated, *see supra* Sections V.A.–C., we find that H.B. 369 exceeds the State's powers under Article I.

VI. LACHES

The doctrine of laches "is rooted in the notion that those who sleep on their rights lose them." *Libertarian Party of Ohio v. Husted*, No. 2:13-cv-953, 2014 WL 12647018, at *1 (S.D. Ohio Sept. 24, 2014) (citations and internal quotation marks omitted). "Where a plaintiff seeks solely equitable relief, his action may be barred by the equitable defense of laches if (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant was prejudiced by this delay." *ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641, 647 (6th Cir. 2004). Defendants argue that laches bars Plaintiffs' claims because Plaintiffs' seven-year delay in bringing this action is unjustified and has prejudiced Defendants. Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 72–75). We disagree. [901]

901 Our analysis largely tracks that of the three-judge district court in *League of Women Voters of Michigan v. Benson*, 373 F.Supp.3d 908–11, 2019 WL 1856625, at *24–26 (E.D Mich. Apr. 25, 2019). *See also id.* at 908–09, 2019 WL 1856625, at *24 (holding that "that laches does not apply to Plaintiffs' partisan gerrymandering claims as a matter of law," and alternatively holding "that even if laches applies to these types of claims, Intervenors have failed to establish that laches bars Plaintiffs claims in this case.").

As a preliminary point, we note that the nature of Plaintiffs' rights has been uncertain since the *Vieth* case. *See Gill*, 138 S.Ct. at 1933–34 (declining to follow the normal procedure of dismissing the plaintiffs' claim for lack of standing, explaining that "[t]his is not the usual case," and that partisan gerrymandering "concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved."). Indeed, whether Plaintiffs' case remained viable was an open question prior to *Gill*, and ***1166** Plaintiffs filed their initial complaint in this case *before* the Supreme Court decided that case. As we explain further below, rather than "sleeping on their rights," Plaintiffs' course of action was not unjustified given the state of the law and the high bar for proving partisan effect.

Defendants contend that Plaintiffs' claims were ripe "shortly after" the State enacted the current plan. Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 72). In *Bandemer*, however, the plurality found that "the plaintiffs had failed to make a sufficient showing on [partisan effect] because their evidence of unfavorable election results for Democrats was limited to a single election cycle." *See Gill*, 138 S.Ct. at 1927 (citing *Bandemer*, 478 U.S. at 135, 106 S.Ct. 2797). At the very least, then, it would have been unwise for Plaintiffs to bring this action prior to the 2014 elections. Plaintiffs filed this lawsuit after three elections, and a fourth (the 2018 elections) occurred during the litigation, and evidence related to the 2018 elections is in this record. The Supreme Court has not set "clear landmarks," *Gill*, 138 S.Ct. at 1926, but there is a high bar for proving partisan effects, and actual election results are preferred over hypotheticals, *id.* at 1928 (citing *LULAC*, 548 U.S. at 419–20, 126 S.Ct. 2594 (opinion of Kennedy, J.). Consequently, we conclude that Plaintiffs were reasonable in waiting three election cycles before bringing this action.

Further, one clear concern in these cases is that judges should not undertake the "unwelcome obligation" of overseeing the redrawing of district lines unless it is necessary. *See Connor*, 431 U.S. at 415, 97 S.Ct. 1828. When confronted with an extreme partisan gerrymander, it becomes necessary. As we have explained, factors such as whether the plan is an outlier, whether the plan is a durable gerrymander that persists *across election cycles*, and whether districts have frozen the status quo despite *fluctuating vote totals* between the parties help us to make this determination. If we had to make this determination after just one election, then we would essentially be "adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *See LULAC*, 548 U.S. at 420, 126 S.Ct. 2594 (opinion of Kennedy, J.). In this case, more data, which reveals durability and entrenchment despite fluctuating vote totals across election cycles, give us greater confidence in our findings. We are not suggesting a bright-line rule for how many elections are necessary; the point is that allowing for a few elections could reveal that a plan does not, in fact, place significant burdens on a supposedly disfavored party. In a similar vein, we cannot say that there has been an unreasonable delay.

Defendants also rely on *Benisek v. Lamone*, —— U.S. ——, 138 S.Ct. 1942, 201 L.Ed.2d 398 (2018), which

does not address laches. Although *Benisek v. Lamone* may be instructive, it ultimately does not militate in favor of Defendants. The Supreme Court first noted that the plaintiffs filed their complaint in 2013 but "fail[ed] to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Id.* at 1944. In contrast, Plaintiffs before us sought injunctive relief with the filing of their initial complaint. Dkt. 1 (First Compl. at 41–42). Moreover, as in many election-law cases, "a due regard for the public interest in orderly elections" may counsel against granting relief. *Benisek v. Lamone*, 138 S.Ct. at 1944–45; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) ("Court orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). In *Benisek v. Lamone*, the ***1167** plaintiffs "represented to the District Court that any injunctive relief would have to be granted by August 18, 2017, to ensure the timely completion of a new districting scheme in advance of the 2018 election season," but "that date had 'already come and gone' by the time the court ruled on plaintiffs' motion." *Benisek v. Lamone*, 138 S.Ct. at 1945 (citation omitted). That is not this case. In their motion to stay the trial in this case, Defendants represented to this Court that a new congressional map would need to be submitted by September 20, 2019 "to fulfill the administrative duties and obligations associated with preparing for the 2020 congressional election." *See* Dkt. 185-1 (Wolfe Decl. at 2). That deadline is over four months away. Accordingly, there is enough time to implement a remedy on Defendants' own timetable, hence negating the risk of voter confusion.

In sum, we conclude that Plaintiffs' delay in this case was not unjustified or unreasonable. This alone disposes of Defendants' laches defense. Also important, the concerns present in *Benisek v. Lamone* are not present here.

We will nonetheless address Defendants' remaining arguments on prejudice, none of which we find persuasive. First, the "[u]navailability of important witnesses, dulling of memories of witnesses, and loss or destruction of relevant evidence all constitute prejudice." *See Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002). Defendants point to several potential fact witnesses who have since died, and these witnesses primarily go to the purported "bipartisan negotiations" that Defendants say justify the map. *See* Dkt. 252 (Defs.' & Intervenors' Post-Trial Br. at 73). We have already explained the problems with this justification; in brief, even if there were negotiations, the desire to achieve a 12-4 map was not negotiable. Additionally, none of the deceased individuals were members of the Ohio General Assembly at the time the current plan was enacted and many of the main map drawers were still witnesses in this case.

Second, Defendants argue that "[v]oters are acclimated to the 2011 plan, and members of Congress have invested deeply in their districts." *Id.* at 74. The first point is unpersuasive because the map also imposes serious burdens on individuals' rights to vote and to associate. Similarly, for the second point, congressional representatives may have invested deeply in their districts, but they have no right to choose their voters, and representatives' interests are not implicated in this case —representatives answer to the voters, whose interests are implicated in this case. Thus, the fact that they have invested deeply in their districts is not a reason to find that laches applies.

Third, Defendants argue that the State has been forced "to litigate on an accelerated basis near the end of a redistricting cycle," which runs afoul of the "heavy presumption against last-minute changes to the electoral system." *Id.* Defendants again cite *Benisek v. Lamone*, which we addressed above, as well as *Service Employees International Union Local 1 v. Husted* ("*SEIU Local 1* "), 698 F.3d 341 (6th Cir. 2012). To be sure, "last-minute injunctions changing election procedures are strongly disfavored." *Id.* at 345. In *SEIU Local 1*, however, the Sixth Circuit addressed a motion for preliminary injunction filed in the district court on October 17, 2012, just three weeks out from the November 6, 2012 election. *Id.* at 343. Here, again, the deadline for new maps is over four months away, and the 2020 election will not be held for over one year after that.

***1168** Lastly, even if a prima facie case for laches could be established, Plaintiffs can rebut a presumption that laches bars their claims by "establish[ing] that there was a good excuse for [the] delay ...." *Nartron*, 305 F.3d at 409. We observe, as in *Gill*, that "[t]his is not the usual case." 138 S.Ct. at 1933–34. As stated, the unsettled nature of partisan-gerrymandering claims and the high bar for proving partisan effect provides good cause for any delay. *Cf. Benson*, 373 F.Supp.3d at 910–11, 2019 WL 1856625, at *26 (reasoning that "it was not unreasonable for Plaintiffs to wait to sue until the law in this area had developed sufficiently to allow Plaintiffs to articulate and support their partisan gerrymandering claims.").

For these reasons, we reject Defendants' laches defense. [902]

902 Whether laches even applies to injunctive relief, which Plaintiffs seek, seems to be an open question. In *Kay v. Austin*, an election-law case, the Sixth Circuit held that the plaintiff was "not entitled to equitable relief in this instance as a result of laches." 621 F.2d 809, 813 (6th Cir. 1980). In a more recent election-law case, the Sixth Circuit also considered, though ultimately rejected, a laches defense to a plaintiff's claims for declaratory and injunctive relief. *See Taft*, 385 F.3d at 647. Conversely, the Sixth Circuit has also held that "[l]aches only bars damages that occurred before the filing date of the lawsuit. It does not prevent [a] plaintiff from obtaining injunctive relief or post-filing damages." *Nartron*, 305 F.3d at 412 (internal citations omitted); *see also Kellogg Co. v. Exxon Corp.*, 209 F.3d 562, 568 (6th Cir. 2000) (same); *TWM Mfg. Co. v. Dura Corp.*, 592 F.2d 346, 349–50 (6th Cir. 1979) (same). In this latter set of cases, the Sixth Circuit has reasoned that "[o]nly by proving the elements of estoppel may a defendant defeat such prospective relief." *TWM Mfg.*, 592 F.2d at 350; *see also, e.g.*, *Nartron*, 305 F.3d at 412–13 (also noting that estoppel "requires more than a showing of mere silence on the part of a plaintiff"). (Defendants have not asserted an estoppel defense here.) Of course, the *TWM Manufacturing*, *Kellogg*, and *Nartron* line of cases, if applicable, would render Defendants' laches defense completely inapplicable. *See Benson*, 373 F.Supp.3d at 909–10, 2019 WL 1856625, at *25 (holding "that laches does not bar [partisan-gerrymandering] claims as a matter of law" and citing *Nartron* and *Kellogg*).

VII. REMEDY AND ORDER

In their complaint, Plaintiffs request that we declare H.B. 369 unconstitutional, enjoin any future elections under the plan enacted in H.B. 369, and "[e]stablish a congressional districting plan that complies with the United States Constitution and all federal and state legal requirements, if the Ohio Legislature and/or Governor fail to enact a new and constitutional plan in a timely manner." *See* Dkt. 37 (Second Am. Compl. at 51–52). We have concluded that H.B. 369 is unconstitutional. Now we turn to the remedy.

Unless "an impending election is imminent and a State's election machinery is already in progress," a court should "tak[e] appropriate action to insure that no further elections are conducted under the invalid plan." *See Reynolds*, 377 U.S. at 585, 84 S.Ct. 1362. No impending election is imminent in this case. Furthermore, Defendants have represented to this Court that a new congressional districting plan would need to be adopted by September 20, 2019 "to fulfill the administrative duties and obligations associated with preparing for the 2020 congressional election." *See* Dkt. 185-1 (Wolfe Decl. at 2). We are committed to working with that timeline for establishing a remedial plan. We also observe that former Governor Kasich signed H.B. 319 into law on September 26, 2011, and then he signed H.B. 369, the actual plan that was used in the 2012 elections, into law on December 15, 2011. *See* Dkt. 234 (Final Pretrial Order at App. A., 2–4). Even though the current plan was enacted in December, the State still prepared ***1169** adequately for the 2012 congressional elections on that slightly shorter timeline. Accordingly, ***we hereby enjoin*** the State from conducting any elections using the plan enacted in H.B. 369 in any future congressional elections.

The parties have not yet fully briefed the issue of a remedial plan. As a general rule, however, when a federal court declares a redistricting plan unconstitutional, "it is ... appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *See Wise v. Lipscomb*, 437 U.S. 535, 540, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978). At this time, we see no reason to deviate from this general rule. Plaintiffs' requested relief also seems to assume this general rule, as their complaint asks this Court to establish a new plan, "if the Ohio Legislature and/or Governor fail to enact a new and constitutional plan in a timely manner." *See* Dkt. 37 (Second Am. Compl. at 51–52). We therefore hope that the Ohio General Assembly "will perform that duty and enact a constitutionally acceptable plan." *Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975).

We advise that Defendants and Plaintiffs must be prepared to move forward on a remedial plan pursuant to the following timeline and conditions:

1. The State should enact forthwith its own remedial plan consistent with this opinion no later than June 14, 2019. No continuances will be granted. The date of enactment shall be the date on which the Governor signs the proposed remedial plan into law; or, if the Governor vetoes the

proposed remedial plan, the date of enactment shall be the date on which the General Assembly overrides the Governor's veto.

2. On the same day that the State enacts its own remedial plan, Defendants shall provide notice of the plan's enactment to this Court and to Plaintiffs. No later than seven days from the date on which the State enacts its own remedial plan (assuming it enacts such a plan by the June 14 deadline), Defendants shall file the enacted remedial plan with this Court.

3. When Defendants file the State-enacted remedial plan with this Court, they shall also include:

(A) All transcripts of committee hearings and floor debates related to the State-enacted remedial plan;

(B) A description of the process that the General Assembly, and any constituent committees or members thereof, followed in drawing the State-enacted remedial plan, and Defendants shall disclose the identity of all participants involved in the process and map drawing;

(C) Data on the remedial plan's population deviation, compactness, municipality and county splits, and any incumbent pairings;

(D) Any alternative plans considered by the General Assembly or any constituent committee;

(E) All criteria, formal or informal, that were applied in drawing the State-enacted remedial plan, including, without limitation, any criteria related to race, partisanship, the use of political data, or the protection of incumbents, and a description of how the map drawers used any such criteria. If any of the criteria just listed were not used, Defendants shall so state.

4. If Plaintiffs believe that the State-enacted remedial map that the Defendants file is still unconstitutional, they ***1170** must file their specific objections to it no later than seven days from the date on which Defendants file the State-enacted remedial plan with this Court.

We will then assess whether the State-enacted remedial plan is constitutionally permissible.

If the State fails in its task to enact a remedial plan, we have our "own duty to cure illegally gerrymandered districts through an orderly process in advance of elections." *See Covington*, 138 S.Ct. at 2553–54 (citing *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5). In the appropriate circumstance, we may in our discretion not give the State "a second bite at the apple." *See id.* at 2554 (citation omitted) (holding that the District Court did not abuse its discretion in appointing a Special Master when the State failed to enact a permissible remedial plan). This situation may arise if the State does not enact its own remedial plan by the June 14 deadline or if the State-enacted remedial plan is not "a constitutionally acceptable plan." *Chapman*, 420 U.S. at 27, 95 S.Ct. 751. If this Court must step into the role of putting in place a new plan, several options are available. We will address each.

First, we may appoint a Special Master pursuant to Federal Rule of Civil Procedure 53 to assist the Court in drawing a remedial plan. To that end, ***we hereby order*** the parties to confer and file no later than June 3, 2019 at 5 P.M., a list of no more than three qualified and mutually acceptable candidates to serve as a Special Master. We may then select a Special Master from that list and issue an order outlining the timeline and requirements that apply to the Special Master's submission of a proposed remedial plan. The parties would be allowed to comment on any proposal from a Special Master. In the event that the parties cannot agree on any candidates for Special Master, we may identify a Special Master without input from the parties.

Second, a situation could arise in which the State enacts a remedial plan, but we nonetheless find it constitutionally unacceptable. In this situation, the same procedures regarding the appointment of a Special Master would apply. If the State enacts a remedial plan that we reject, we will include in our opinion and order on that plan a timeline for the Special Master's submission of a remedial plan.

Finally, Mr. Cooper has submitted a Proposed Remedial Plan (and a corrected version thereof), as well as two hypothetical alternative plans that addressed the pairing of incumbents. ***Whether or not the State enacts a remedial plan*** that we consider, ***we hereby order*** the parties to brief whether one of Mr. Cooper's plans could or should be adopted as a remedial plan. The parties shall file these briefs simultaneously on June 3, 2019 at 5 P.M., along with the parties' list of mutually acceptable candidates for Special Master (if the parties have not yet filed that list by that date).

* * *

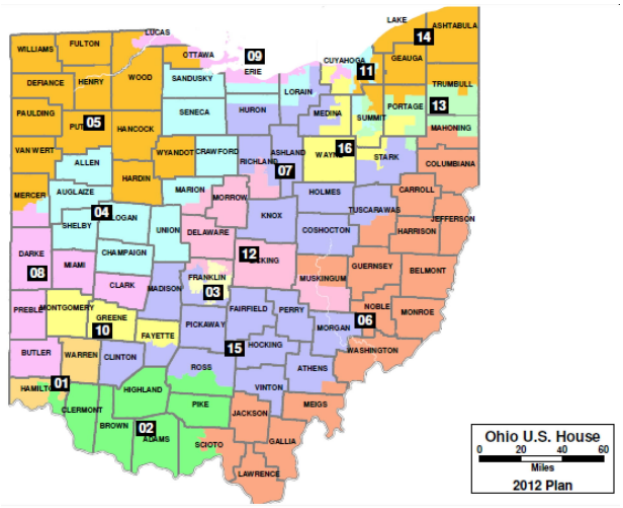
In conclusion, we **GRANT** Plaintiffs' request to declare the redistricting plan enacted in H.B. 369 unconstitutional. Moreover, we **GRANT** Plaintiffs' request for injunctive relief, and **we hereby enjoin** the State from conducting any elections using the plan enacted in H.B. 369 in any future congressional elections. Finally, we **ORDER** that the parties proceed according to the remedial schedule outlined above.

IT IS SO ORDERED.

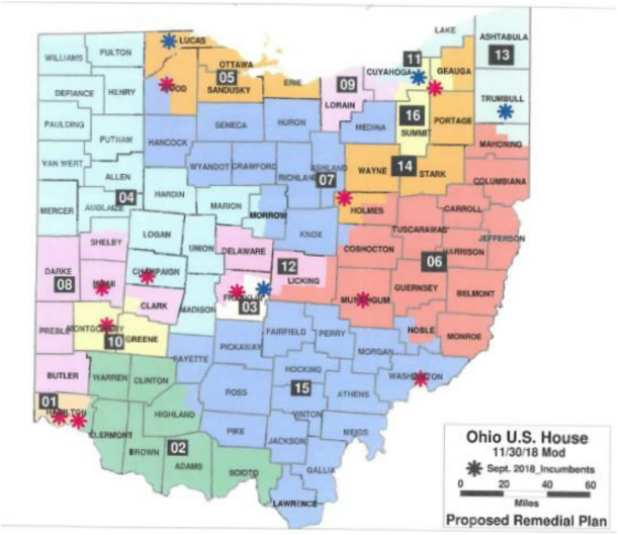
Attachment

APPENDIX A

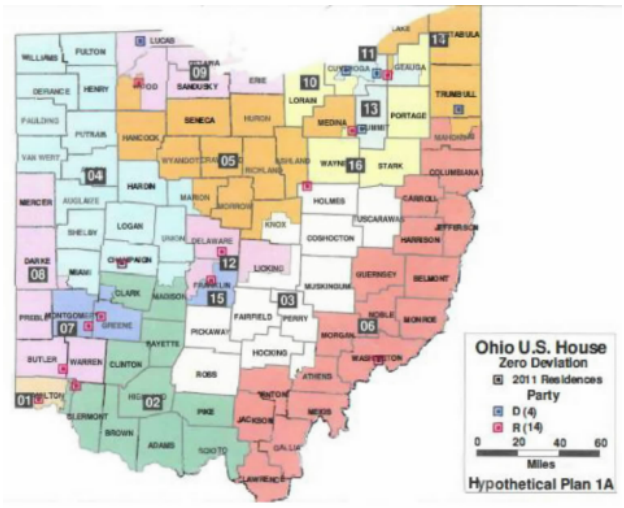
***1171**

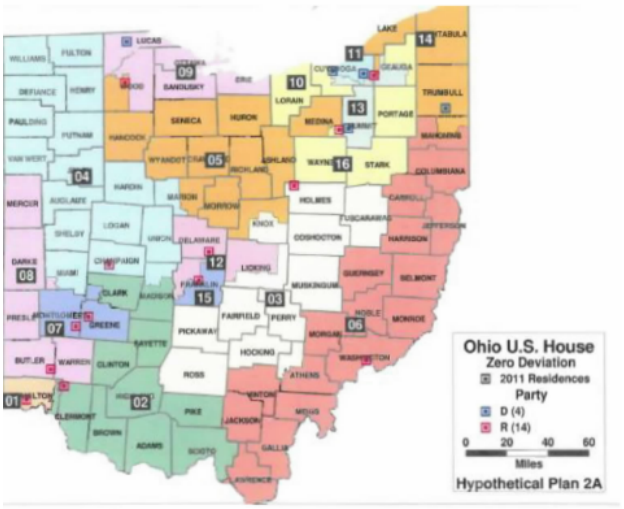


APPENDIX B



***1172** APPENDIX C





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139 S.Ct. 2484
Supreme Court of the United States.

Robert A. RUCHO, et al., Appellants
v.
COMMON CAUSE, et al.;
Linda H. Lamone, et al., Appellants
v.
O. John Benisek, et al.

Nos. 18–422 and 18–726
|
June 27, 2019

Synopsis

Background: Voters and others in North Carolina and Maryland challenged their states' congressional districting maps as unconstitutional partisan gerrymanders. In first case, remedial congressional redistricting plan enacted by North Carolina's Republican-controlled legislature was alleged to violate Equal Protection Clause, Elections Clause, First Amendment, and Article I, and, following trial, a three-judge panel of the United States District Court for the Middle District of North Carolina, Wynn, Circuit Judge, 279 F.Supp.3d 587, issued order finding that plan was unconstitutional, enjoined state from conducting further elections using plan, and required drawing of new maps, and subsequently denied legislators' motion to stay court's order pending appeal to the Supreme Court, 284 F.Supp.3d 780. On direct appeal, the Supreme Court, 138 S.Ct. 2679, vacated the judgment and remanded for further consideration. On remand, the District Court, Wynn, Circuit Judge, 318 F.Supp.3d 777, again struck down plan, and direct appeal was taken. In second case, congressional redistricting map enacted by Maryland's Democrat-controlled legislature was alleged to violate First Amendment. On parties' cross-motions for summary judgment, a three-judge panel of the United States District Court for the District of Maryland, Niemeyer, Circuit Judge, 348 F.Supp.3d 493, granted voters' motion, and direct appeal was taken. The Supreme Court postponed its consideration of jurisdiction in both cases.

The Supreme Court, Chief Justice Roberts, held that partisan gerrymandering claims present political questions beyond the reach of the federal courts, abrogating *Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797, 92 L. Ed. 2d 85.

Vacated and remanded with instructions.

Justice Kagan filed a dissenting opinion in which Justices Ginsburg, Breyer, and Sotomayor joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Syllabus [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Voters and other plaintiffs in North Carolina and Maryland filed suits challenging their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs claimed that the State's districting plan discriminated against Democrats, while the Maryland plaintiffs claimed that their State's plan discriminated against Republicans. The plaintiffs alleged violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

Held: Partisan gerrymandering claims present political questions beyond the reach of the federal courts. Pp. 2493 – 2508.

(a) In these cases, the Court is asked to decide an important question of constitutional law. Before it does so, the Court "must find that the question is presented in a 'case' or 'controversy' that is ... 'of a Judiciary Nature.' " *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854, 164 L.Ed.2d 589. While it is "the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed. 60, sometimes the law is that the Judiciary cannot entertain a claim because it presents a nonjusticiable "political

question," *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663. Among the political question cases this Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.* This Court's partisan gerrymandering cases have left unresolved the question whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. See *Gill v. Whitford*, 585 U.S. ——, ——, 138 S.Ct. 1916, 1929, 201 L.Ed.2d 313.

Partisan gerrymandering was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. They addressed the election of Representatives to Congress in the Elections Clause, Art. I, § 4, cl. 1, assigning to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. But the Framers did not set aside all electoral issues as questions that only Congress can resolve. In two areas —one-person, one-vote and racial gerrymandering—this Court has held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. But the history of partisan gerrymandering is not irrelevant. Aware of electoral districting problems, the Framers chose a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress, with no suggestion that the federal courts had a role to play.

Courts have nonetheless been called upon to resolve a variety of questions surrounding districting. The claim of population inequality among districts in *Baker v. Carr*, for example, could be decided under basic equal protection principles. 369 U.S. at 226, 82 S.Ct. 691. Racial discrimination in districting also raises constitutional issues that can be addressed by the federal courts. See *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 81 S.Ct. 125, 5 L.Ed.2d 110. Partisan gerrymandering claims have proved far more difficult to adjudicate, in part because "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731. To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is "determining when political gerrymandering has gone too far." *Vieth v. Jubelirer*, 541 U.S. 267, 296, 124 S.Ct. 1769, 158 L.Ed.2d 546 (plurality opinion). Despite considerable efforts in *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298; *Davis v. Bandemer*, 478 U.S. 109, 116–117, 106 S.Ct. 2797, 92 L.Ed.2d 85; *Vieth,* 541 U.S. at 272–273, 124 S.Ct. 1769; and *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 414, 126 S.Ct. 2594, 165 L.Ed.2d 609 (*LULAC*), this Court's prior cases have left "unresolved whether ... claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering," *Gill,* 585 U.S., at ——, 138 S.Ct., at 1929. Two "threshold questions" remained: standing, which was addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.* P. 2498.

(b) Any standard for resolving partisan gerrymandering claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." *Vieth,* 541 U.S. at 306–308, 124 S.Ct. 1769 (Kennedy, J., concurring in judgment). The question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U.S. at 420, 126 S.Ct. 2594 (opinion of Kennedy, J.). Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Such claims invariably sound in a desire for proportional representation, but the Constitution does not require proportional representation, and federal courts are neither equipped nor authorized to apportion political power as a matter of fairness. It is not even clear what fairness looks like in this context. It may mean achieving a greater number of competitive districts by undoing packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But it could mean engaging in cracking and packing to ensure each party its "appropriate" share of "safe" seats. Or perhaps it should be measured by adherence to "traditional" districting criteria. Deciding among those different visions of fairness poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments. And it is only after determining how to define fairness that one can even begin to answer the determinative question: "How much is too much?"

The fact that the Court can adjudicate one-person, one-vote claims does not mean that partisan gerrymandering claims are justiciable. This Court's one-person, one-vote cases recognize that each person is entitled to an equal say in the election of representatives. It hardly follows from that principle that a person is entitled to have his political party achieve representation commensurate to its share of statewide

support. Vote dilution in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. That requirement does not extend to political parties; it does not mean that each party must be influential in proportion to the number of its supporters. The racial gerrymandering cases are also inapposite: They call for the elimination of a racial classification, but a partisan gerrymandering claim cannot ask for the elimination of partisanship. Pp. 2498 – 2502.

(c) None of the proposed "tests" for evaluating partisan gerrymandering claims meets the need for a limited and precise standard that is judicially discernible and manageable. Pp. 2502 – 2507.

(1) The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. It applied a three-part test, examining intent, effects, and causation. The District Court's "predominant intent" prong is borrowed from the test used in racial gerrymandering cases. However, unlike race-based decisionmaking, which is "inherently suspect," *Miller v. Johnson*, 515 U.S. 900, 915, 115 S.Ct. 2475, 132 L.Ed.2d 762, districting for some level of partisan advantage is not unconstitutional. Determining that lines were drawn on the basis of partisanship does not indicate that districting was constitutionally impermissible. The *Common Cause* District Court also required the plaintiffs to show that vote dilution is "likely to persist" to such a degree that the elected representatives will feel free to ignore the concerns of the supporters of the minority party. Experience proves that accurately predicting electoral outcomes is not simple, and asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise. The District Court's third prong—which gave the defendants an opportunity to show that discriminatory effects were due to a "legitimate redistricting objective"—just restates the question asked at the "predominant intent" prong. P. 2502.

(2) The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation, an actual burden on political speech or associational rights, and a causal link between the invidious intent and actual burden. But their analysis offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. Pp. 2503 – 2505.

(3) Using a State's own districting criteria as a baseline from which to measure how extreme a partisan gerrymander is would be indeterminate and arbitrary. Doing so would still leave open the question of how much political motivation and effect is too much. Pp. 2505 – 2506.

(4) The North Carolina District Court further held that the 2016 Plan violated Article I, § 2, and the Elections Clause, Art. I, § 4, cl. 1. But the *Vieth* plurality concluded—without objection from any other Justice—that neither § 2 nor § 4 "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U.S. at 305, 124 S.Ct. 1769. Any assertion that partisan gerrymanders violate the core right of voters to choose their representatives is an objection more likely grounded in the Guarantee Clause of Article IV, § 4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e.g.*, *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377. Pp. 2506 – 2507.

(d) The conclusion that partisan gerrymandering claims are not justiciable neither condones excessive partisan gerrymandering nor condemns complaints about districting to echo into a void. Numerous States are actively addressing the issue through state constitutional amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage. The Framers also gave Congress the power to do something about partisan gerrymandering in the Elections Clause. That avenue for reform established by the Framers, and used by Congress in the past, remains open. Pp. 2506 – 2508.

318 F.Supp.3d 777 and 348 F.Supp.3d 493, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***2491** Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

A

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. *Rucho v. Common Cause*. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. 318 F.Supp.3d 777, 807–808 (M.D.N.C. 2018). As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.*, at 809. He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Id.*, at 808. One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates." *Ibid.* The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote. *Id.*, at 809.

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. *Id.*, at 810. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three. ***2492** The

Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

This litigation began in August 2016, when the North Carolina Democratic Party, Common Cause (a nonprofit organization), and 14 individual North Carolina voters sued the two lawmakers who had led the redistricting effort and other state defendants in Federal District Court. Shortly thereafter, the League of Women Voters of North Carolina and a dozen additional North Carolina voters filed a similar complaint. The two cases were consolidated.

The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliating against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of "the People" to elect their preferred candidates for Congress, in violation of the requirement in Article I, § 2, of the Constitution that Members of the House of Representatives be chosen "by the People of the several States." Finally, they alleged that the Plan violated the Elections Clause by exceeding the State's delegated authority to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress.

After a four-day trial, the three-judge District Court unanimously concluded that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. The court further held, with Judge Osteen dissenting, that the Plan violated the First Amendment. *Common Cause v. Rucho*, 279 F.Supp.3d 587 (M.D.N.C. 2018). The defendants appealed directly to this Court under 28 U.S.C. § 1253.

While that appeal was pending, we decided *Gill v. Whitford*, 585 U.S. ——, 138 S.Ct. 1916, 201 L.Ed.2d 313 (2018), a partisan gerrymandering case out of Wisconsin. In that case, we held that a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must establish standing by showing he lives in an allegedly "cracked" or "packed" district. *Id.*, at ——, 138 S.Ct., at 1931. A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others. *Id.*, at —— – ——, 138 S.Ct., at 1924

After deciding *Gill*, we remanded the present case for further consideration by the District Court. 585 U.S. ——, 138 S.Ct. 1916, 201 L.Ed.2d 313 (2018). On remand, the District Court again struck down the 2016 Plan. 318 F.Supp.3d 777. It found standing and concluded that the case was appropriate for judicial resolution. On the merits, the court found that "the General Assembly's predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates," and to "entrench Republican candidates" through widespread cracking and packing of Democratic voters. *Id.*, at 883–884. The court rejected the defendants' arguments that the distribution of Republican and Democratic voters throughout North Carolina and the interest in protecting incumbents neutrally explained the 2016 Plan's discriminatory effects. *Id.*, at 896–899. In the end, the District Court held that 12 of the 13 districts constituted partisan gerrymanders that violated the Equal Protection Clause. *Id.*, at 923.

***2493** The court also agreed with the plaintiffs that the 2016 Plan discriminated against them because of their political speech and association, in violation of the First Amendment. *Id.*, at 935. Judge Osteen dissented with respect to that ruling. *Id.*, at 954–955. Finally, the District Court concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. *Id.*, at 935–941. The District Court enjoined the State from using the 2016 Plan in any election after the November 2018 general election. *Id.*, at 942.

The defendants again appealed to this Court, and we postponed jurisdiction. 586 U.S. ——, 139 S.Ct. 783, 202 L.Ed.2d 510 (2019).

B

The second case before us is *Lamone v. Benisek*. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a "serial gerrymanderer," to advise the committee. 348 F.Supp.3d 493, 502 (D. Md. 2018). The Governor later testified that his aim was to "use the redistricting process to change the overall

composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. *Ibid.* "[A] decision was made to go for the Sixth," *ibid.*, which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. *Id.*, at 498. The 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. *Id.*, at 499–501. The map was adopted by a party-line vote. *Id.*, at 506. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, § 2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for the plaintiffs. 348 F.Supp.3d 493. It concluded that the plaintiffs' claims were justiciable, and that the Plan violated the First Amendment by diminishing their "ability to elect their candidate of choice" because of their party affiliation and voting history, and by burdening their associational rights. *Id.*, at 498. On the latter point, the court relied upon findings that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy." *Id.*, at 524.

The District Court permanently enjoined the State from using the 2011 Plan and ordered it to promptly adopt a new plan for the 2020 election. *Id.*, at 525. The defendants appealed directly to this Court under 28 U.S.C. § 1253. We postponed jurisdiction. 586 U.S. ——, 139 S.Ct. 783, 202 L.Ed.2d 510 (2019).

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts ***2494** can address only questions "historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.' " *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)).

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer*, 541 U.S. 267, 277, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable —outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.*

Last Term in *Gill v. Whitford*, we reviewed our partisan gerrymandering cases and concluded that those cases "leave unresolved whether such claims may be brought." 585 U.S., at ——, 138 S.Ct., at 1929. This Court's authority to act, as we said in *Gill*, is "grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." *Ibid.* The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere. *Id.*, at ——, 138 S.Ct., at 1926–1937

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. See *Vieth*, 541 U.S. at 274, 124 S.Ct. 1769 (plurality opinion). During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry

of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, The First Gerrymander? 9 Early Am. Studies 792–794, 811 (2011). See 5 Writings of Thomas Jefferson 71 (P. Ford ed. 1895) (Letter to W. Short (Feb. 9, 1789)) ("Henry has so modelled the districts for representatives as to tack Orange [county] to counties where he himself has great influence that Madison may not be elected into the lower federal house").

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker "gerrymander" was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. See *Vieth*, 541 U.S. at 274, 124 S.Ct. 1769 (plurality opinion); E. Griffith, ***2495** The Rise and Development of the Gerrymander 17–19 (1907). "By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength." *Id.*, at 123.

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense:

> "[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local coveniency or prejudices.... Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention of 1787, at 240–241.

During the subsequent fight for ratification, the provision remained a subject of debate. Antifederalists predicted that Congress's power under the Elections Clause would allow Congress to make itself "omnipotent," setting the "time" of elections as never or the "place" in difficult to reach corners of the State. Federalists responded that, among other justifications, the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment. M. Klarman, The Framers' Coup: The Making of the United States Constitution 340–342 (2016). The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had been in Great Britain. See 6 The Documentary History of the Ratification of the Constitution: Massachusetts 1278–1279 (J. Kaminski & G. Saladino eds. 2000).

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be "composed of contiguous territory," Act of June 25, 1842, ch. 47, 5 Stat. 491, in "an attempt to forbid the practice of the gerrymander," Griffith, *supra*, at 12. Later statutes added requirements of compactness and equality of population. Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28. (Only the single member district requirement remains in place today. 2 U.S.C. § 2c.) See *Vieth*, 541 U.S. at 276, 124 S.Ct. 1769 (plurality opinion). Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870, ch. 114, 16 Stat. 140. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections. See, *e.g.*, 52 U.S.C. § 10101 *et seq.*

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. See *Baker*, 369 U.S. at 217, 82 S.Ct. 691. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a ***2496** role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. See *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*Shaw I*).

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will ... not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as

readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. Early on, doubts were raised about the competence of the federal courts to resolve those questions. See *Wood v. Broom*, 287 U.S. 1, 53 S.Ct. 1, 77 L.Ed. 131 (1932); *Colegrove v. Green*, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946).

In the leading case of *Baker v. Carr*, voters in Tennessee complained that the State's districting plan for state representatives "debase[d]" their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. The plaintiffs argued that votes of people in overpopulated districts held less value than those of people in less-populated districts, and that this inequality violated the Equal Protection Clause of the Fourteenth Amendment. The District Court dismissed the action on the ground that the claim was not justiciable, relying on this Court's precedents, including *Colegrove*. *Baker v. Carr*, 179 F.Supp. 824, 825, 826 (MD Tenn. 1959). This Court reversed. It identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217, 82 S.Ct. 691. The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. *Id.*, at 226, 82 S.Ct. 691. In *Wesberry v. Sanders*, the Court extended its ruling to malapportionment of congressional districts, holding that Article I, § 2, required that "one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 8, 84 S.Ct. 526.

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion v. Lightfoot*, concluding that a challenge to an "uncouth twenty-eight sided" municipal boundary line that excluded black voters from city elections stated a constitutional claim. 364 U.S. 339, 340, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). In *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), the Court extended ***2497** the reasoning of *Gomillion* to congressional districting. See *Shaw I*, 509 U.S. at 645, 113 S.Ct. 2816.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (citing *Bush v. Vera*, 517 U.S. 952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, 905, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw I*, 509 U.S. at 646, 113 S.Ct. 2816). See also *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth*, 541 U.S. at 296, 124 S.Ct. 1769 (plurality opinion). See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

We first considered a partisan gerrymandering claim in *Gaffney v. Cummings* in 1973. There we rejected an equal protection challenge to Connecticut's redistricting plan, which "aimed at a rough scheme of proportional representation of the two major political parties" by "wiggl[ing] and joggl[ing] boundary lines" to create the appropriate number of safe seats for each party. 412 U.S. at 738, 752, n. 18, 93 S.Ct. 2321 (internal quotation marks

omitted). In upholding the State's plan, we reasoned that districting "inevitably has and is intended to have substantial political consequences." *Id.*, at 753, 93 S.Ct. 2321.

Thirteen years later, in *Davis v. Bandemer, we addressed a claim that Indiana Republicans had cracked and packed Democrats in violation of the Equal Protection Clause.* 478 U.S. 109, 116–117, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (plurality opinion). A majority of the Court agreed that the case was justiciable, but the Court splintered over the proper standard to apply. Four Justices would have required proof of "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.*, at 127, 106 S.Ct. 2797. Two Justices would have focused on "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." *Id.*, at 165, 106 S.Ct. 2797 (Powell, J., concurring in part and dissenting in part). Three Justices, meanwhile, would have held that the Equal Protection Clause simply "does not supply judicially manageable standards for resolving purely political gerrymandering claims." *Id.*, at 147, 106 S.Ct. 2797 (O'Connor, J., concurring in judgment). At the end of the day, there was "no 'Court' for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander." *Id.*, at 185, n. 25, 106 S.Ct. 2797 (opinion of Powell, J.). In any event, the Court held that the plaintiffs had failed ***2498** to show that the plan violated the Constitution.

Eighteen years later, in *Vieth*, the plaintiffs complained that Pennsylvania's legislature "ignored all traditional redistricting criteria, including the preservation of local government boundaries," in order to benefit Republican congressional candidates. 541 U.S. at 272–273, 124 S.Ct. 1769 (plurality opinion) (brackets omitted). Justice Scalia wrote for a four-Justice plurality. He would have held that the plaintiffs' claims were nonjusticiable because there was no "judicially discernible and manageable standard" for deciding them. *Id.*, at 306, 124 S.Ct. 1769. Justice Kennedy, concurring in the judgment, noted "the lack of comprehensive and neutral principles for drawing electoral boundaries [and] the absence of rules to limit and confine judicial intervention." *Id.*, at 306–307, 124 S.Ct. 1769. He nonetheless left open the possibility that "in another case a standard might emerge." *Id.*, at 312, 124 S.Ct. 1769. Four Justices dissented.

In *LULAC*, the plaintiffs challenged a mid-decade redistricting map approved by the Texas Legislature. Once again a majority of the Court could not find a justiciable standard for resolving the plaintiffs' partisan gerrymandering claims. See 548 U.S. at 414, 126 S.Ct. 2594 (noting that the "disagreement over what substantive standard to apply" that was evident in *Bandemer* "persists").

As we summed up last Term in *Gill*, our "considerable efforts in *Gaffney*, *Bandemer*, *Vieth*, and *LULAC* leave unresolved whether ... claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering." 585 U.S., at ——, 138 S.Ct., at 1929. Two "threshold questions" remained: standing, which we addressed in *Gill*, and "whether [such] claims are justiciable." *Ibid.*

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." 541 U.S. at 306–308, 124 S.Ct. 1769 (opinion concurring in judgment). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U.S. at 145, 106 S.Ct. 2797 (opinion of O'Connor, J.). See *Gaffney*, 412 U.S. at 749, 93 S.Ct. 2321 (observing that districting implicates "fundamental 'choices about the nature of representation' " (quoting *Burns v. Richardson*, 384 U.S. 73, 92, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S. at 306, 124 S.Ct. 1769 (opinion of Kennedy, J.).

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U.S. at 420, 126 S.Ct. 2594 (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U.S. at 307, 124

S.Ct. 1769 ***2499** (opinion of Kennedy, J.). If federal courts are to "inject [themselves] into the most heated partisan issues" by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U.S. at 145, 106 S.Ct. 2797 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from "constitutional political gerrymandering." *Cromartie*, 526 U.S. at 551, 119 S.Ct. 1545.

B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer*, 478 U.S. at 159, 106 S.Ct. 2797 (opinion of O'Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Ibid.* "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130, 106 S.Ct. 2797 (plurality opinion). See *Mobile v. Bolden*, 446 U.S. 55, 75–76, 100 S.Ct. 1490, 1504, 64 L.Ed.2d 47 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*:

> " 'Fairness' does not seem to us a judicially manageable standard.... Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, ***2500** to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." 541 U.S. at 291, 124 S.Ct. 1769.

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive ... even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer*, 478 U.S. at 130, 106 S.Ct. 2797 (plurality opinion).

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. See *id.*, at 130–131, 106 S.Ct. 2797 ("To draw district lines

to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit."); *Gaffney*, 412 U.S. at 735–738, 93 S.Ct. 2321. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as *Amici Curiae*; Brief for Professor Wesley Pegden et al. as *Amici Curiae* in No. 18–422. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." *Vieth*, 541 U.S. at 308–309, 124 S.Ct. 1769 (opinion concurring in judgment). See *id.*, at 298, 124 S.Ct. 1769 (plurality opinion) ("[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines").

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S.Ct. 1421, 182 L.Ed.2d 423 (2012).

***2501** And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," *Vieth*, 541 U.S. at 296, 124 S.Ct. 1769 (plurality opinion), and "results from one gerrymandering case to the next would likely be disparate and inconsistent," *id.*, at 308, 124 S.Ct. 1769 (opinion of Kennedy, J.).

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, "this Court is not responsible for vindicating generalized partisan preferences. The Court's

constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." 585 U.S., at ——, 138 S.Ct., at 1933–1934. See also *Bandemer*, 478 U.S. at 150, 106 S.Ct. 2797 (opinion of O'Connor, J.) ("[T]he Court has not accepted the argument that an 'asserted entitlement to group representation' ... can be traced to the one person, one vote principle." (quoting *Bolden*, 446 U.S., at 77, 100 S.Ct., at 1505)). [1]

1 The dissent's observation that the Framers viewed political parties "with deep suspicion, as fomenters of factionalism and symptoms of disease in the body politic" *post*, at 2512, n. 1 (opinion of KAGAN, J.) (internal quotation marks and alteration omitted), is exactly right. Its inference from that fact is exactly wrong. The Framers would have been amazed at a constitutional theory that guarantees a certain degree of representation to political parties.

***2502** Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Shaw I*, 509 U.S. at 650, 113 S.Ct. 2816 (citation omitted). Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

IV

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

A

The *Common Cause* District Court concluded that all but one of the districts in North Carolina's 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. 318 F.Supp.3d at 923. In reaching that result the court first required the plaintiffs to prove "that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.' " *Id.*, at 865 (quoting *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. ——, ——, 135 S.Ct. 2652, 2658, 192 L.Ed.2d 704 (2015)). The District Court next required a showing "that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." 318 F.Supp.3d at 867. Finally, after a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are "attributable to a legitimate state interest or other neutral explanation." *Id.*, at 868.

The District Court's "predominant intent" prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a "predominant intent" inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because "race-based decisionmaking is inherently suspect." *Miller*, 515 U.S. at 915, 115 S.Ct. 2475. See *Bush*, 517 U.S. at 959, 116 S.Ct. 1941 (principal opinion). But determining that lines were drawn on ***2503** the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent "predominates."

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. 318 F.Supp.3d at 867. But "[t]o allow district courts to strike down apportionment plans on the basis of their prognostications

as to the outcome of future elections ... invites 'findings' on matters as to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U.S. at 160, 106 S.Ct. 2797 (opinion of O'Connor, J.). See *LULAC*, 548 U.S. at 420, 126 S.Ct. 2594 (opinion of Kennedy, J.) ("[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs."). And the test adopted by the *Common Cause* court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread.

The appellees assure us that "the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Brief for Appellees League of Women Voters of North Carolina et al. in No. 18422, p. 55. See also 318 F.Supp.3d at 885. Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional ***2504** holdings on unstable ground outside judicial expertise.

It is hard to see what the District Court's third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a "legitimate redistricting objective"—adds to the inquiry. 318 F.Supp.3d at 861. The first prong already requires the plaintiff to prove that partisan advantage predominates. Asking whether a legitimate purpose other than partisanship was the motivation for a particular districting map just restates the question.

B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. See *Common Cause*, 318 F.Supp.3d at 929; *Benisek*, 348 F.Supp.3d at 522. Both District Courts concluded that the districting plans at issue violated the plaintiffs' First Amendment right to association. The District Court in North Carolina relied on testimony that, after the 2016 Plan was put in place, the plaintiffs faced "difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues such Plaintiffs sought to advance." 318 F.Supp.3d at 932. Similarly, the District Court in Maryland examined testimony that "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion," and concluded that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting." 348 F.Supp.3d at 523–524.

To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.

The plaintiffs' argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, "[i]t would be idle ... to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U.S. at 752, 93 S.Ct. 2321. The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? The *Common Cause* District Court held that a partisan gerrymander places an unconstitutional burden on speech if it has more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. 318 F.Supp.3d at 930. The court went on to rule that there would be an adverse effect "even if the speech of [the plaintiffs] was not *in* ***2505** *fact* chilled"; it was enough that the districting plan "makes it easier for supporters of Republican candidates to translate their votes into seats," thereby "enhanc[ing] the[ir] relative voice." *Id.*, at 933 (internal quotation marks omitted).

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. The *Common Cause* court embraced that conclusion, observing that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in such partisan gerrymandering." *Id.*, at 851. The decisions below prove the prediction of the *Vieth* plurality that "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting," 541 U.S. at 294, 124 S.Ct. 1769, contrary to our established precedent.

C

The dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the "median" map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent. *Post*, at 2517 – 2518, 2521 (opinion of KAGAN, J.).

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent's proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." *Vieth*, 541 U.S. at 296–297, 124 S.Ct. 1769 (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, see *post*, at 2519 – 2520, but it seems a useful way to make the point.) The dissent's answer says it all: "This much is too much." *Post*, at 2521. That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. See *post*, at 2522. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine "substantial anticompetitive effect[s]" in antitrust law. *Post*, at 2522 (citing *Ohio v. American Express Co.*, 585 U.S. ——, 138 S.Ct. 2274, 201 L.Ed.2d 678 (2018)). That language, however, grew out of

the Sherman Act, understood from the beginning to have its "origin in the common law" and to be "familiar in the law of this country prior to and at the time of the ***2506** adoption of the [A]ct." *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 51, 31 S.Ct. 502, 55 L.Ed. 619 (1911). Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as "substantial risk" or "substantial harm," but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, § 4, cl. 1. and Congress may take into account when districting." 541 U.S. at 305, 124 S.Ct. 1769.

The District Court nevertheless asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Art. I, § 2, "namely, that the voters should choose their representatives, not the other way around." 318 F.Supp.3d at 940 (quoting *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2677; internal quotation marks omitted; alteration in original). That seems like an objection more properly grounded in the Guarantee Clause of Article IV, § 4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e.g.*, *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912).

D

The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. We are unconvinced by that novel approach.

Article I, § 2, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, § 4, cl. 1.

The District Court concluded that the 2016 Plan exceeded the North Carolina General Assembly's Elections Clause authority because, among other reasons, "the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts." 318 F.Supp.3d at 937. The court further held that partisan gerrymandering infringes the right of "the People" to select their representatives. *Id.*, at 938–940. Before the District Court's decision, no court had reached a similar conclusion. In fact, the plurality in *Vieth* concluded—without objection from any other Justice—that neither § 2 nor § 4 of Article I "provides a judicially enforceable limit on the political considerations that the States

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2586, does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal ***2507** courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. *Vieth*, 541 U.S. at 278, 279, 124 S.Ct. 1769 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: "this Court *can* address the problem of partisan gerrymandering because it *must*." 585 U.S., at ——, 138 S.Ct., at 1929. That is not the test of our authority under the Constitution; that document instead "confines the federal courts to a properly judicial role." *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. ——, ——, 137 S.Ct. 1645, 1650, 198 L.Ed.2d 64 (2017).

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down

a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. See *post*, at 2525.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (2015). The dissent wonders why we can't do the same. See *post*, at 2524 – 2525. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. (We do not understand how the dissent can maintain that a provision saying that no districting plan "shall be drawn with the intent to favor or disfavor a political party" provides little guidance on the question. See *post*, at 2524 –2525, n. 6.) Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§ 44, 46; Mich. Const., Art. IV, § 6. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines. Mo. Const., Art. III, § 3.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. ***2508** See Fla. Const., Art. III, § 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, § 3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code § 42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, § 804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H. R. 1, 116th Cong., 1st Sess., §§ 2401, 2411 (2019).

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. In 2010, H. R. 6250 would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting. It also would have prohibited the establishment of congressional districts "with the major purpose of diluting the voting strength of any person, or group, including any political party," except when necessary to comply with the Voting Rights Act of 1965. H. R. 6250, 111th Cong., 2d Sess., § 2 (referred to committee).

Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative's residence. H. R. 2642, 109th Cong., 1st Sess., § 4 (referred to subcommittee).

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch at 177. In this rare circumstance, that means our duty is to say "this is not law."

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

***2509** For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

A

The plaintiffs here challenge two congressional districting plans—one adopted by Republicans in North Carolina and the other by Democrats in Maryland—as unconstitutional partisan gerrymanders. As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work?

Start with North Carolina. After the 2010 census, the North Carolina General Assembly, with Republican majorities in both its House and its Senate, enacted a new congressional districting plan. That plan governed the two next national elections. In 2012, Republican candidates won 9 of the State's 13 seats in the U.S. House ***2510** of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote. Soon afterward, a District Court struck down two districts in the plan as unconstitutional racial gerrymanders. See *Harris v. McCrory*, 159 F.Supp.3d 600 (M.D.N.C. 2016), aff'd *sub nom. Cooper v. Harris*, 581 U.S. ——, 137 S.Ct. 1455, 197 L.Ed.2d 837

(2017). The General Assembly, with both chambers still controlled by Republicans, went back to the drawing board to craft the needed remedial state map. And here is how the process unfolded:

- The Republican co-chairs of the Assembly's redistricting committee, Rep. David Lewis and Sen. Robert Rucho, instructed Dr. Thomas Hofeller, a Republican districting specialist, to create a new map that would maintain the 10–3 composition of the State's congressional delegation come what might. Using sophisticated technological tools and precinct-level election results selected to predict voting behavior, Hofeller drew district lines to minimize Democrats' voting strength and ensure the election of 10 Republican Congressmen. See *Common Cause v. Rucho*, 318 F.Supp.3d 777, 805–806 (M.D.N.C. 2018).

- Lewis then presented for the redistricting committee's (retroactive) approval a list of the criteria Hofeller had employed—including one labeled "Partisan Advantage." That criterion, endorsed by a party-line vote, stated that the committee would make all "reasonable efforts to construct districts" to "maintain the current [10–3] partisan makeup" of the State's congressional delegation. *Id.,* at 807.

- Lewis explained the Partisan Advantage criterion to legislators as follows: We are "draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe it['s] possible to draw a map with 11 Republicans and 2 Democrats." *Id.,* at 808 (internal quotation marks omitted).

- The committee and the General Assembly later enacted, again on a party-line vote, the map Hofeller had drawn. See *id.,* at 809.

- Lewis announced: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Ibid.* (internal quotation marks omitted).

You might think that judgment best left to the American people. But give Lewis credit for this much: The map has worked just as he planned and predicted. In 2016, Republican congressional candidates won 10 of North Carolina's 13 seats, with 53% of the statewide vote. Two years later, Republican candidates won 9 of 12 seats though they received only 50% of the vote. (The 13th seat has not yet been filled because fraud tainted the initial election.)

Events in Maryland make for a similarly grisly tale. For 50 years, Maryland's 8-person congressional delegation typically consisted of 2 or 3 Republicans and 5 or 6 Democrats. After the 2000 districting, for example, the First and Sixth Districts reliably elected Republicans, and the other districts as reliably elected Democrats. See R. Cohen & J. Barnes, Almanac of American Politics 2016, p. 836 (2015). But in the 2010 districting cycle, the State's Democratic leaders, who controlled the governorship and both houses of the General Assembly, decided to press their advantage.

- Governor Martin O'Malley, who oversaw the process, decided (in his own later words) "to create a map that was ***2511** more favorable for Democrats over the next ten years." Because flipping the First District was geographically next-to-impossible, "a decision was made to go for the Sixth." *Benisek v. Lamone*, 348 F.Supp.3d 493, 502 (D. Md. 2018) (quoting O'Malley; emphasis deleted).

- O'Malley appointed an advisory committee as the public face of his effort, while asking Congressman Steny Hoyer, a self-described "serial gerrymanderer," to hire and direct a mapmaker. *Id.,* at 502. Hoyer retained Eric Hawkins, an analyst at a political consulting firm providing services to Democrats. See *id.,* at 502–503.

- Hawkins received only two instructions: to ensure that the new map produced 7 reliable Democratic seats, and to protect all Democratic incumbents. See *id.,* at 503.

- Using similar technologies and election data as Hofeller, Hawkins produced a map to those specifications. Although new census figures required removing only 10,000 residents from the Sixth District, Hawkins proposed a large-scale population transfer. The map moved about 360,000 voters out of the district and another 350,000 in. That swap decreased the number of registered Republicans in the district by over 66,000 and increased the number of registered Democrats by about 24,000, all to produce a safe Democratic district. See *id.,* at 499, 501.

- After the advisory committee adopted the map on a party-line vote, State Senate President Thomas Miller briefed the General Assembly's Democratic caucuses about the new map's aims. Miller told his colleagues that the map would give "Democrats a real opportunity to pick up a seventh seat in the delegation" and that "[i]n the face of Republican gains in redistricting in other states[,] we

have a serious obligation to create this opportunity." *Id.,* at 506 (internal quotation marks omitted).

- The General Assembly adopted the plan on a party-line vote. See *id.,* at 506.

Maryland's Democrats proved no less successful than North Carolina's Republicans in devising a voter-proof map. In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats—including the once-reliably-Republican Sixth District.

B

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people." 4 Annals of Cong. 934 (1794).

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." ***2512** 2 The Federalist No. 37, p. 4 (J. & A. McLean eds. 1788). Members of the House of Representatives, in particular, are supposed to "recollect[ ] [that] dependence" every day. *Id.,* No. 57, at 155. To retain an "intimate sympathy with the people," they must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." *Id.,* Nos. 52, 57, at 124, 155. Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." *Vieth v. Jubelirer*, 541 U.S. 267, 317, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (Kennedy, J., concurring in judgment) (internal quotation marks omitted). By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives, not the other way around." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. ——, ——, 135 S.Ct. 2652, 2677, 192 L.Ed.2d 704 (2015) (internal quotation marks omitted). Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, "in the Government over the people." 4 Annals of Cong. 934.

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles." *Ante,* at 2506 (quoting *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2658). And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. See *ante,* at 2524 – 2525; *infra,* at 2523 – 2525. The other is that political gerrymanders have always been with us. See *ante,* at 2494 – 2495, 2503. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. See *ante,* at 2495 – 2496. [1] The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

[1] And even putting that aside, any originalist argument would have to deal with an inconvenient fact. The Framers originally viewed political parties themselves (let alone their most partisan actions) with deep suspicion, as fomenters of factionalism and "symptom[s] of disease in the

> body politic." G. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, p. 140 (2009).

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic's earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today's gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, ***2513** based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today's world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. See Brief for Political Science Professors as *Amici Curiae* 20–22. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. See *id.,* at 22–25. While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's—let alone the Framers'—gerrymanders.

The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country's history. I've already recounted the results from North Carolina and Maryland, and you'll hear even more about those. See *supra,* at 2510 – 2511; *infra,* at 2518 – 2519. But the voters in those States were not the only ones to fall prey to such districting perversions. Take Pennsylvania. In the three congressional elections occurring under the State's original districting plan (before the State Supreme Court struck it down), Democrats received between 45% and 51% of the statewide vote, but won only 5 of 18 House seats. See *League of Women Voters v. Pennsylvania*, 645 Pa. 1, 178 A.3d 737, 764 (2018). Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats. See *Ohio A. Philip Randolph Inst. v. Householder*, 373 F.Supp.3d 978, 1074 (S.D. Ohio. 2019). (Nor is there any reason to think that the results in those States stemmed from political geography or non-partisan districting criteria, rather than from partisan manipulation. See *infra*, at 2515 – 2516, 2524 – 2525.) And gerrymanders will only get worse (or depending on your perspective, better) as time goes on—as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn't hold a candle (or an LED bulb?) to what will become possible with developments like machine learning. And someplace along this road, "we the people" become sovereign no longer.

C

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. See generally *Gill* v. *Whitford*, 585 U.S. ——, ——– ——, 138 S.Ct. 1916, 1929–1931, 201 L.Ed.2d 313 (2018). He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their ***2514** preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. See *id.,* at ——, 138 S.Ct., at 1924 (KAGAN, J., concurring). In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). And that opportunity "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.,* at 555, 84 S.Ct. 1362. Based on that principle,

this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus "dilut[e] the weight of votes because of place of residence." *Id.,* at 566, 84 S.Ct. 1362. The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to "full[y] and effective[ly] participat[e] in the political process[ ]." *Id.,* at 565, 84 S.Ct. 1362. As Justice Kennedy (in a controlling opinion) once hypothesized: If districters declared that they were drawing a map "so as most to burden [the votes of] Party X's" supporters, it would violate the Equal Protection Clause. *Vieth*, 541 U.S. at 312, 124 S.Ct. 1769. For (in the language of the one-person-one-vote decisions) it would infringe those voters' rights to "equal [electoral] participation." *Reynolds*, 377 U.S. at 566, 84 S.Ct. 1362; see *Gray v. Sanders*, 372 U.S. 368, 379–380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications").

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth*, 541 U.S. at 314, 124 S.Ct. 1769 (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative democracy is "unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000). By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. See *Gill*, 585 U.S., at ——, 138 S.Ct., at 1938 (KAGAN, J., concurring) ("Members of the disfavored party[,] deprived of their natural political strength[,] may face difficulties fundraising, registering voters, [and] eventually accomplishing their policy objectives"). In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of "democracy embodied in the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 357, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (internal quotation marks omitted).

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: ***2515** Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. See, *e.g., Vieth*, 541 U.S. at 293, 124 S.Ct. 1769 (plurality opinion) ("[A]n excessive injection of politics [in districting] is unlawful" (emphasis deleted)); *id.*, at 316, 124 S.Ct. 1769 (opinion of Kennedy, J.) ("[P]artisan gerrymandering that disfavors one party is [im]permissible"); *id.,* at 362, 124 S.Ct. 1769 (BREYER, J., dissenting) (Gerrymandering causing political "entrenchment" is a "violat[ion of] the Constitution's Equal Protection Clause"); *Davis v. Bandemer*, 478 U.S. 109, 132, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (plurality opinion) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process"); *id.*, at 165, 106 S.Ct. 2797 (Powell, J., concurring) ("Unconstitutional gerrymandering" occurs when "the boundaries of the voting districts have been distorted deliberately" to deprive voters of "an equal opportunity to participate in the State's legislative processes"). Once again, the majority never disagrees; it appears to accept the "principle that each person must have an equal say in the election of representatives." *Ante,* at 2501. And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. See *ante,* at 2498 – 2501. According to the majority,

"[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." *Ante,* at 2499. But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims "inevitably" would require courts to decide what is "fair" in the context of districting. *Ante,* at 2499 – 2500. They would have "to make their own political judgment about how much representation particular political parties *deserve*" and "to rearrange the challenged districts to achieve that end." *Ibid.* (emphasis in original). And second, the majority argues that even after establishing a baseline, a court would have no way to answer "the determinative question: 'How much is too much?' " *Ante,* at 2501. No "discernible and manageable" standard is available, the majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan. *Ante,* at 2501 – 2502; see *ante,* at 2498 – 2499.

I'll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics ***2516** is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). See also *Ohio A. Philip Randolph Inst.*, 373 F.Supp.3d 978; *League of Women Voters of Michigan v. Benson*, 373 F.Supp.3d 867 (ED Mich. 2019). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

Below, I first explain the framework courts have developed, and describe its application in these two cases. Doing so reveals in even starker detail than before how much these partisan gerrymanders deviated from democratic norms. As I lay out the lower courts' analyses, I consider two specific criticisms the majority levels—each of which reveals a saddening nonchalance about the threat such districting poses to self-governance. All of that lays the groundwork for then assessing the majority's more general view, described above, that judicial policing in this area cannot be either neutral or restrained. The lower courts' reasoning, as I'll show, proves the opposite.

A

Start with the standard the lower courts used. The majority disaggregates the opinions below, distinguishing the one from the other and then chopping up each into "a number of 'tests.' " *Ante,* at 2502; see *ante,* at 2502 – 2507. But in doing so, it fails to convey the decisions' most significant—and common—features. Both courts focused on the harm of vote dilution, see *supra,* at 2513 – 2514, though the North Carolina court mostly grounded its analysis in the Fourteenth Amendment and the Maryland court in the First. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. *Rucho*, 318 F.Supp.3d at 864 (quoting *Arizona State Legislature*, 576 U.S., at ——, 135 S.Ct., at 2658). Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. *Lamone*, 348 F.Supp.3d at 498. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. See *Rucho*, 318 F.Supp.3d at 867.[2] If you are a lawyer, you know that ***2517** this test looks utterly ordinary. It is the sort of thing courts work with every day.

[2] Neither North Carolina nor Maryland offered much of an alternative explanation for the evidence that the plaintiffs put forward. Presumably, both States had trouble coming up with something. Like the majority, see *ante,* at 2503 – 2504, I therefore pass quickly over this part of the test.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant

purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. To remind you of some highlights, see *supra,* at 2510 – 2511: North Carolina's redistricting committee used "Partisan Advantage" as an official criterion for drawing district lines. And from the first to the last, that committee's chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that "electing Republicans is better than electing Democrats." For their part, Maryland's Democrats —the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. They did not blanch from moving some 700,000 voters into new districts (when one-person-one-vote rules required relocating just 10,000) for that reason and that reason alone.

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. *Ante,* at 2502 – 2503. But that is wrong. True enough, that the intent to inject "political considerations" into districting may not raise any constitutional concerns. In *Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), for example, we thought it non-problematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. See *Vieth*, 541 U.S. at 286, 124 S.Ct. 1769 (plurality opinion). But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. Consider again Justice Kennedy's hypothetical of mapmakers who set out to maximally burden (*i.e.,* make count for as little as possible) the votes going to a rival party. See *supra,* at 2514. Does the majority really think that goal is permissible? But why even bother with hypotheticals? Just consider the purposes here. It cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution. See *supra,* at 2514 – 2515.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. The majority fails to discuss most of the evidence the District Courts relied on to find that the plaintiffs had done so. See *ante,* at 2502 – 2503. But that evidence—particularly from North Carolina—is the key to understanding both the problem these cases present and the solution to it they offer. The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes. See *Vieth*, 541 U.S. at 312–313, 124 S.Ct. 1769 (opinion of Kennedy, J.) (predicting that development).

Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects ***2518** mostly by relying on what might be called the "extreme outlier approach." (Here's a spoiler: the State's plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except for* partisan gain. For each of those maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i.e.,* the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other.[3] We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution. See generally Brief for Eric S. Lander as *Amicus Curiae* 7–22.

3 As I'll discuss later, this distribution of outcomes provides what the majority says does not exist—a neutral comparator for the State's own plan. See *ante,* at 2499 – 2501; *supra,* at 2515; *infra*, at 2519 – 2521. It essentially answers the question: In a State with these geographic features and this distribution of voters and this set of districting criteria—but without partisan manipulation—what would happen?

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. See *Rucho*, 318 F.Supp.3d at 875–876, 894; App. 276. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (*e.g.,* compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. See *Rucho,* 318 F.Supp.3d at 893–894. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes. [4]

4 The District Court also relied on actual election results (under both the new plan and the similar one preceding it) and on mathematical measurements of the new plan's "partisan asymmetry." See *Rucho*, 318 F.Supp.3d at 884–895. Those calculations assess whether supporters of the two parties can translate their votes into representation with equal ease. See Stephanopoulos & McGhee, The Measure of a Metric, 70 Stan. L. Rev. 1503, 1505–1507 (2018). The court found that the new North Carolina plan led to extreme asymmetry, compared both to plans used in the rest of the country and to plans previously used in the State. See *Rucho*, 318 F.Supp.3d at 886–887, 892–893.

Because the Maryland gerrymander involved just one district, the evidence in that case was far simpler—but no less powerful for that. You've heard some of the numbers before. See *supra,* at 2511. ***2519** The 2010 census required only a minimal change in the Sixth District's population—the subtraction of about 10,000 residents from more than 700,000. But instead of making a correspondingly minimal adjustment, Democratic officials reconfigured the entire district. They moved 360,000 residents out and another 350,000 in, while splitting some counties for the first time in almost two centuries. The upshot was a district with 66,000 fewer Republican voters and 24,000 more Democratic ones. In the old Sixth, 47% of registered voters were Republicans and only 36% Democrats. But in the new Sixth, 44% of registered voters were Democrats and only 33% Republicans. That reversal of the district's partisan composition translated into four consecutive Democratic victories, including in a wave election year for Republicans (2014). In what was once a party stronghold, Republicans now have little or no chance to elect their preferred candidate. The District Court thus found that the gerrymandered Maryland map substantially dilutes Republicans' votes. See *Lamone,* 348 F.Supp.3d at 519–520.

The majority claims all these findings are mere "prognostications" about the future, in which no one "can have any confidence." *Ante,* at 2503 (internal quotation marks omitted). But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders' effects on voters—both in the past and predictably in the future—were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them. They availed themselves of all the information that mapmakers (like Hofeller and Hawkins) and politicians (like Lewis and O'Malley) work so hard to amass and then use to make every districting decision. They refused to content themselves with unsupported and out-of-date musings about the unpredictability of the American voter. See *ante,* at 2503 – 2504; but see Brief for Political Science Professors as *Amici Curiae* 14–20 (citing chapter and verse to the contrary). They did not bet America's future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

B

The majority's broadest claim, as I've noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be "politically neutral" or

"manageable." *Ante,* at 2500 – 2501; see *supra,* at 2515. Courts, the majority argues, will have to choose among contested notions of electoral fairness. (Should they take as the ideal mode of districting proportional representation, many competitive seats, adherence to traditional districting criteria, or so forth?) See *ante,* at 2499 – 2501. And even once courts have chosen, the majority continues, they will have to decide "[h]ow much is too much?"—that is, how much deviation from the chosen "touchstone" to allow? *Ante,* at 2500 – 2501. In answering that question, the majority surmises, they will likely go far too far. See *ante,* at 2498 – 2499. So the whole thing is impossible, the majority concludes. To prove its point, the majority throws a bevy of question marks on the page. (I count nine in just two paragraphs. ***2520** See *ante,* at 2500 – 2501.) But it never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you've already heard enough to know, is the latter. That kind of oversight is not only possible; it's been done.

Consider neutrality first. Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge's philosophizing but of the State's own characteristics and judgments. The effects evidence in these cases accepted as a given the State's physical geography (*e.g.,* where does the Chesapeake run?) and political geography (*e.g.,* where do the Democrats live on top of each other?). So the courts did not, in the majority's words, try to "counteract 'natural' gerrymandering caused, for example, by the urban concentration of one party." *Ante,* at 2501. Still more, the courts' analyses used the State's own criteria for electoral fairness—except for naked partisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians' effort to entrench themselves in office.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I've mentioned formed the core of the plaintiffs' case that the North Carolina plan was an "extreme[ ] outlier." *Rucho*, 318 F.Supp.3d at 852 (internal quotation marks omitted); see *supra*, at 2517 – 2519. Those maps took the State's political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact was built into all the maps; it became part of the baseline. See *Rucho*, 318 F.Supp.3d at 896–897. On top of that, the maps took the State's legal landscape as a given. They incorporated the State's districting priorities, excluding partisanship. So in North Carolina, for example, all the maps adhered to the traditional criteria of contiguity and compactness. See *supra,* at 2518 – 2519. But the comparator maps in another State would have incorporated different objectives—say, the emphasis Arizona places on competitive districts or the requirement Iowa imposes that counties remain whole. See Brief for Mathematicians et al. as *Amici Curiae* 19–20. The point is that the assemblage of maps, reflecting the characteristics and judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. *Not* as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

The Maryland court lacked North Carolina's fancy evidence, but analyzed the gerrymander's effects in much the same way—not as against an ideal goal, but as against an *ex ante* baseline. To see the difference, shift gears for a moment and compare Maryland and Massachusetts—both of which (aside from Maryland's partisan gerrymander) use traditional districting criteria. In those two States alike, Republicans receive about 35% of the vote in ***2521** statewide elections. See Almanac of American Politics 2016, at 836, 880. But the political geography of the States differs. In Massachusetts, the Republican vote is spread evenly across the State; because that is so, districting plans (using traditional criteria of contiguity and compactness) consistently lead to an all-Democratic congressional delegation. By contrast, in Maryland, Republicans are clumped—into the Eastern Shore (the First District) and the Northwest Corner (the old Sixth). Claims of partisan gerrymandering in those two States could come out the same way if judges, à la the majority, used their own visions of fairness to police districting plans; a judge in each State could then insist, in line with proportional representation, that 35% of the vote share entitles citizens to around that much of the delegation. But those suits would not come out the same if courts instead asked: What would

have happened, given the State's natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation? And that is what the District Court in Maryland inquired into. The court did not strike down the new Sixth District because a judicial ideal of proportional representation commanded another Republican seat. It invalidated that district because the quest for partisan gain made the State override *its own* political geography and districting criteria. So much, then, for the impossibility of neutrality.

The majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." *Ante,* at 2505. But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State's districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. *Ante,* at 2505 – 2506. But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (*e.g.,* must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority's analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation. See *ante,* at 2499 – 2500. But those two demands are different, and only the former is at issue here.

The majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats ***2522** to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. See *Lamone,* 348 F.Supp.3d at 519. Even the majority acknowledges that "[t]hese cases involve blatant examples of partisanship driving districting decisions." *Ante,* at 2505. If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, see *ante,* at 2505 – 2506, it could have used the lower courts' general standard—focusing on "predominant" purpose and "substantial" effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. See *ante,* at 2500 – 2501 (focusing on the difficulty of measuring effects). That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. See, *e.g., Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above. (Most of the majority's difficulties here really come from its idea that ideal visions set the baseline. But that is double-counting—and, as already shown, wrong to boot.) As this Court recently noted, "the law is full of instances" where a judge's decision rests on "estimating rightly ... some matter of degree"—including the "substantial[ity]" of risk or harm. *Johnson v. United States*, 576 U.S. ——, ——, 135 S.Ct. 2551, 2561, 192 L.Ed.2d 569 (2015) (internal quotation marks omitted); see, *e.g., Ohio v. American Express Co.*, 585 U.S. ——, ——, 138 S.Ct. 2274, 201 L.Ed.2d 678 (2018) (determining "substantial anticompetitive effect[s]" when applying the Sherman Act); *United States* v. *Davis*, *ante,* at 2494 – 2496 (KAVANAUGH, J., dissenting) (cataloging countless statutes requiring a "substantial" risk of harm). The majority is wrong to think that these laws typically (let

alone uniformly) further "confine[ ] and guide[ ]" judicial decisionmaking. *Ante,* at 2505 – 2506. They do not, either in themselves or through "statutory context." *Ibid.* To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority's suggestion, see *ibid.*, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution. See *supra,* at 2514 – 2515. Illicit purpose was simple to show here only because politicians and mapmakers thought their actions could not be attacked in court. See *Rucho*, 318 F.Supp.3d at 808 (quoting Lewis's statements to that effect). They therefore felt free to openly proclaim their intent to ***2523** entrench their party in office. See *supra,* at 2510 – 2511. But if the Court today had declared that behavior justiciable, such smoking guns would all but disappear. Even assuming some officials continued to try implementing extreme partisan gerrymanders,[5] they would not brag about their efforts. So plaintiffs would have to prove the intent to entrench through circumstantial evidence—essentially showing that no other explanation (no geographic feature or non-partisan districting objective) could explain the districting plan's vote dilutive effects. And that would be impossible unless those effects were even more than substantial—unless mapmakers had packed and cracked with abandon in unprecedented ways. As again, they did here. That the two courts below found constitutional violations does not mean their tests were unrigorous; it means that the conduct they confronted was constitutionally appalling—by even the strictest measure, inordinately partisan.

5 A decision of this Court invalidating the North Carolina and Maryland gerrymanders would of course have curbed much of that behavior. In districting cases no less than others, officials respond to what this Court determines the law to sanction. See, *e.g.,* Charles & Fuentes-Rohwer, Judicial Intervention as Judicial Restraint, 132 Harv. L. Rev. 236, 269 (2018) (discussing how the Court's prohibition of racial gerrymanders affected districting).

The majority, in the end, fails to understand both the plaintiffs' claims and the decisions below. Everything in today's opinion assumes that these cases grew out of a "desire for proportional representation" or, more generally phrased, a "fair share of political power." *Ante,* at 2499, 2502. And everything in it assumes that the courts below had to (and did) decide what that fair share would be. But that is not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice's removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals' supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people's power to vote.

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." *Reynolds*, 377 U.S. at 566, 84 S.Ct. 1362. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. "For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill*, 585 U.S., at ——, 138 S.Ct., at 1941 (KAGAN, J., concurring). Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. "Dozens of [those] bills have been introduced," the majority says. *Ante,* at 2508. One was "introduced in 2005 and has been reintroduced ***2524** in every Congress since." *Ibid.* And might be reintroduced until the end of time. Because what all these *bills* have in common is that they are not *laws*. The politicians who benefit from partisan gerrymandering

are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. See *ante,* at 2507 – 2508. Some Members of the majority, of course, once thought such initiatives unconstitutional. See *Arizona State Legislature,* 576 U.S., at ——, 135 S.Ct., at 2658 (ROBERTS, C. J., dissenting). But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland), voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail. Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. See *ante,* at 2507 – 2508. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. See Mo. H. J. Res. 48, 100th Gen. Assembly, 1st Reg. Sess. (2019). I'd put better odds on that bill's passage than on all the congressional proposals the majority cites.

The majority's most perplexing "solution" is to look to state courts. *Ante,* at 2506 – 2507. "[O]ur conclusion," the majority states, does not "condemn complaints about districting to echo into a void": Just a few years back, "the Supreme Court of Florida struck down that State's congressional districting plan as a violation" of the State Constitution. *Ante,* at 2507; see *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (2015). And indeed, the majority might have added, the Supreme Court of Pennsylvania last year did the same thing. See *League of Women Voters*, 645 Pa. at 49, 178 A. 3d, at 818. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we? [6]

6 Contrary to the majority's suggestion, state courts do not typically have more specific "standards and guidance" to apply than federal courts have. *Ante*, at 2507. The Pennsylvania Supreme Court based its gerrymandering decision on a constitutional clause providing only that "elections shall be free and equal" and no one shall "interfere to prevent the free exercise of the right of suffrage." *League of Women Voters*, 645 Pa. at 38, 178 A. 3d, at 803–804 (quoting Pa. Const., Art. I, § 5). And even the Florida "Free Districts Amendment," which the majority touts, says nothing more than that no districting plan "shall be drawn with the intent to favor or disfavor a political party." Fla. Const., Art. III, § 20(a). If the majority wants the kind of guidance that will keep courts from intervening too far in the political sphere, see *ante,* at 2498 – 2499, that Amendment does not provide it: The standard is in fact a good deal less exacting than the one the District Courts below applied. In any event, only a few States have a constitutional provision like Florida's, so the majority's state-court solution does not go far.

We could have, and we should have. The gerrymanders here —and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes ***2525** counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, see *ante,* at 2508, this *was* law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the *amicus* briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call "a cascade of negative results." Brief as *Amicus Curiae* 5. These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. See *id.,* at 5–6. Last year, we heard much the same from current and former state legislators. In their

view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal." Brief as *Amicus Curiae* in *Gill* v. *Whitford*, O. T. 2016, No. 16–1161, pp. 6, 25. Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. See *supra,* at 2494 – 2495. In our government, "all political power flows from the people." *Arizona State Legislature,* 576 U.S., at ——, 135 S.Ct., at 2677. And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." 2 Debates on the Constitution 257 (J. Elliot ed. 1891). But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

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139 Ohio St. 499
Supreme Court of Ohio.

STATE ex rel. HERBERT, Atty. Gen.,
v.
BRICKER, Governor, et al.

No. 29008.
|
April 10, 1942.

Synopsis
ZIMMERMAN, J., dissenting.

Action in mandamus by the State on the relation of Thomas J. Herbert, Attorney General, against John W. Bricker, Governor, and others, to compel the respondents to apportion correctly the senatorial districts in accordance with requirements of the Constitution and to determine the senatorial representation, the corrected districts will be severally entitled to during each legislative session during the present decennial period.-[Editorial Statement].

Writ allowed.

****378** *Syllabus by the Court.*

***499** 1. Under Article XI of the Constitution, which provides, inter alia, for the apportionment of senatorial districts, such districts do not fall apart with the lapse of each decennial period, but continue in existence and become the basis for the new decennial apportionment.

2. The apportioning board, consisting of the Governor, Auditor of State and Secretary of State, in making such apportionment at the end of the decennial period, shall (1) ascertain the senatorial ratio by dividing the population of the state by thirty-five, (2) separate a county from a district when the county and the remainder of the district each have a full senatorial ratio, (3) separate an original district from a senatorial district, previously formed by combining two or more districts, when the original district to be separated and the remainder of the combined district have in each a population equal to or more than three-fourths of a senatorial ratio, (4) annex a district, in which the population has fallen below three-fourths of a senatorial ratio, to the adjoining district having the least population, and (5) exercise implied discretionary power only when necessary to carry express constitutional power into effect.

3. Any violation of the express provisions of Article XI of the Constitution by the apportioning board makes the apportionment a nullity and mandamus will lie to compel compliance with constitutional requirements.

This is an action in mandamus, originating in this court, in which the Attorney General of Ohio, as relator, ***500** seeks a writ to compel the Governor, the Auditor of State and the Secretary of State, as respondents, to apportion correctly the senatorial districts in accordance with the requirements of the provisions of the state Constitution and to determine the senatorial representation the corrected districts will be severally entitled to during each legislative session to be held during the present decennial period. To relator's petition the respondent, John W. Bricker, as Governor, filed a separate answer, in effect admitting the material allegations of the petition, but neither filed a brief nor took part in the argument. The respondents, Joseph T. Ferguson and John E. Sweeney, as Auditor of State and Secretary of State, respectively, filed a joint answer, and supported their position as respondents by brief and oral argument. To these answers the relator filed separate general demurrers and upon such demurrers the cause is submitted to this court.

The material facts admitted by the demurrers may well be stated summarily without reference to the different pleadings.

There were originally thirty-three such districts and the senatorial ratio for each decennial apportionment must be ascertained by dividing the whole population of the state by the number thirty-five. Seventy-five per cent of the full senatorial ratio gives what is referred to in the Constitution as ‘three-fourths of a senatorial ratio’ and what is referred to herein as ‘the three-fourths ratio.’

On or about May 28, 1941, the Governor, Auditor of State and Secretary of State, acting under authority of Section 11, Article XI, of the Constitution, among other things to be done by them, made an apportionment of the senatorial districts for the state of Ohio.

****379** There was available the action taken decennially by the various apportioning boards since the present method of senatorial apportionment was incorporated in the Constitution of 1851 to and including the action ***501** taken in 1931. Of these this court will take judicial notice. The action with

respect to senatorial districts through the decenniums of that period was as follows:

1861: Seventeenth and twenty-eighth were combined. Seventeenth fell below the three-fourths ratio.

1871: Twenty-seventh and twenty-ninth were combined. Both fell below the three-fourths ratio.

1881: Fifteenth and sixteenth were combined. Sixteenth fell below the three-fourths ratio. Eighteenth and nineteenth were combined. Both fell below the three-fourths ratio. (The original districts fifteenth, sixteenth, eighteenth and nineteenth are located in a block.) Twenty-fourth and twenty-sixth were combined. Twenty-fourth fell below the three-fourths ratio.

1891: Second and fourth were combined. Both fell below the three-fourths ratio. Fifth and sixth were combined. Both fell below the three-fourths ratio. The original districts second, fourth, fifth, sixth, ninth and fourteenth are located together in a block. The first four were separated from the fourteenth by the ninth, which did not fall below the three-fourths ratio. Ninth and fourteenth were combined. Fourteenth fell below the three-fourths ratio. Twentieth and twenty-second were combined. Twentieth fell below the three-fourths ratio.

1901: Lucas county was segregated, made a district by itself and called number thirty-four. Lucas county and the remainder of district thirty-three each had more than a full senatorial ratio.

1911: Thirteenth and thirty-first were combined. Thirty-first fell below the three-fourths ratio.

1921: Seventh and eighth were combined. Eighth fell below the three-fourths ratio. Eleventh and twelfth were combined. Twelfth fell below the three-fourths Combined district seventeenth-twenty-eighth was annexed to combined district eighteenth-nineteenth. Seventeenth-eighteenth fell below the three-fourths ***502** ratio. Eighteenth-nineteenth had more than the three-fourths ratio.

1931: A copy of the apportionment of the year 1931 is attached to the answer of the respondents Ferguson and Sweeney. Thirtieth and thirty-third were combined. Thirtieth fell below the three-fourths ratio. No other change was made. The apportionment for 1931 is shown by the map on page 380 of 41 N.E.2d.

Such map and the one on page 381 of 41 N.E.2d, show how the original thirty-three senatorial districts established by the Constitution of 1851, with the exception of the thirty-third, retain their character as constituted.

Likewise the action of the respondents, as a board, is shown in every phase by the map on page 381 of 41 N.E.2d.

A comparison of the two maps will disclose the changes in senatorial districts sought to be made in the report of the respondent board.

What the board did and how it changed those districts is shown by the following summary:

1941: Districts first, third, tenth, eleventh-twelfth, twenty-first, twenty-fifth, thirtieth-thiry-third, thirty-second and thirty-fourth were left as they were. Districts eleventh-twelfth and thirtieth-thirty-third were left as they were although in the former both fell below the three-fourths ratio and in the latter thirtieth had fallen below the ratio.

The following combined districts, second-fourth, fifth-sixth, seventh-eighth, ninth-fourteenth, thirteenth-thirty-first, fifteenth-sixteenth, seventeenth-eighteenth-nineteenth-twenty-eighth, twentieth-twenty-second, twenty-fourth-twenty-sixth and twenty-seventh-twenty-ninth were broken up and the original districts placed in new combinations and original district twenty-third was changed by annexing district twenty-fourth thereto.

The specific separations and changes were as follows:

Second and fourth were separated although fourth ***503** had less than the three-fourths ratio. Second was left a separate district and fourth was combined with fifth-sixth.

Seventh and eighth were separated although eighth had less than the three-fourths ratio and eighth was annexed to ninth, which was separated from fourteenth (see below), and seventh was made a separate district.

Thirteenth was separated from thirty-first although neither had the three-fourths ****380** ratio. Thirteenth was then joined with seventeenth, thirty-first annexed to twenty-ninth.

Ninth and fourteenth were separated although neither had the three-fourths ratio (see above).

Fifteenth and sixteenth were separated (both had less than the three-fourths ratio) and fifteenth was joined with fourteenth, and sixteenth with eighteenth.

Seventeenth, eighteenth, nineteenth and twenty-eighth (which constituted a combined district) were separated

from each other, though none of the original districts had more than the three-fourths ratio. In addition thirteenth-seventeenth, sixteenth-eighteenth, nineteenth-twentieth, and twenty-seventh-twenty-eighth were formed.

Twentieth and twenty-second were separated though twentieth had less than the three-fourths ratio. Twentieth was added to nineteenth, and twenty-second was made a separate district.

Twenty-fourth and twenty-sixth were separated though twenty-fourth had less than the three-fourths ratio. Twenty-fourth was added to twenty-third, and twenty-sixth was made a separate district.

Twenty-seventh and twenty-ninth were separated though each had less than the three-fourths ratio.

The following quotations from the report of the present board respecting changed senatorial districts, with explanations interspersed will show the reasons given by the board for its action:

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***506** 'The second district * * *, having acquired a population in excess of three-quarters of a ratio, is separated from the fourth senatorial district with which it was combined * * *.'

The separation of both the seventh from the eighth and twenty-second from the twentieth were set forth in like manner.

'The twenty-sixth district * * *, having acquired a population in excess of the senatorial ratio, is separated from the twenty-fourth senatorial district with which it was combined, * * *.

'The fourth senatorial district * * *, having been separated from the second is combined with the fifth * * *, the district adjoining it having the least number of inhabitants, and together with the sixth, * * * form one representative (senatorial) district * * *.

'The eighth senatorial district * * *, having been separated from the seventh district, is combined with the ninth district, * * * the district adjoining it having the least number of inhabitants * * *.

'The thirteenth district * * *, not having acquired a sufficient population to elect separately, is combined with the seventeenth district * * * the adjoining district having the least number of inhabitants * * *.'

The separation of the fifteenth, sixteenth, twentieth, twenty-fourth, twenty-seventh and twenty-ninth from the ones with

which they were joined and the combination of **382 each with another specified district, as heretofore indicated, is reported in substantially the same manner.

There are several counties in the state with a population that equals or exceeds the full senatorial ratio. No such county, however, is in a senatorial district whose population, exclusive of such county, amounts to a full senatorial ratio.

As all the material facts appear from the foregoing it seems unnecessary to copy verbatim the entire report of the apportionment board which is incorporated *507 in the pleadings or to set out in full the allegations of the petition and answers.

No question is made on the report except as to senatorial districts.

Attorneys and Law Firms

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Opinion

WILLIAMS, Judge.

The question raised by the general demurrers to the separate answers is whether the apportionment of senatorial districts made by the Governor, Auditor of State and Secretary of State, acting as a board under and by virtue of Section 11, Article XI of the Constitution, violates provisions in that article and is therefore a nullity.

What the board did in its apportionment was to leave nine senatorial districts (original or combined) as they were during the preceding decennium and rearrange the others.

Never before since the framing of the Constitution of 1851 has such a course been pursued. In fact never in that time had any senatorial district, formed by the combination of two or more districts, been thereafter broken up on re-apportionment. The unprecedented action of the board can be justified only upon the theory and assumption that at the end of each decennium the districts combined by annexation 'segregate' or 'fall apart by limitation' and so a new apportionment can be made without regard to the manner or nature of prior combinations. The theory of segregation of combined districts was advanced in State ex rel. v. Campbell, 48 Ohio St. 435, 27 N.E. 884, in which the opinion was written by Judge Minshall, although *508 his name did not originally appear in the reported case in 48 Ohio St.; but the theory was not approved or disapproved in that case for the reason that the determination of the rights of the parties therein did not require the court's action in that behalf. Here, however, the question is squarely presented and a judicial determination depends upon whether such segregation takes place.

To determine the soundness of the socalled theory of segregation it is necessary to look not only to the letter of the constitutional provisions but to their spirit and purpose. Prior to the Constitution of 1851, the apportionments of legislative districts had been made by the General Assemnbly with the result that oftentimes political advantage was sought to be gained by the party in power. Accordingly Article XI was incorporated in the Constitution for the purpose of correcting the evils of former days by placing the power of apportionment in the hands of a board composed of the Governor, the Auditor of State and the Secretary of State and making the provisions self-acting. Constitutional Convention Debates (1850-1851), Vol. 1, pp. 99, 100, 130 and 157; Vol. 2, pp. 767, 773.

Judge Ranney, who was himself a member of the Constitutional Convention of 1851, in writing the opinion in the case of State ex rel. Evans v. Dudley, 1 Ohio St. 437, at page 443 made this comment: 'To construct a scheme of constitutional apportionments, to endure for many years, and so far as the election of members of the General Assembly is concerned, subject to no control or alteration by that body, is a work of much difficulty, when it is considered how constantly and materially changes are being wrought in the political divisions of the state, and in the relative increase of population. And yet I am much mistaken if the system adopted by the convention is not found entirely adequate to accomplish all the substantial purposes proposed, and one of the most valuable features of the *509 constitution. The state had been subjected to a most humiliating experience, while the power was left with the General Assembly; and the scenes of anarchy and confusion, which had marked its exercise there, undoubtedly determined the people to deprive that body of it absolutely, so far as the election of **383 their own members was concerned, for the future.'

The objective sought by the constitutional provisions was the prevention of gerrymandering. By creating a board of ex officio members and adopting selfacting provisions it was

sought to place the function of apportionment in impartial hands and at the same time mark the way so that in the main at least the provisions of the Constitution would work automatically and the apportioning process ordinarily be a mere matter of calculation. If the proper construction were that the districts fall apart at the end of each decennium, an entirely new adjustment would be necessary and the way for gerrymandering opened up. So the theory of segregation, if accepted and applied, would lead to the very evil which the constitutional provisions were intended to prevent. Thus the argument for segregation reduces itself to an absurdity.

If any doubt remains as to whether the combined districts fall apart, it should be dispelled by the constitutional provisions themselves. See Article XI. They clearly define how the apportionment should be made, prescribe conditions under which a district, previously combined with another or other districts, may be given separate representation at the end of the decennial period, and are, as far as they go, self-executing and mandatory and, after the full provisions are set forth, there follows Section 10, which declares that 'no change shall ever be made * * * in the senatorial districts, except as above provided.' This very language implies that the senatorial districts continue unchanged from decennium to decennium except insofar as the Constitution itself prescribes a change.

***510** The apportioning board, then, was required to take the apportionment made in 1931 as a basis and make whatever reapportionment was required by the Constitution.

Some of the provisions of Article XI relate to the apportionment of members of the Lower House of the General Assembly and to the ratio of representation in that House. These will not be mentioned except as they are made applicable to the senatorial districts by reference. Nor are we concerned with anything here except the manner and method of apportioning senatorial districts.

The following provisions of Article XI of the Constitution are germane to the inquiry here.

Section 2: 'Every county having a population equal to one-half of said ratio, shall be entitled to one representative; every county, containing said ratio, and three-fourths over, shall be entitled to two representatives; every county containing three times said ratio, shall be entitled to three representatives; and so on, requiring after the first two, and entire ratio for each additional representative. *Provided, however, that each county shall have one representative*.' (As amended November 3, 1902. Italics ours.) The only change wrought by the amendment of this section was the addition of the words quoted in italics.

Section 4: 'Any county, forming with another county or counties, a representative district, during one decennial period, if it have acquired sufficient population at the next decennial period, shall be entitled to a separate representation, if there shall be left, in the district from which it shall have been separated, a population sufficient for a representative; but no such change shall be made, except at the regular decennial period for the apportionment of representatives.' This section so far as it relates to representatives has been impliedly repealed by Section 2 as ***511** amended November 3, 1902, but it is still in force as to senatorial districts.

Section 5: 'If, in fixing any subsequent ratio, a county, previously entitled to a separate representation, shall have less than the number required by the new ratio for a representative, such county shall be attached to the county adjoining it, having the least number of inhabitants; and the representation of the district, so formed shall be determined as herein provided.'

Section 6: 'The ratio for a senator shall forever, hereafter, be ascertained by dividing the whole population of the state by the number thirty-five.'

Section 7: It is not necessary to quote this section in full. It divided the state into thirty-three original senatorial districts all of which still retain their identity except the thirty-third. The latter district was changed in the apportionment of 1901 by carving out Lucas county as the thirty-fourth district. The remainder of the district has continued to be known as the thirty-third.

****384** Section 8: 'The same rules shall be applied, in apportioning the fractions of senatorial districts, and in annexing districts, which may hereafter have less than three-fourths of a senatorial ratio, as are applied to representative districts.'

Section 9: 'Any county forming part of a senatorial district, having acquired a population equal to a full senatorial ratio, shall be made a separate senatorial district, at any regular decennial apportionment, if a full senatorial ratio shall be left in the district from which it shall be taken.'

Section 10: The vital part of this section has already been referred to.

Section 11: 'The governor, auditor, and secretary of state, or any two of them, shall, at least six months prior to the October election, in the year one thousand eight hundred and sixty-one, and, at each decennial ***512** period thereafter, ascertain and determine the ratio of representation, according to the decennial census, the number of representatives and senators each county or district shall be entitled to elect, and for what years within the next ensuing ten years, and the governor shall cause the same to be published, in such manner as shall be directed by law.'

Experience has developed that there are only five steps which the apportioning board is required to or may take.

First: The board must determine the ratio by dividing the whole population of the state according to the last preceding census by the number thirty-five. The result is the full senatorial ratio. Seventy five per cent of this amount constitutes what is called the three-fourths ratio.

Second: The board must ascertain whether any county, forming part of a senatorial district, has acquired a population equal to or more than a full senatorial ratio. If so then such county must be made a separate senatorial district, provided a full senatorial ratio be left in the remaining part of the district. In such event two new senatorial districts are created out of the original. This eventuality has occurred but once in the history of the state, namely, in the separation of Lucas county (now the thirty-fourth district) from the remainder of the thirty-third district as above stated.

By the separation the status of thirty-third (as it now exists) and thirty-fourth became the same as that of an original district with respect to future annexations and combinations. Herein is found a cogent reason for the requirement of a full senatorial ratio on either hand before separation of a county from a district can take place. So in referring to original districts in this opinion existing thirty-third and thirty-fourth will be included unless otherwise apparent.

Third: When two or more districts have been combined into one senatorial district and thereafter at the ***513** end of the decennial period the population of any district has increased so as to equal or exceed three-fourths of a senatorial ratio, such original district shall be separated from a senatorial district provided there is left in the part that remains a population equal to or in excess of three-fourths of a senatorial ratio.

Section 8, as has appeared, provides for apportionment of fractions of senatorial districts and prescribes that the same rules shall be applied as are applied to representative districts. This provision requires a transformation of Section 4 which in terms applies only to representative districts. Section 4, mutatis mutandis, would run thus: 'Any district, forming with another district or districts, a senatorial district, during one decennial period, if it have acquired sufficient population at the next decennial period, shall be entitled to a separate representation, if there shall be left, in the district from which it shall have been separated, a population sufficient for a senator; but no such change shall be made, except at the regular decennial period for the apportionment of senators.' See State ex rel. v. Campbell, supra, 48 Ohio St. at page 438, 27 N.E. 884.

Section 4 as *mutated* requires an original district to be separated from a combined senatorial district when such original district has a population sufficient for a senator, provided the part of the combined district that is left likewise has a population sufficient for a senator.

'Population sufficient for a senator,' it is evident from a reading of the various provisions, is three-fourths of a ratio. It is significant that under Section 2, before amendment, one-half of a ratio was sufficient for a representative. By the amendment of that section, however, each county became entitled to a representative. Such amendment likewise nullified Section 4, so far as representative districts are ****385** concerned. But the latter section is still efficacious as to senatorial districts by virtue of Section 8, and, as an aid to interpretation, we may even look to the original Section 2 in so ***514** far as it refers to a fraction of a ratio for a representative. A separate senatorial district is entitled to a senator and continued existence so long as its population does not fall below three-fourths of a senatorial ratio. The underlying reasons will become more apparent in the discussion of the next step with which this particular branch of the inquiry is linked to a greater or lesser degree.

Fourth: The board must next inquire whether there are any existing senatorial districts which according to the last census have fallen below three-fourths of a senatorial ratio and, if so, such district shall be attached to the adjoining district having the least number of inhabitants.

This principle is also grounded upon Section 8 with which Section 5 must be interpreted. Section 5, on mutation, runs thus: 'If, in fixing any subsequent ratio, a district, previously

entitled to a separate representation, shall have less than the number required by the new ratio for a senator, such district shall be attached to the district adjoining it, having the least number of inhabitants; and the representation of the district, so formed, shall be determined as herein provided.'

It is the intent of the constitutional provisions that a senatorial district, whether single or combined, could sink below the full senatorial ratio and still be entitled to a senator. On the other hand when such a district sinks below the three-fourths ratio, it must be annexed to the adjoining district having the least population. These assertions are in keeping with what has heretofore been said in connection with the third step respecting the separation of a single district from a combined district. The same test applies to separating a district previously combined with another or other districts and to annexing a district to an adjoining district. Markedly in either event the basic principle is ***515** that population amounting to at least three-fourths of a full senatorial ratio is 'sufficient for a senator.'

Fifth: The board may exercise its discretion, where necessary, to the full discharge of the mandatory duties expressly imposed by Article XI. The fifth step is therefore fundamentally different from the first four, which are mandatory.

Though there may be no departure from the express provisions of the Constitution, circumstances may arise which were not anticipated and provided for. Nevertheless the board must act and make the apportionment. To meet the difficulty a wellknown rule is invoked. The board has implied power to exercise such discretion as may be necessary to carry the express powers into execution.

Up to this moment only one kind of situation has actually been uncovered which permits the exercise of discretion. When each of two or more districts adjoining each other or located in a block falls below the three-fourths ratio at the end of the decennial period, the board is confronted with the requirement that each district be attached to the nearest district having the 'least number of inhabitants.' Then a problem is presented for the exercise of discretion. The Constitution does not provide the numerical order in which districts shall be annexed and if the apportioning board cannot exercise discretion it can not act at all for the way is not wholly charted by the organic law. This exact situation among others was before the court in the Campbell case, supra, which dealt with the apportionment of 1891. In that apportionment second, fourth, fifth, sixth, ninth and fourteenth were in a block. The ninth, however, had more than a three-fourths ratio. There were, therefore, as appears from the maps, four districts, to wit, second, fourth, fifth and sixth which were together, each with less than a three-fourths ratio. These four districts had not previously been attached to any district in an apportionment. ***516** Essentially the manner of annexing the four districts was a matter within the sound discretion of the board. In the case at bar no such situation is presented.

The scope of the attempted apportionment of 1941 should not be overlooked. The respondent board broke up the following combined districts, to wit: second-fourth, seventh-eighth, ninth-fourteenth, thirteenth-thirty-first, fifteenth-sixteenth, twentieth-twenty-second, twenty-fourth-twenty-sixth, and twenty-seventh-twenty-ninth. In all of these combined districts, consisting as they do of two original districts, either one or both of the original districts have, according to the census of 1940, less than the three-fourths ratio.

****386** The board also broke up the senatorial district composed of four original districts, the seventeenth, eighteenth, nineteenth and twenty-eighth, every one of which had a population of less than the three-fourths ratio. It is evident that under the rule as to the three-fourths ratio not one of these combined districts could be interfered with. Out of the original districts released by the breaking up of the combined districts wholly new districts were created and, by the process of rearrangement, the set-up of twenty-three original districts was altered. What a contrast to the apportionment of 1931, when the only change was the annexation of the thirtieth district to the thirty-third, a course strictly within constitutional limitations.

Incidentally it may be remarked that combined districts eleventh-twelfth and thirtieth-thirty-third were not disturbed, although eleventh, twelfth and thirtieth fell below the three-fourths ratio. No valid reason appears for this seeming inconsistency of action.

There was no warrant for the course pursued by the board. No situation was presented which permitted the exercise of discretion and the Constitution expressly forbade what was done. In fact there was not a single change that could have been made by the ***517** board if it adhered to the Constitution. These assertions must be conceded on all hands, unless as said in the beginning, the districts fell apart leaving the way open for a complete and all-comprehensive distribution and combination of all the original districts of the state every ten years. Such an outcome was never intended and cannot be. Positive it is that the gerrymander can be

restored only by constitutional amendment. The pretended apportionment violated the Constitution and is a nullity.

For the reasons given the demurrers to the answers are sustained and, as the demurrers search the record, they are overruled as to the petition. Accordingly the apportionment is declared a nullity and a writ of mandamus is allowed commanding the respondents to apportion correctly the senatorial districts in accordance herewith and to determine the senatorial representation the corrected districts will be severally entitled to during each legislative session to be held during the present decennial period.

Writ allowed.

WEYGANDT, C. J., and TURNER, MATTHIAS, and HART, JJ., concur.

ZIMMERMAN, J., dissents.

BETTMAN, J., not participating.

ZIMMERMAN, Judge, (dissenting).

The relator herein contends that the decennial apportionment of senatorial districts made in May of 1941 by the unanimous action of the apportioning board composed of the Governor, Auditor of State and Secretary of State is unconstitutional and void.

In State ex rel. v. Campbell, 48 Ohio St. 435, 436, 27 N.E. 884, 885, the statement is made:

'To authorize this court to interfere and command the board to make another apportionment, the apportionment made must so far violate the rules prescribed ***518** by the constitution as to enable us to say that what has been done is no apportionment at all, and should be wholly disregarded. If by any fair construction of the principles prescribed by the constitution for making an apportionment the one made may be sustained, then it cannot be disregarded and a new one ordered.'

By Section 7, Article XI of the Constitution, thirty-three senatorial districts were erected. In the apportionment of senators for the various decenniums since that time, many of the original districts have been annexed to other original districts.

On the assumption that Section 4 of Article XI of the Constitution applies to senatorial districts as well as representative districts, the majority opinion holds that senatorial districts do not fall apart with the lapse of each decennial period, but continue in existence and become the basis for a new decennial apportionment. Consequently, the 1941 apportioning board was required to undertake its work with the senatorial apportionment of 1931 as a statrting point and, according to the majority opinion, 'there was not a single change that could have been made by the board if it adhered to the Constitution.'

The 1941 apportioning board adopted the view that the senatorial districts are created by Section 7, Article XI of the Constitution, and no new permanent senatorial districts can be established except as prescribed by Section 9 of Article XI; that the Constitution contemplates a new ****387** apportionment of senatorial representation every ten years and that in making annexations of districts having less than three-fourths of a ratio for the ensuing decennium, the numerical order in which such annexations shall be made rests in the sound discretion of the board, the Constitution being silent on the subject.

In other words, the theory pursued by the 1941 apportioning board, and which in my judgment was authorized, is that the constitutional provisions as to annexing ***519** districts refer to the original thirty-three districts created by the Constitution, and that in applying these provisions a board should interpret the word 'district' or 'districts' as referring to the original districts and not as referring to districts created at a prior decennium by another board.

Under this interpretation the board, in annexing districts at any decennial period, forms a district for the decennium immediately following, for the purposes of senatorial apportionment during that decennium.

Therefore, a board in annexing or uniting districts at one decennial period should do so with regard to the original thirty-three senatorial districts set up, in the Constitution, and not with regard to districts created at prior decennial periods.

This theory, that the districts created by a board by annexation are to exist only for the decennium, is based on the proposition that Section 8, Article XI of the Constitution, providing that 'the same rules shall be applied * * * in annexing districts * * * as are applied to representative districts,' refers to Section 5, Article XI, of the Constitution, and does not contemplate

Section 4, Article XI, relating to the severing or disuniting of counties in representative districts.

More specifically, Section 4 is confined solely to representative districts, and has its counterpart as to senatorial districts in Section 9.

Recognizing the logic of such approach, it was said in State ex rel. v. Campbell, supra, 48 Ohio St. at page 439, 27 N.E. at page 886:

'On the other hand, it is argued that at the end of each decennial period the original districts, however they may have been united by annexation, again segregate,-in other words, fall apart by limitation,-and that it then becomes the duty of the board to make a new apportionment, without any reference to the manner in which the districts were annexed prior thereto.

***520** 'There is much force in the argument of the relator, but we do not find it necessary to decide the question * * *.'

All Citations

139 Ohio St. 499, 41 N.E.2d 377, 22 O.O. 557

KeyCite Red Flag - Severe Negative Treatment
Superseded by Statute as Stated in State v. Braden, Ohio, October 16, 2019

103 Ohio St.3d 580
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
WHITE, Appellant.

Nos. 2003–1048, 2003–1049.
|
Submitted April 14, 2004.
|
Decided Nov. 24, 2004.

Synopsis

Background: Defendant was convicted on his plea of no contest in the Court of Common Pleas, Guernsey County, of possession of cocaine. Defendant received prison sentence and court costs were assessed against him, despite finding of indigency. Defendant appealed. The Court of Appeals affirmed.

Holdings: Upon certification of conflict and grant of defendant's request for discretionary appeal, the Supreme Court, O'Connor, J. held that:

[1] trial court had authority to assess costs against defendant; abrogating, *State v. Clark*, 2002 WL 31742999;

[2] collection of court costs did not violate Equal Protection Clause; and

[3] clerk of courts could attempt collection of court costs from defendant.

Affirmed in part, reversed in part.

Pfeifer, J., filed opinion, concurring in part and dissenting in part.

West Headnotes (4)

[1] **Costs, Fees, and Sanctions** Indigence; Proceedings in Forma Pauperis

Trial court had authority to assess court costs against indigent defendant who had been convicted of a felony as part of his sentence; statutes at issue did not prohibit trial court from assessing costs against indigent defendants, but instead required trial court to assess costs against all convicted defendants; abrogating, *State v. Clark*, 2002 WL 31742999. R.C. §§ 2949.14, 2949.19, 2947.23.

306 Cases that cite this headnote

[2] **Constitutional Law** Court and administrative costs or fees; assistance of counsel

Costs, Fees, and Sanctions Remedies for collection in general

Jury Costs

Collection of court costs that had been assessed against indigent defendant as part of his sentence following his felony conviction did not punish defendant for exercising his right to trial by jury, such as would violate Equal Protection Clause; administrative code provision governing court orders for payment of funds from prison inmate's account required that defendant, in his status as prison inmate, be informed of his right to claim protective exemptions for indigent inmates and types of exemptions available. U.S.C.A. Const.Amend. 14; R.C. § 2329.66; OAC 5120-5-03.

79 Cases that cite this headnote

[3] **Costs, Fees, and Sanctions** Remedies for collection in general

Clerk of courts could attempt collection of court costs that had been assessed against indigent defendant who had been convicted of a felony as part of his sentence; statutory scheme at issue was silent as to indigent defendants, from which

it could be inferred that collection of court costs from indigent defendants was merely permissive.

R.C. §§ 309.08(A), 2949.14, 2947.23.

248 Cases that cite this headnote

[4] **Statutes** Departing from or varying language of statute

Statutes Absent terms; silence; omissions

It is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used.

1 Cases that cite this headnote

****394 Syllabus of the Court**

***580** 1. A trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence.

2. A clerk of courts may attempt the collection of court costs assessed against an indigent defendant.

Attorneys and Law Firms

***585** David H. Bodiker, State Public Defender, and Stephen P. Hardwick, Assistant Public Defender, for appellant.

Opinion

O'CONNOR, J.

{¶ 1} The issue certified for our review is whether, pursuant to R.C. 2949.14 and R.C. 2947.23, a trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence. Although this question was presented as a single issue, there are two questions to be answered: first, whether a court may assess costs against an indigent defendant; and, second, whether those costs may be collected. We hold that such costs may be assessed and collected.

***581** {¶ 2} Appellant Terry White pleaded no contest to a charge of possession of cocaine, in violation of R.C. 2925.11(C)(4)(a). The trial court entered a judgment of conviction, sentenced White to prison, and assessed court costs against him despite a finding of indigency.

{¶ 3} White's sole assignment of error on appeal was that the trial court erred by imposing court costs upon an indigent felony defendant. The appellate court disagreed. It held that a trial court may assess such costs but that they may not be collected unless the defendant ceases to be indigent.

{¶ 4} This cause is now before us pursuant to a certification of conflict and White's discretionary appeal.

Assessment of Court Costs

[1] {¶ 5} The appellate court in this case examined two Revised Code provisions on the subject of costs. R.C. 2947.23(A)(1) states, "In all criminal cases * * * the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs." R.C. 2949.14 states, "Upon conviction of a nonindigent person ****395** for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made in such prosecution * * *."

{¶ 6} The appellate court recognized that R.C. 2947.23 gives the trial court the authority to "include in the [criminal defendant's] sentence the costs of prosecution and render a judgment against the defendant for such costs," whereas R.C. 2949.14 addresses "the ability of the clerk of courts to collect the costs from the person convicted." The court stated, "While R.C. 2949.14 provides a collection mechanism only for non-indigent defendants, nothing in R.C. 2947.23 prohibits the court from assessing costs to an indigent defendant as part of the sentence. * * * Ohio law does not prohibit a judge from including court costs as part of the sentence of an indigent defendant."

{¶ 7} The appellate court determined that its decision was in conflict with the decision of the Fourth District Court of Appeals in *State v. Clark,* Pickaway App. No. 02CA12, 2002-Ohio-6684, 2002 WL 31742999. Clark, an indigent, pleaded guilty to felonious assault. The trial court accepted Clark's plea, sentenced him, and assessed court costs against him. On appeal, Clark contended that it was error for the trial court to assess court costs against him because he was indigent. The Fourth District agreed. The court relied upon R.C. 2949.14 and 2949.19 to conclude that indigent

defendants cannot be assessed court costs in felony cases. The court noted that the use of the term "nonindigent" in R.C. 2949.14 implies that indigent defendants cannot be assessed costs. Id. at ¶ 18. It garnered support from R.C. 2949.19, which delineates the procedure by which the clerk of ***582** common pleas court may be reimbursed for some costs associated with the conviction of an indigent person.

{¶ 8} We determine that R.C. 2949.14 does not govern a court's ability to assess costs. It governs only a clerk's ability to collect assessed costs from nonindigent defendants. Moreover, R.C. 2947.23 does not prohibit a court from assessing costs against an indigent defendant; rather it *requires* a court to assess costs against all convicted defendants. Though R.C. 2949.19 supplies a procedure for reimbursement of some of an indigent defendant's costs, it does not purport to apply to all indigent defendants. Rather, the procedure applies only if a court has waived costs. [1]

Collection of Court Costs

{¶ 9} Having determined that a trial court may assess court costs against a convicted indigent defendant, we turn to the matter of collection. White argues that even if we hold that a court may impose costs on an indigent defendant, the costs may not be collected.

[2] {¶ 10} We first address White's contention that the collection of costs from an indigent defendant violates the Equal Protection Clause of the United States Constitution. He claims that assessing costs against an indigent defendant in effect punishes the defendant for exercising his right to trial by jury. White cites two United States Supreme Court cases for the proposition that indigent defendants and those on whom recoupment would work a "manifest hardship" should be exempted from having to pay court costs. Both of ****396** the cited cases, however, can be distinguished because they deal with recoupment statutes for appointed counsel costs. The cases do not speak to the imposition of court costs, and they examine the effect of recoupment statutes on the right to counsel, not on the right to a jury trial.

{¶ 11} In *Fuller v. Oregon* (1974), 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642, Fuller, an indigent, pleaded guilty and was sentenced to five years of probation. As a condition of probation, Fuller participated in a work-release program and was required to reimburse the county for the fees and expenses of the attorney and investigator who had been provided to him because of his indigent status. The Supreme Court found that the recoupment statute under which Fuller's obligation was imposed did not violate the Equal Protection Clause because it retained exemptions afforded to other judgment debtors.

***583** {¶ 12} Conversely, the court in *James v. Strange* (1972), 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600, held that a Kansas recoupment statute violated the Equal Protection Clause for its failure to conserve for indigent defendants protective exemptions that were available to civil judgment debtors.

{¶ 13} White's argument relies on Ohio Adm.Code 5120–5–03, which grants the state the ability to take money from an inmate's prison account, leaving no less than $10 per month. Relying on *James,* he concludes: "Leaving only $10.00 per month does not satisfy the equal protection prohibition against imposing unduly harsh repayment terms on debts owed to the State." Yet White ignores a critical difference between Ohio Adm.Code 5120–5–03 and the statute at issue in *James.* The *James* statute was held unconstitutional because of its failure to provide for indigent defendants protective exemptions that are available for civil judgment debtors. The Ohio code has no such flaw. Ohio Adm.Code 5120–5–03(C) states that an inmate must be informed "of a right to claim exemptions and types of exemptions available under section 2329.66 of the Revised Code." R.C. 2329.66 identifies a judgment debtor's "property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order." R.C. 2329.66(A).

[3] **[4]** {¶ 14} We next turn our attention to R.C. 2949.14, which authorizes common pleas courts' clerks to certify and enforce judgments for costs. It states, "Upon conviction of a nonindigent person for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made in such prosecution * * *." The bill is then presented to the prosecuting attorney for examination and certification. "Upon certification by the prosecuting attorney, the clerk shall attempt to collect the costs from the person convicted." R.C. 2929.14. The clerk is therefore required to certify a bill of costs and attempt collection from nonindigent defendants. The statute, however, is silent as to indigent defendants. Similarly, R.C. 309.08(A), which imposes a

general duty upon prosecuting attorneys to attempt collection of costs, is silent as to the indigent status of defendants. The General Assembly has neither explicitly prohibited nor explicitly required collection from indigent defendants. " 'It is the duty of this court to give effect to the *words used* [in a statute], not to delete words used *or to insert words not used.*' (Emphasis added.)" *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4, 12 O.O.3d 1, 3, 387 N.E.2d 1222, quoting *Columbus–Suburban Coach Lines, Inc. v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127, 49 O.O.2d 445, 254 N.E.2d 8. We are therefore left to infer from this silence that collection from indigent defendants is merely permissive. ****397** As we have discussed above, R.C. 2947.23 requires a judge to assess costs against all convicted criminal defendants, and waiver of costs is permitted—but not required—if the defendant is indigent. It logically follows that a clerk of courts may attempt the collection of assessed court costs from an indigent defendant.

***584** {¶ 15} The possible methods of collection are numerous, despite the lack of guidance from the Revised Code. One possibility is to assess costs and attempt collection through the defendant's prison account.[2] Another is to attempt collection at a later date, when it becomes apparent that the defendant is no longer indigent.[3] Yet another is to impose community service upon the defendant as a method to pay off or forgive costs.[4] We will not, however, speak to the legality of the several avenues for collection from an indigent defendant, as those questions are not before us. We therefore limit our holding to rule only that a trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence and that a clerk of courts may attempt the collection of court costs assessed against an indigent defendant.

Judgment affirmed in part and reversed in part.

MOYER, C.J., RESNICK, FRANCIS E. SWEENEY, SR., LUNDBERG STRATTON and O'DONNELL, JJ., concur.

PFEIFER, J., concurs in part and dissents in part.

PFEIFER, J., concurring in part and dissenting in part.

{¶ 16} I concur with the judgment of the majority that pursuant to former R.C. 2947.23, 1953 H.B. No. 1, a judge has the authority to include in the sentence of any defendant a judgment for the costs of the prosecution. R.C. 2947.23 applies "[i]n all criminal cases, including violations of ordinances." Nowhere in R.C. 2947.23 does the General Assembly set forth a collection procedure instituted by the clerk of courts.

{¶ 17} Unlike R.C. 2947.23, R.C. 2949.14 addresses only one category of defendants—nonindigent persons convicted of felonies. It does set forth a process by which the clerk "shall attempt to collect the costs from the person convicted." The General Assembly specifically set forth a class of defendants —nonindigent felony offenders—for collection procedures. Its failure to include indigent felons within the clerk's collection authority must be afforded meaning. Expressio unius est exclusio alterius.

{¶ 18} The current version of R.C. 2947.23 leaves no doubt as to the intention of the General Assembly. R.C. 2947.23(A)(1)(a) calls for the defendant to pay the amount of judgment or to make ****398** timely payments. If the defendant does not pay, "the court may order the defendant to perform community service" to satisfy the debt. Collection procedures outlined in R.C. 2949.14 remain applicable only to nonindigent felony defendants. For indigent defendants or persons convicted of misdemeanors, community service has become an alternate means of collection under R.C. 2947.23(A)(1). Unpaid balances are to be paid in sweat.

All Citations

103 Ohio St.3d 580, 817 N.E.2d 393, 2004 -Ohio- 5989

Footnotes

1 R.C. 2949.092 outlines those circumstances in which a court may waive costs for indigents. R.C. 2949.092 permits a court to waive payment of specific court costs required by R.C. 2743.70 and 2949.091 only if

"the court determines that the offender is indigent and the court waives the payment of all court costs imposed upon the offender."

2 Ohio Adm.Code 5120–5–03.

3 Many decisions have stated that a court may look at a defendant's current financial status to collect on a past order for costs. *State v. McDowell,* 11th Dist. No. 2001–P–0149, 2003-Ohio-5352, 2003 WL 22290889, ¶ 57; *State v. Clark,* 4th Dist. No. 02–CA–62, 2002-Ohio-6684, 2002 WL 31742999, ¶ 21. White argues that such holdings were incorrect but neglects to provide reasoning for his assertion.

4 R.C. 2947.23(A)(1)(a) states, "If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service * * *." Note that this subsection was not in effect at the time of White's sentencing. We mention it here merely to highlight methods of collection in general. We do not suggest that such an order would be appropriate for White.

97 S.Ct. 555
Supreme Court of the United States

VILLAGE OF ARLINGTON HEIGHTS et al., Petitioners,
v.
METROPOLITAN HOUSING DEVELOPMENT CORPORATION et al.

No. 75-616.
|
Argued Oct. 13, 1976.
|
Decided Jan. 11, 1977.

Synopsis

A nonprofit real estate developer which had contracted to purchase a tract of land in order to build racially integrated low and moderate income housing filed a suit for injunctive and declaratory relief, alleging that local authorities' refusal to change the tract from a single-family to a multi-family classification was racially discriminatory. The District Court, 373 F.Supp. 208, held that the rezoning denial was motivated not be racial discrimination but by a desire to protect property values and to maintain the prevailing zoning plan, and the Court of Appeals, 517 F.2d 409, reversed, finding that the "ultimate effect" of the rezoning denial was racially discriminatory. On grant of certiorari, the Supreme Court, Mr. Justice Powell, held, inter alia, that the developer and an individual plaintiff had standing to bring the action and that they failed to carry their burden of proving that racially discriminatory intent or purpose was a motivating factor in the rezoning decision.

Reversed and remanded.

Mr. Justice Marshall concurred in part and dissented in part and filed opinion in which Mr. Justice Brennan joined.

Mr. Justice White dissented and filed opinion.

****556** Syllabus [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***252** Respondent Metropolitan Housing Development Corp. (MHDC), a nonprofit developer, contracted to purchase a tract within the boundaries of petitioner Village in order to build racially integrated low- and moderate-income housing. The contract was contingent upon securing rezoning as well as federal housing assistance. MHDC applied to the Village for the necessary rezoning from a single-family to a multiple-family (R-5) classification. At a series of Village Plan Commission public meetings, both supporters and opponents touched upon the fact that the project would probably be racially integrated. Opponents also stressed zoning factors that pointed toward denial of MHDC's application: The location had always been zoned single-family, and the Village's apartment policy called for limited use of R-5 zoning, primarily as a buffer between single-family development and commercial or manufacturing districts, none of which adjoined the project's proposed location. After the Village denied rezoning, MHDC and individual minority respondents filed this suit for injunctive and declaratory relief, alleging that the denial was racially discriminatory ****557** and violated, inter alia, the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act. The District Court held that the Village's rezoning denial was motivated not by racial discrimination but by a desire to protect property values and maintain the Village's zoning plan. Though approving those conclusions, the Court of Appeals reversed, finding that the "ultimate effect" of the rezoning denial was racially discriminatory and observing that the denial would disproportionately affect blacks, particularly in view of the fact that the general surburban area, though economically expanding, continued to be marked by residential segregation. Held:

1. MHDC and at least one individual respondent have standing to bring this action. Pp. 561-563.

(a) MHDC has met the constitutional standing requirements by showing injury fairly traceable to petitioners' acts. The challenged action of the Village stands as an absolute barrier to constructing the housing for which MHDC had contracted, a barrier which could be ***253** removed if injunctive relief were granted. MHDC, despite the contingency provisions in its contract, has suffered economic injury based upon the

expenditures it made in support of its rezoning petition, as well as noneconomic injury from the defeat of its objective, embodied in its specific project, of making suitable low-cost housing available where such housing is scarce. Pp. 561-562.

(b) Whether MHDC has standing to assert the constitutional rights of its prospective minority tenants need not be decided, for at least one of the individual respondents, a Negro working in the Village and desirous of securing low-cost housing there but who now lives 20 miles away, has standing. Focusing on the specific MHDC project, he has adequately alleged an "actionable causal relationship" between the Village's zoning practices and his asserted injury. Warth v. Seldin, 422 U.S. 490, 507, 95 S.Ct. 2197, 2209, 45 L.Ed.2d 343. Pp. 562-563.

2. Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment, and respondents failed to carry their burden of proving that such an intent or purpose was a motivating factor in the Village's rezoning decision. Pp. 563-566.

(a) Official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "(Such) impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." Washington v. Davis, 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 48 L.Ed.2d 597. A racially discriminatory intent, as evidenced by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers, must be shown. Pp. 563-565.

(b) The evidence does not warrant overturning the concurrent findings of both courts below that there was no proof warranting the conclusion that the Village's rezoning decision was racially motivated. Pp. 565-566.

3. The statutory question whether the rezoning decision violated the Fair Housing Act of 1968 was not decided by the Court of Appeals and should be considered on remand. P. 566.

517 F.2d 409, reversed and remanded.

Attorneys and Law Firms

***254** Jack M. Siegel, Chicago, Ill., for petitioners.

F. Willis Caruso, Chicago, Ill., for respondents.

Opinion

Mr. Justice POWELL delivered the opinion of the Court.

In 1971 respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered ****558** townhouse units for low- and moderate-income tenants. The Village denied the rezoning request. MHDC, joined by other plaintiffs who are also respondents here, brought suit in the United States District Court for the Northern District of Illinois. [1] They alleged that the denial was racially discriminatory and that it violated, inter alia, the Fourteenth Amendment and the Fair Housing Act of 1968, 82 Stat. 81, 42 U.S.C. s 3601 et seq. Following a bench trial, the District Court entered judgment for the Village, 373 F.Supp. 208 (1974), and respondents appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the "ultimate effect" of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. 517 F.2d 409 (1975). We granted ***255** the Village's petition for certiorari, 423 U.S. 1030, 96 S.Ct. 560, 46 L.Ed.2d 404 (1975), and now reverse.

1 Respondents named as defendants both the Village and a number of its officials, sued in their official capacity. The latter were the Mayor, the Village Manager, the Director of Building and Zoning, and the entire Village Board of Trustees. For convenience, we will occasionally refer to all the petitioners collectively as "the Village."

I

Arlington Heights is a suburb of Chicago, located about 26 miles northwest of the downtown Loop area. Most of the land in Arlington Heights is zoned for detached single-family homes, and this is in fact the prevailing land use. The Village experienced substantial growth during the 1960's, but, like other communities in northwest Cook County, its population of racial minority groups remained quite low. According to the 1970 census, only 27 of the Village's 64,000 residents were black.

The Clerics of St. Viator, a religious order (Order), own an 80-acre parcel just east of the center of Arlington Heights. Part of the site is occupied by the Viatorian high school, and part by the Order's three-story novitiate building, which houses dormitories and a Montessori school. Much of the site, however, remains vacant. Since 1959, when the Village first adopted a zoning ordinance, all the land surrounding the Viatorian property has been zoned R-3, a single-family specification with relatively small minimum lot-size requirements. On three sides of the Viatorian land there are single-family homes just across a street; to the east the Viatorian property directly adjoins the backyards of other single-family homes.

The Order decided in 1970 to devote some of its land to low- and moderate-income housing. Investigation revealed that the most expeditious way to build such housing was to work through a nonprofit developer experienced in the use of federal housing subsidies under s 236 of the National Housing Act, 48 Stat. 1246, as added and amended, 12 U.S.C. s 1715z-1. [2]

[2] Section 236 provides for "interest reduction payments" to owners of rental housing projects which meet the Act's requirements, if the savings are passed on to the tenants in accordance with a rather complex formula. Qualifying owners effectively pay 1% interest on money borrowed to construct, rehabilitate, or purchase their properties. (Section 236 has been amended frequently in minor respects since this litigation began. See 12 U.S.C. s 1715z-1 (1970 ed., Supp. V), and the Housing Authorization Act of 1976, s 4, 90 Stat. 1070.)
New commitments under s 236 were suspended in 1973 by executive decision, and they have not been revived. Projects which formerly could claim s 236 assistance, however, will now generally be eligible for aid under s 8 of the United States Housing Act of 1937, as amended by s 201(a) of the Housing and Community Development Act of 1974, 42 U.S.C. s 1437f (1970 ed., Supp. V), and by the Housing Authorization Act of 1976, s 2, 90 Stat. 1068. Under the s 8 program, the Department of Housing and Urban Development contracts to pay the owner of the housing units a sum which will make up the difference between a fair market rent for the area and the amount contributed by the low-income tenant. The eligible tenant family pays between 15% and 25% of its gross income for rent. Respondents indicated at oral argument that, despite the demise of the s 236 program, construction of the MHDC project could proceed under s 8 if zoning clearance is now granted.

***256** MHDC is such a developer. It was organized in 1968 by several prominent Chicago ****559** citizens for the purpose of building low- and moderate-income housing throughout the Chicago area. In 1970 MHDC was in the process of building one s 236 development near Arlington Heights and already had provided some federally assisted housing on a smaller scale in other parts of the Chicago area.

After some negotiation, MHDC and the Order entered into a 99-year lease and an accompanying agreement of sale covering a 15-acre site in the southeast corner of the Viatorian property. MHDC became the lessee immediately, but the sale agreement was contingent upon MHDC's securing zoning clearances from the Village and s 236 housing assistance from the Federal Government. If MHDC proved unsuccessful in securing either, both the lease and the contract of sale would lapse. The agreement established a bargain purchase price of $300,000, low enough to comply with federal limitations governing land-acquisition costs for s 236 housing.

MHDC engaged an architect and proceeded with the project, ***257** to be known as Lincoln Green. The plans called for 20 two-story buildings with a total of 190 units, each unit having its own private entrance from outside. One hundred of the units would have a single bedroom, thought likely to attract elderly citizens. The remainder would have two, three, or four bedrooms. A large portion of the site would remain open, with shrubs and trees to screen the homes abutting the property to the east.

The planned development did not conform to the Village's zoning ordinance and could not be built unless Arlington Heights rezoned the parcel to R-5, its multiple-family housing classification. Accordingly, MHDC filed with the Village Plan Commission a petition for rezoning, accompanied by supporting materials describing the development and specifying that it would be subsidized under s 236. The materials made clear that one requirement under s 236 is an affirmative marketing plan designed to assure that a subsidized development is racially integrated. MHDC also submitted studies demonstrating the need for housing of this type and analyzing the probable impact of the development. To prepare for the hearings before the Plan Commission and to assure compliance with the Village building code, fire regulations, and related requirements, MHDC consulted with

the Village staff for preliminary review of the development. The parties have stipulated that every change recommended during such consultations was incorporated into the plans.

During the spring of 1971, the Plan Commission considered the proposal at a series of three public meetings, which drew large crowds. Although many of those attending were quite vocal and demonstrative in opposition to Lincoln Green, a number of individuals and representatives of community groups spoke in support of rezoning. Some of the comments, both from opponents and supporters, addressed what was referred to as the "social issue" the desirability or undesirability of introducing at this location in Arlington Heights ***258** low- and moderate-income housing, housing that would probably be racially integrated.

Many of the opponents, however, focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the Village's apartment policy, adopted by the Village Board in 1962 and amended in 1970, called for R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. Lincoln Green did not meet this requirement, as it adjoined no commercial or manufacturing district.

At the close of the third meeting, the Plan Commission adopted a motion to recommend to the Village's Board of Trustees that it deny the request. The motion stated: "While the need for low and moderate ****560** income housing may exist in Arlington Heights or its environs, the Plan Commission would be derelict in recommending it at the proposed location." Two members voted against the motion and submitted a minority report, stressing that in their view the change to accommodate Lincoln Green represented "good zoning." The Village Board met on September 28, 1971, to consider MHDC's request and the recommendation of the Plan Commission. After a public hearing, the Board denied the rezoning by a 6-1 vote.

The following June MHDC and three Negro individuals filed this lawsuit against the Village, seeking declaratory and injunctive relief.[3] A second nonprofit corporation and an individual of Mexican-American descent intervened as plaintiffs. ***259** The trial resulted in a judgment for petitioners. Assuming that MHDC had standing to bring the suit,[4] the District Court held that the petitioners were not motivated by racial discrimination or intent to discriminate against low-income groups when they denied rezoning, but rather by a desire "to protect property values and the integrity of the Village's zoning plan." 373 F.Supp., at 211. The District Court concluded also that the denial would not have a racially discriminatory effect.

3 The individual plaintiffs sought certification of the action as a class action pursuant to Fed.Rule Civ.Proc. 23 but the District Court declined to certify. 373 F.Supp. 208, 209 (1974).

4 A different District Judge had heard early motions in the case. He had sustained the complaint against a motion to dismiss for lack of standing, and the judge who finally decided the case said he found "no need to reexamine (the predecessor judge's) conclusions" in this respect. Ibid.

A divided Court of Appeals reversed. It first approved the District Court's finding that the defendants were motivated by a concern for the integrity of the zoning plan, rather than by racial discrimination. Deciding whether their refusal to rezone would have discriminatory effects was more complex. The court observed that the refusal would have a disproportionate impact on blacks. Based upon family income, blacks constituted 40% of those Chicago area residents who were eligible to become tenants of Lincoln Green, although they composed a far lower percentage of total area population. The court reasoned, however, that under our decision in James v. Valtierra, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971), such a disparity in racial impact alone does not call for strict scrutiny of a municipality's decision that prevents the construction of the low-cost housing.[5]

5 Nor is there reason to subject the Village's action to more stringent review simply because it involves respondents' interest in securing housing. Lindsey v. Normet, 405 U.S. 56, 73-74, 92 S.Ct. 862, 874, 31 L.Ed.2d 36 (1972). See generally San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 18-39, 93 S.Ct. 1278, 1288-1300, 36 L.Ed.2d 16 (1973).

There was another level to the court's analysis of allegedly discriminatory results. Invoking language from ***260** Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108, 112 (C.A.2 1971), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1970), the Court of Appeals ruled that the denial of rezoning must be examined in light

of its "historical context and ultimate effect."[6] 517 F.2d, at 413. Northwest Cook County was enjoying rapid growth in employment opportunities and population, but it continued to exhibit a high degree of residential segregation. The court held that Arlington Heights could not simply ignore this problem. Indeed, it found that the Village had been "exploiting" the situation by allowing itself to become a nearly all white community. Id., at 414. The Village had no other current plans for building low- and moderate-income housing, and no other R-5 parcels in the Village were available to MHDC at an economically feasible price.

6 This language apparently derived from our decision in Reitman v. Mulkey, 387 U.S. 369, 373, 87 S.Ct. 1627, 1629, 18 L.Ed.2d 830 (1967) (quoting from the opinion of the California Supreme Court in the case then under review).

**561 Against this background, the Court of Appeals ruled that the denial of the Lincoln Green proposal had racially discriminatory effects and could be tolerated only if it served compelling interests. Neither the buffer policy nor the desire to protect property values met this exacting standard. The court therefore concluded that the denial violated the Equal Protection Clause of the Fourteenth Amendment.

II

At the outset, petitioners challenge the respondents' standing to bring the suit. It is not clear that this challenge was pressed in the Court of Appeals, but since our jurisdiction to decide the case is implicated, Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1848, 23 L.Ed.2d 404 (1969) (plurality opinion), we shall consider it.

In Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), a case similar in some respects to this one, we reviewed the constitutional limitations and prudential considerations that guide a court in determining a party's standing, and we need not repeat that discussion here. The essence of the standing question, *261 in its constitutional dimension, is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' (as) to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Id., at 498-499, 95 S.Ct. at 2205, quoting Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect, see United States v. SCRAP, 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925 - 1926, 48 L.Ed.2d 450 (1976); O'Shea v. Littleton, 414 U.S. 488, 498, 94 S.Ct. 669, 677, 38 L.Ed.2d 674 (1974); Linda R. S. v. Richard D., 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973).

A

Here there can be little doubt that MHDC meets the constitutional standing requirements. The challenged action of the petitioners stands as an absolute barrier to constructing the housing MHDC had contracted to place on the Viatorian site. If MHDC secures the injunctive relief it seeks, that barrier will be removed. An injunction would not, of course, guarantee that Lincoln Green will be built. MHDC would still have to secure financing, qualify for federal subsidies,[7] and carry through with construction. But all housing developments are subject to some extent to similar uncertainties. When a project is as detailed and specific as Lincoln Green, a court is not required to engage in undue speculation *262 as a predicate for finding that the plaintiff has the requisite personal stake in the controversy. MHDC has shown an injury to itself that is "likely to be redressed by a favorable decision." Simon v. Eastern Ky. Welfare Rights Org., supra, 426 U.S., at 38, 96 S.Ct., at 1924.

7 Petitioners suggest that the suspension of the s 236 housing-assistance program makes it impossible for MHDC to carry out its proposed project and therefore deprives MHDC of standing. The District Court also expressed doubts about MHDC's position in the case in light of the suspension. 373 F.Supp., at 211. Whether termination of all available assistance programs would preclude standing is not a matter we need to decide, in view of the current likelihood that subsidies may be secured under s 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974. See n. 2, supra.

Petitioners nonetheless appear to argue that MHDC lacks standing because it has suffered no economic injury. MHDC, they point out, is not the owner of the property in question. Its

contract of purchase is contingent upon securing rezoning. [8] ****562** MHDC owes the owners nothing if rezoning is denied.

[8] Petitioners contend that MHDC lacks standing to pursue its claim here because a contract purchaser whose contract is contingent upon rezoning cannot contest a zoning decision in the Illinois courts. Under the law of Illinois, only the owner of the property has standing to pursue such an action. Clark Oil & Refining Corp. v. City of Evanston, 23 Ill.2d 48, 177 N.E.2d 191 (1961); but see Solomon v. City of Evanston, 29 Ill.App.3d 782, 331 N.E.2d 380 (1975).

State law of standing, however, does not govern such determinations in the federal courts. The constitutional and prudential considerations canvassed at length in Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), respond to concerns that are peculiarly federal in nature. Illinois may choose to close its courts to applicants for rezoning unless they have an interest more direct than MHDC's, but this choice does not necessarily disqualify MHDC from seeking relief in federal courts for an asserted injury to its federal rights.

We cannot accept petitioners' argument. In the first place, it is inaccurate to say that MHDC suffers no economic injury from a refusal to rezone, despite the contingency provisions in its contract. MHDC has expended thousands of dollars on the plans for Lincoln Green and on the studies submitted to the Village in support of the petition for rezoning. Unless rezoning is granted, many of these plans and studies will be worthless even if MHDC finds another site at an equally attractive price.

Petitioners' argument also misconceives our standing requirements. It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's ***263** standing. United States v. SCRAP, supra, 412 U.S., at 686-687, 93 S.Ct., at 2415; Sierra Club v. Morton, 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); Data Processing Service v. Camp, 397 U.S. 150, 154, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest. See Sierra Club v. Morton, supra, 405 U.S., at 739, 92 S.Ct., at 1368. The specific project MHDC intends to build, whether or not it will generate profits, provides that "essential dimension of specificity" that informs judicial decisionmaking. Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221, 94 S.Ct. 2925, 2932, 41 L.Ed.2d 706 (1974).

B

Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. See Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928); Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). But the heart of this litigation has never been the claim that the Village's decision fails the generous Euclid test, recently reaffirmed in Belle Terre. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. Warth v. Seldin, 422 U.S., at 499, 95 S.Ct., at 2205. But we need not decide whether the circumstances of this case would justify departure from that prudential limitation and permit MHDC to assert the constitutional rights of its prospective minority tenants. See Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953); cf. ***264** Sullivan v. Little Hunting Park, 396 U.S. 229, 237, 90 S.Ct. 400, 404, 24 L.Ed.2d 386 (1969); Buchanan v. Warley, 245 U.S. 60, 72-73, 38 S.Ct. 16, 17, 62 L.Ed. 149 (1917). For we have at least one individual plaintiff who has demonstrated standing to assert these rights as his own. [9]

[9] Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.

****563** Respondent Ransom, a Negro, works at the Honeywell factory in Arlington Heights and lives approximately 20 miles away in Evanston in a 5-room house with his mother and his son. The complaint alleged that he seeks and would qualify for the housing MHDC wants to build in Arlington Heights. Ransom testified at trial that if

Lincoln Green were built he would probably move there, since it is closer to his job.

The injury Ransom asserts is that his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory. If a court grants the relief he seeks, there is at least a "substantial probability," Warth v. Seldin, supra, 422 U.S., at 504, 95 S.Ct., at 2208, that the Lincoln Green project will materialize, affording Ransom the housing opportunity he desires in Arlington Heights. His is not a generalized grievance. Instead, as we suggested in Warth, supra, at 507, 508 n. 18, 95 S.Ct., at 2210, it focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court. See id., at 505, 95 S.Ct., at 2208; Simon v. Eastern Ky. Welfare Rights Org., 426 U.S., at 41-42, 96 S.Ct., at 1925 - 1926. Unlike the individual plaintiffs in Warth, Ransom has adequately averred an "actionable causal relationship" between Arlington Heights' zoning practices and his asserted injury. Warth v. Seldin, supra, 422 U.S., at 507, 95 S.Ct., at 2209. We therefore proceed to the merits.

III

Our decision last Term in Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), made it clear that official action will not be held ***265** unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." Id., at 242, 96 S.Ct., at 2049. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, [10] the holding in Davis reaffirmed a principle well established in a variety of contexts. E. g., Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973) (schools); Wright v. Rockefeller, 376 U.S. 52, 56-57, 84 S.Ct. 603, 605, 11 L.Ed.2d 512 (1964) (election districting); Akins v. Texas, 325 U.S. 398, 403-404, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945) (jury selection).

10 Palmer v. Thompson, 403 U.S. 217, 225, 91 S.Ct. 1940, 1945, 29 L.Ed.2d 438 (1971); Wright v. Council of City of Emporia, 407 U.S. 451, 461-462, 92 S.Ct. 2196, 2202-2203, 33 L.Ed.2d 51 (1972); cf. United States v. O'Brien, 391 U.S. 367, 381-386, 88 S.Ct. 1673, 1681-1684, 20 L.Ed.2d 672 (1968). See discussion in Washington v. Davis, 426 U.S., at 242-244, 96 S.Ct., at 2049-2050.

Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. [11] In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose ***266** has been a motivating factor in the decision, this judicial deference is no longer justified. [12]

11 In McGinnis v. Royster, 410 U.S. 263, 276-277, 93 S.Ct. 1055, 1063, 35 L.Ed.2d 282 (1973), in a somewhat different context, we observed:
"The search for legislative purpose is often elusive enough, Palmer v. Thompson, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute."

12 For a scholarly discussion of legislative motivation, see Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup.Ct.Rev. 95, 116-118.

****564** Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it "bears more heavily on one race than another," Washington v. Davis, supra, 426 U.S., at 242, 96 S.Ct., at 2049 may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). The evidentiary inquiry is then relatively easy. [13]

But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, [14] and the Court must look to other evidence. [15]

13 Several of our jury-selection cases fall into this category. Because of the nature of the jury-selection task, however, we have permitted a finding of constitutional violation even when the statistical pattern does not approach the extremes of Yick Wo or Gomillion. See, e. g., Turner v. Fouche, 396 U.S. 346, 359, 90 S.Ct. 532, 539, 24 L.Ed.2d 567 (1970); Sims v. Georgia, 389 U.S. 404, 407, 88 S.Ct. 523, 525, 19 L.Ed.2d 634 (1967).

14 This is not to say that a consistent pattern of official racial discrimination is a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act in the exercise of the zoning power as elsewhere would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions. See City of Richmond v. United States, 422 U.S. 358, 378, 95 S.Ct. 2296, 2307, 45 L.Ed.2d 245 (1975).

15 In many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the "heterogeneity" of the Nation's population. Jefferson v. Hackney, 406 U.S. 535, 548, 92 S.Ct. 1724, 1732, 32 L.Ed.2d 285 (1972); see also Washington v. Davis, supra, 426 U.S., at 248, 96 S.Ct., at 2051.

***267** The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. See Lane v. Wilson, supra; Griffin v. School Board, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); Davis v. Schnell, 81 F.Supp. 872 (S.D.Ala.), aff'd per curiam, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 (1949); cf. Keyes v. School Dist. No. 1, Denver, Colo., supra, 413 U.S., at 207, 93 S.Ct., at 2696. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. Reitman v. Mulkey, 387 U.S. 369, 373-376, 87 S.Ct. 1627, 1629-1631, 18 L.Ed.2d 830 (1967); Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936). For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, [16] we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important ****565** by the decisionmaker strongly favor a decision contrary to the one reached. [17]

16 See, e. g., Progress Development Corp. v. Mitchell, 286 F.2d 222 (C.A.7 1961) (park board allegedly condemned plaintiffs' land for a park upon learning that the homes plaintiffs were erecting there would be sold under a marketing plan designed to assure integration); Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108 (C.A.2 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971) (town declared moratorium on new subdivisions and rezoned area for parkland shortly after learning of plaintiffs' plans to build low income housing). To the extent that the decision in Kennedy Park Homes rested solely on a finding of discriminatory impact, we have indicated our disagreement. Washington v. Davis, supra, 426 U.S., at 244-245, 96 S.Ct., at 2050.

17 See Dailey v. City of Lawton, 425 F.2d 1037 (C.A.10 1970). The plaintiffs in Dailey planned to build low-income housing on the site of a former school that they had purchased. The city refused to rezone the land from PF, its public facilities classification, to R-4, high-density residential. All the surrounding area was zoned R-4, and both the present and the former planning director for the city testified that there was no reason "from a zoning standpoint" why the land should not be classified R-4. Based on this and other evidence, the Court of Appeals ruled that "the record sustains the (District Court's) holding of racial motivation and of arbitrary and unreasonable action." Id., at 1040.

***268** The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege. See Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); United States v. Nixon, 418 U.S. 683, 705,

94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974); 8 J. Wigmore, Evidence s 2371 (McNaughton rev.ed. 1961). [18]

18 This Court has recognized, ever since Fletcher v. Peck, 6 Cranch 87, 130-131, 3 L.Ed. 162 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore "usually to be avoided." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971). The problems involved have prompted a good deal of scholarly commentary. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif.L.Rev. 341, 356-361 (1949); A. Bickel, The Least Dangerous Branch 208-221 (1962); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Brest, supra, n. 12.

The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us.

IV

This case was tried in the District Court and reviewed in the Court of Appeals before our decision in Washington v. Davis, supra. The respondents proceeded on the erroneous theory that the Village's refusal to rezone carried a racially discriminatory effect and was, without more, unconstitutional. But both courts below understood that at least part of their function was to examine the purpose underlying the decision. ***269** In making its findings on this issue, the District Court noted that some of the opponents of Lincoln Green who spoke at the various hearings might have been motivated by opposition to minority groups. The court held, however, that the evidence "does not warrant the conclusion that this motivated the defendants." 373 F.Supp., at 211.

On appeal the Court of Appeals focused primarily on respondents' claim that the Village's buffer policy had not been consistently applied and was being invoked with a strictness here that could only demonstrate some other underlying motive. The court concluded that the buffer policy, though not always applied with perfect consistency, had on several occasions formed the basis for the Board's decision to deny other rezoning proposals. "The evidence does not necessitate a finding that Arlington Heights administered this policy in a discriminatory manner." 517 F.2d, at 412. The Court of Appeals therefore approved the District Court's findings concerning the Village's purposes in denying rezoning to MHDC.

We also have reviewed the evidence. The impact of the Village's decision does arguably bear more heavily on racial minorities. Minorities constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green. But there is little about the sequence of ****566** events leading up to the decision that would spark suspicion. The area around the Viatorian property has been zoned R-3 since 1959, the year when Arlington Heights first adopted a zoning map. Single-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use. The rezoning request progressed according to the usual procedures. [19] The Plan Commission even scheduled two additional ***270** hearings, at least in part to accommodate MHDC and permit it to supplement its presentation with answers to questions generated at the first hearing.

19 Respondents have made much of one apparent procedural departure. The parties stipulated that the Village Planner, the staff member whose primary responsibility covered zoning and planning matters, was never asked for his written or oral opinion of the rezoning request. The omission does seem curious, but respondents failed to prove at trial what role the Planner customarily played in rezoning decisions, or whether his opinion would be relevant to respondents' claims.

The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the Village's rezoning decisions. There is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity. The Village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case. Finally, MHDC called one member of the Village Board to the stand at trial. Nothing in her testimony supports an inference of invidious purpose. [20]

20 Respondents complain that the District Court unduly limited their efforts to prove that the Village Board acted for discriminatory purposes, since it forbade questioning Board members about their motivation at the time they cast their votes. We perceive no abuse of discretion in the circumstances of this case, even if such an inquiry into motivation would otherwise have been proper. See n. 18, supra. Respondents were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision. In light of respondents' repeated insistence that it was effect and not motivation which would make out a constitutional violation, the District Court's action was not improper.

In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. [21] ***271** This conclusion ends the constitutional inquiry. The court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.

21 Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing. See Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471.

V

Respondents' complaint also alleged that the refusal to rezone violated the Fair Housing Act of 1968, 42 U.S.C. s 3601 et seq. They continue to urge here that a zoning decision made by a public body may, and that petitioners' action did, violate s 3604 or s 3617. The Court of Appeals, however, proceeding in a somewhat unorthodox fashion, did not decide the statutory question. We remand the case for further ****567** consideration of respondents' statutory claims.

Reversed and remanded.

Mr. Justice STEVENS took no part in the consideration or decision of this case.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, concurring in part and dissenting in part.

I concur in Parts I-III of the Court's opinion. However, I believe the proper result would be to remand this entire case to the Court of Appeals for further proceedings consistent with Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and today's opinion. The Court of Appeals is better situated ***272** than this Court both to reassess the significance of the evidence developed below in light of the standards we have set forth and to determine whether the interests of justice require further District Court proceedings directed toward those standards.

Mr. Justice WHITE, dissenting.

The Court reverses the judgment of the Court of Appeals because it finds, after re-examination of the evidence supporting the concurrent findings below, that "(r)espondents . . . failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." Ante, p. 566. The Court reaches this result by interpreting our decision in Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and applying it to this case, notwithstanding that the Court of Appeals rendered its decision in this case before Washington v. Davis was handed down, and thus did not have the benefit of our decision when it found a Fourteenth Amendment violation.

The Court gives no reason for its failure to follow our usual practice in this situation of vacating the judgment below and remanding in order to permit the lower court to reconsider its ruling in light of our intervening decision. The Court's articulation of a legal standard nowhere mentioned in Davis indicates that it feels that the application of Davis to these facts calls for substantial analysis. If this is true, we would do better to allow the Court of Appeals to attempt that analysis in the first instance. Given that the Court deems it necessary

to re-examine the evidence in the case in light of the legal standard it adopts, a remand is especially appropriate. As the cases relied upon by the Court indicate, the primary function of this Court is not to review the evidence supporting findings of the lower courts. See, e. g., Wright v. Rockefeller, 376 U.S. 52, 56-57, 84 S.Ct. 603, 605, 11 L.Ed.2d 512 (1964); Akins v. Texas, 325 U.S. 398, 402, 65 S.Ct. 1276, 1278, 89 L.Ed. 1692 (1945). ***273** A further justification for remanding on the constitutional issue is that a remand is required in any event on respondents' Fair Housing Act claim, 42 U.S.C. s 3601 et seq., not yet addressed by the Court of Appeals. While conceding that a remand is necessary because of the Court of Appeals' "unorthodox" approach of deciding the constitutional issue without reaching the statutory claim, ante, at 566, the Court refuses to allow the Court of Appeals to reconsider its constitutional holding in light of Davis should it become necessary to reach that issue.

Even if I were convinced that it was proper for the Court to reverse the judgment below on the basis of an intervening decision of this Court and after a re-examination of concurrent findings of fact below, I believe it is wholly unnecessary for the Court to embark on a lengthy discussion of the standard for proving the racially discriminatory purpose required by Davis for a Fourteenth Amendment violation. The District Court found that the Village was motivated "by a legitimate desire to protect property values and the integrity of the Village's zoning plan." The Court of Appeals accepted this finding as not clearly erroneous, and the Court quite properly refuses to overturn it on review here. There is thus no need for this Court to list various "evidentiary sources" or "subjects of proper inquiry" in determining whether a racially discriminatory purpose existed.

****568** I would vacate the judgment of the Court of Appeals and remand the case for consideration of the statutory issue and, if necessary, for consideration of the constitutional issue in light of Washington v. Davis.

All Citations

429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450

134 Ohio St.3d 221
Supreme Court of Ohio.

WILSON et al.
v.
KASICH, Governor, et al.

No. 2012–0019.
|
Submitted April 24, 2012.
|
Decided Nov. 27, 2012.

Synopsis

Background: Electors brought original action in the Supreme Court for declaration that Apportionment Board's reapportionment plan was invalid and failed to comply with constitutional provision that governed decennial apportionment of districts in the General Assembly or with the Open Meetings Law. Electors also sought injunction preventing the board members from calling, holding, supervising, administering, or certifying any elections under the plan. The Supreme Court, O'Donnell, J., 131 Ohio St.3d 249, 963 N.E.2d 1282, found that it did not have jurisdiction over the open meetings claim, and that laches barred electors claims to the extent they contested apportionment for the upcoming election.

Holdings: Subsequently, the Supreme Court, O'Donnell, J., held that:

Apportionment Board was not precluded from considering political factors in drafting reapportionment plan for house and senate districts;

the four constitutional provisions that governed the establishment of boundary lines in compact house districts composed of contiguous territory were coequal, and thus, the Apportionment Board was not required to correct a violation of one section by violating another;

the Board's decision not to adopt prior house district boundaries did not constitute a violation of constitutional section that provided that when making a new apportionment district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section that governed the permitted deviation in the population of a house district; and

two alternative apportionment plans drafted by electors' expert were insufficient to establish beyond a reasonable doubt that the plan adopted by the Apportionment Board was invalid and failed to comply with constitutional provisions that governed decennial apportionment of districts in the General Assembly or with the Open Meetings Law.

Relief denied.

Pfeifer, J., filed dissenting opinion, in which O'Connor, C.J., concurred.

McGee Brown, J., filed dissenting opinion, in which O'Connor, C.J., concurred.

****816 *221 SYLLABUS OF THE COURT**

1. The Ohio Constitution does not mandate political neutrality in the reapportionment of house and senate districts, but partisan considerations cannot prevail over the nonpartisan requirements set forth in Article XI.

****817** 2. The burden of proof on one challenging the constitutionality of an apportionment plan is to establish that the plan is unconstitutional beyond a reasonable doubt. In the absence of evidence to the contrary, we presume that the apportionment board properly performed its duties in a lawful manner. (*State ex rel. Skaggs v. Brunner,* 120 Ohio St.3d 506, 2008-Ohio-6333, 900 N.E.2d 982, ¶ 51, and *State ex rel. Speeth v. Carney,* 163 Ohio St. 159, 186, 126 N.E.2d 449 (1955), applied).

3. When coequal provisions of Article XI of the Ohio Constitution are irreconcilable, the apportionment board has the duty to choose the proper course, and this court will not order it to correct one constitutional violation by committing another. (*Voinovich v. Ferguson,* 63 Ohio St.3d 198, 586 N.E.2d 1020 (1992), followed.)

4. The Ohio Constitution, Article XI, Section 7(D) is coequal with Article XI, Sections 7(A), (B), and (C), and the court will not order the apportionment board to correct a violation of Sections 7(A), (B), and (C) by violating Section 7(D).

Attorneys and Law Firms

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Michael DeWine, Attorney General, and Richard N. Coglianese, Michael J. Schuler, and Erin Butcher–Lyden, Assistant Attorneys General, for respondent Secretary of State Jon Husted.

Opinion

O'DONNELL, J.

{¶ 1} The Ohio Constitution provides for an apportionment board consisting of the "governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member." Ohio Constitution, Article XI, Section 1. It further charges the board with the responsibility to draw the district boundaries, *id*., and vests the Ohio Supreme Court with "exclusive, original jurisdiction in all cases arising under this Article," *id*. at Section 13. Apportionment is "primarily a political and legislative process," *Gaffney v. Cummings,* 412 U.S. 735, 749, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973), and as a result, both courts and scholars have universally agreed that politics cannot be divorced from the process.

{¶ 2} The issue we confront in this original action challenging the decennial apportionment of districts in the General Assembly is whether the plan adopted by the apportionment board complies with the Ohio Constitution, Article XI, Sections 7 and 11. Because relators failed to rebut the presumed constitutionality accorded the 2011 apportionment plan by establishing that the plan is unconstitutional beyond a reasonable doubt, we deny their ****818** request for declaratory and injunctive relief.

***223 Facts**

{¶ 3} The 2011 Ohio Apportionment Board consisted of respondents, Governor John Kasich, Auditor David Yost, Secretary of State Jon Husted, and Senate President Thomas Niehuas, who are members of the Republican Party, and House Minority Leader Armond Budish, a member of the Democratic Party. The board has the constitutional authority to apportion the districts for members of the General Assembly. Ohio Constitution, Article XI, Section 1.

{¶ 4} The board's joint secretaries prepared an apportionment plan and submitted it to the board. On September 28, 2011, the board voted four to one to approve an amended version of that plan, with the four Republican members of the board voting in favor and the lone Democratic member voting in opposition. On September 30, 2011, the board adopted another amendment to the secretaries' plan and approved the final plan with a four-to-zero vote, with respondents all voting in favor of the plan and the sole Democratic board member unable to attend the meeting.

{¶ 5} On January 4, 2012, relators, 36 electors living in various house districts as reapportioned by the Ohio Apportionment Board, filed this action under Article XI against respondents, four members of the apportionment board, but did not designate Armond Budish, the House Minority Leader, as a party. They primarily sought a declaration that the decennial apportionment plan adopted by respondents is invalid under Article XI and the Open Meetings Act and a prohibitory injunction preventing respondents from conducting elections using the state legislative districts set forth in the plan.

{¶ 6} Following the submission of responses, evidence, and briefs pursuant to a court-ordered accelerated schedule, on February 17, 2012, we dismissed relators' open-meetings claim for lack of subject-matter jurisdiction and denied relators' Article XI claims based on laches insofar as they attempted to challenge the use of the apportionment plan for the 2012 election cycle. *Wilson v. Kasich,* 131 Ohio St.3d 249, 2012-Ohio-612, 963 N.E.2d 1282, ¶ 8 (O'Donnell, J., dissenting in part) (urging that the court has an obligation to review apportionment matters expeditiously and asserting that a piecemeal resolution permitting electors to vote when the underlying apportionment is under constitutional attack is ill-advised precedent). Relators' remaining Article XI claims are still pending. *Id.*

{¶ 7} On March 2, 2012, we ordered the parties to file supplemental briefs addressing the following questions and invited them to address any other issues they deemed necessary:

> ***224** 1. Does the Supreme Court of Ohio have jurisdiction over this case when only four of the five members of the apportionment board have been named as respondents and the board has not been named as a party?
>
> 2. Does the Ohio Constitution mandate political neutrality in the reapportionment of house and senate districts?
>
> 3. What is relators' burden in showing that a reapportionment plan is unconstitutional?
>
> 4. Does tension exist among sections 3, 7, and 10 of Article XI of the Ohio Constitution, and if so, how are these sections to be harmonized?
>
> ****819** The parties are further permitted to address any other issues they deem necessary to this court's review in the supplemental briefs.

131 Ohio St.3d 1468, 2012-Ohio-848, 962 N.E.2d 800.

{¶ 8} After the parties filed their supplemental briefs, we denied relators' motion for leave to file an amended complaint to add Budish as a relator, 131 Ohio St.3d 1519, 2012-Ohio-1783, 965 N.E.2d 1002, and held oral argument.

{¶ 9} This cause is now before the court for its consideration of relators' remaining claims.

Legal Analysis

Jurisdiction

{¶ 10} As the parties now agree, neither the apportionment board nor board member Budish is a necessary and indispensable party to this action under Civ.R. 19. We do note, however, that it remains better practice in this type of action to name the board and all its members as parties. The Ohio Constitution, Article XI, Section 13 specifies that this court "shall have exclusive, original jurisdiction in all cases arising under this Article" and further notes that if any apportionment plan "made by the persons responsible for apportionment, by a majority of their number" is determined to be invalid by either this court or the United States Supreme Court, "the persons responsible for apportionment by a majority of their number" shall determine a new, constitutionally compliant plan; *see also Voinovich v. Ferguson,* 63 Ohio St.3d 198, 586 N.E.2d 1020 (1992) (court resolved declaratory-judgment action involving the constitutionality of an apportionment plan in which the apportionment board was not one of the named parties), and *State ex rel. Lehman v. DiSalle,* 173 Ohio St. 361, 182 N.E.2d 564 (1962) (court resolved mandamus action challenging state-senate apportionment plan although board was not named a party).

{¶ 11} Thus, the merits of relators' remaining claims are properly before us.

***225** *Political Neutrality*

{¶ 12} Pursuant to the Ohio Constitution, Article XI, Section 1, the five-member apportionment board is responsible for the apportionment of the state for members of the General Assembly. The board must establish the boundaries for each of the 99 house districts and 33 senate districts every ten years. The method of apportionment of the state for members of the General Assembly is determined by using a ratio of representation, which is calculated by dividing the whole population of the state, as determined by the federal decennial census, by 99 for the house and by 33 for the senate. Ohio Constitution, Article XI, Section 2. The population of each house and senate district must be substantially equal to the

applicable ratio of representation, and in no event shall any district contain a population of less than 95 percent or more than 105 percent of the pertinent ratio. Ohio Constitution, Article XI, Sections 3 and 4. Each house district is entitled to a single representative, and each senate district is entitled to a single senator. Ohio Constitution, Article XI, Section 5.

{¶ 13} In assessing relators' Article XI claims, we must initially determine whether these provisions mandate political neutrality in the reapportionment process. " 'Generally speaking, in construing the Constitution, we apply the same rules of construction that we apply in construing statutes.' " *Smith v. Leis,* 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 57, quoting *State v. Jackson,* 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, ¶ 14. ****820** The court's paramount concern in statutory construction is the legislative intent in the statute's enactment, and to discern this intent, we read words and phrases in context according to the rules of grammar and common usage. *State ex rel. Mager v. State Teachers Retirement Sys. of Ohio,* 123 Ohio St.3d 195, 2009-Ohio-4908, 915 N.E.2d 320, ¶ 14. Consequently, our primary concern in construing Article XI is to determine the intent of the electorate in adopting the article, and to discern that intent, we must examine its text.

{¶ 14} The words used in Article XI do not explicitly require political neutrality, or for that matter, politically competitive districts or representational fairness, in the apportionment board's creation of state legislative districts. Unlike Ohio, some states specify in either constitutional or statutory language that no apportionment plan shall be drawn with the intent of favoring or disfavoring a political party. *See In re Senate Joint Resolution of Legislative Apportionment 1176,* 83 So.3d 597, 615 (Fla.2012) fn. 19, and the state constitutions and statutes cited therein. Therefore, Article XI does not prevent the board from considering partisan factors in its apportionment decision.

{¶ 15} Nevertheless, as relators emphasize in their supplemental brief, and as respondents acknowledge in their supplemental response brief, political considerations cannot override the requirements of Article XI. Other states have reached ***226** this same conclusion regarding redistricting in their states. *See Holt v. 2011 Legislative Reapportionment Comm.,* 38 A.3d 711, 745 (Pa.2012) ("It is true, of course, that redistricting has an inevitably legislative, and therefore an inevitably political, element; but, the constitutional commands and restrictions on the process exist precisely as a brake on the most overt of potential excesses and abuse"); *In re Reapportionment of the Colorado Gen. Assembly,* —— P.3d ——, ——, 2011 WL 5830123, *3 (Colo.2011) ("Other nonconstitutional considerations, such as the competitiveness of a district, are not per se illegal or improper; however, such factors may be considered only after all constitutional criteria have been met"); *In re Legislative Districting of the State,* 370 Md. 312, 370, 805 A.2d 292 (2002) ("The constitution 'trumps' political considerations. Politics or non-constitutional considerations never 'trump' constitutional requirements").

{¶ 16} Therefore, the Ohio Constitution does not mandate political neutrality in the reapportionment of house and senate districts, but partisan considerations cannot prevail over the requirements set forth in Article XI. As long as the 2011 apportionment plan satisfied the constitutional requirements set forth in Article XI, respondents were not precluded from considering political factors in drafting it. *See Davis v. Bandemer,* 478 U.S. 109, 128, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (plurality opinion), quoting *Gaffney v. Cummings,* 412 U.S. 735, 752–753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (" 'Politics and political considerations are inseparable from districting and apportionment' "). And, here, political factors were considered only after the applicable constitutional and other legal requirements were met.

Presumption of Constitutionality and Burden of Proof

{¶ 17} In assessing the merits of relators' claims, we defer to the apportionment board's reasonable construction of the principles expressed in Article XI. *Voinovich v. Ferguson,* 63 Ohio St.3d 198, 586 N.E.2d 1020 (1992).

> "Hence, it is not sufficient in this proceeding that we might be of the ****821** opinion that we could make a better apportionment than has been made by the board: To authorize this court to interfere and command the board to make another apportionment, the apportionment made must so far violate the rules prescribed by the constitution, as to enable us to say, that what has been done is no apportionment at all, and should be wholly disregarded. If by any fair construction of the principles prescribed by the constitution for making an apportionment, the one made may be sustained, then it cannot be disregarded and a new one ordered.

> " * * * The very fact that the governor, auditor and secretary of state are consociated as a board to apportion the state for members of the ***227** general assemb[l]y, shows of itself, that, in the judgment of the framers of the constitution, in applying the rules prescribed, a discretion would have to be exercised, and those officers were selected to exercise it. Whether the discretion conferred on the board, 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."

Id. at 204, 586 N.E.2d 1020 (Holmes, J., concurring), quoting *State ex rel. Gallagher v. Campbell,* 48 Ohio St. 435, 436–437 and 442, 27 N.E. 884 (1891).

{¶ 18} In resolving claims contesting the constitutionality of a statute, we presume the constitutionality of the legislation, and the party challenging the validity of the statute bears the burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *See State ex rel. Zeigler v. Zumbar,* 129 Ohio St.3d 240, 2011-Ohio-2939, 951 N.E.2d 405, ¶ 24; *Ohio Grocers Assn. v. Levin,* 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E.2d 446, ¶ 11.

{¶ 19} Although a board's apportionment plan is not a statute, the same general principle applies in resolving relators' attack on the constitutionality of the apportionment plan as that which is applied to attacks on the constitutionality of statutes for the following reasons:

{¶ 20} First, Article XI was enacted to permit the apportionment board to perform the duty previously conferred on the General Assembly to apportion seats in the General Assembly. In effect, the apportionment board is performing what was previously a legislative function. *See Ely v. Klahr,* 403 U.S. 108, 114, 91 S.Ct. 1803, 29 L.Ed.2d 352 (1971) ("districting and apportionment are legislative tasks in the first instance"); *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Comm.,* 220 Ariz. 587, 208 P.3d 676 (2009) ¶ 19 ("Not only do enactments that carry the force of law traditionally originate in the legislature, but the process of redistricting is itself traditionally viewed as a legislative task").

{¶ 21} Second, as with legislation, a presumption of validity attaches to the apportionment board's adopted apportionment plan. *See Gallagher,* 48 Ohio St. at 437, 27 N.E. 884 (apportionment board is vested with discretion to adopt decennial apportionment plan, and "[i]f by any fair construction of the principles prescribed by the constitution for making an apportionment, ****822** the one made may be sustained, then it cannot be disregarded and a new one ordered"). " '[I]n the absence of evidence to the contrary, public officers, administrative officers and public authorities, within the limits of the jurisdiction conferred upon them by ***228** law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully.' " *State ex rel. Skaggs v. Brunner,* 120 Ohio St.3d 506, 2008-Ohio-6333, 900 N.E.2d 982, ¶ 51, quoting *State ex rel. Speeth v. Carney,* 163 Ohio St. 159, 186, 126 N.E.2d 449 (1955).

{¶ 22} Third, because the people of Ohio placed apportionment authority in the hands of the board, the apportionment plan should be accorded the same, if not greater, consideration as a statute enacted by the General Assembly. It is logical, therefore, to require relators to rebut the plan's presumed constitutionality by proving beyond a reasonable doubt that the apportionment plan is unconstitutional.

{¶ 23} Finally, this standard comports with the standard applied by other state supreme courts in resolving constitutional challenges to a reapportionment plan. *See Parella v. Montalbano,* 899 A.2d 1226, 1232–1233 (R.I.2006) (challengers to state legislative for existing redistricting statute had the burden of proving that the statute was unconstitutional beyond a reasonable doubt); *Logan v. O'Neill,* 187 Conn. 721, 729–730, 448 A.2d 1306 (1982) (applying the same burden of proof to a reapportionment plan even though it was not a statute—"Although, here, the legislative action being challenged is not a statute because it is not subject to the approval of the governor, it is entitled to at least the same judicial respect as a statute"); *McClure v. Secy. of the Commonwealth,* 436 Mass. 614, 622, 766 N.E.2d 847 (2002) (plaintiffs challenging constitutionality of legislative redistricting plan could not prevail in the case unless they established beyond a reasonable doubt that it is impossible by any reasonable construction to interpret the redistricting statute in harmony with the state constitution); *In re Wolpoff,* 80 N.Y.2d 70, 78, 587 N.Y.S.2d 560, 600 N.E.2d 191 (1992) ("A strong presumption of constitutionality attaches to the

redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional" only when it is shown to be unconstitutional beyond a reasonable doubt).

{¶ 24} Consequently, the burden of proof on one challenging the constitutionality of an apportionment plan is to establish that the plan is unconstitutional beyond a reasonable doubt. In the absence of evidence to the contrary, we presume that the apportionment board properly performed its duties in a lawful manner. With this burden of proof providing the framework for our analysis, we next address relators' claims.

Ohio Constitution, Article XI, Sections 3, 7, and 10

{¶ 25} Relators assert that the board's apportionment plan violates the Ohio Constitution, Article XI, Sections 7 and 11. To assist this court in resolving this claim, the parties provided supplemental briefs on whether tension exists among ***229** Sections 3, 7, and 10 of Article XI, and if so, how these sections could be harmonized.

{¶ 26} As noted previously, we apply the same rules of construction that we apply in construing statutes to interpret the meaning of constitutional provisions. *State ex rel. Colvin v. Brunner,* 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 43. We must first review the words and phrases used. *Id.*

{¶ 27} The Ohio Constitution, Article XI, Section 3, provides: ****823**

> The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.

{¶ 28} The Ohio Constitution, Article XI, Section 7, provides:

> (A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.
>
> (B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.
>
> (C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.
>
> (D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

***230** {¶ 29} The Ohio Constitution, Article XI, Section 10, provides:

> The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:
>
> (A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.
>
> (B) Each county containing population between ninety and ninety-five per cent of the ratio or between

one hundred five and one hundred ten per cent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house ****824** of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts.

{¶ 30} In resolving the tension between these constitutional provisions, we note that Article XI of the Ohio Constitution vests the apportionment board with considerable discretion in formulating an appropriate plan. *See* Ohio Constitution, Article XI, Section 3 (requiring the population of each house district to be "*substantially* equal to the ratio of representation" [emphasis added]); Article XI, Section 7(A) (requiring house district boundary lines to be drawn so as to delineate an area that contains one or more whole counties "[t]o the *extent consistent* with the requirements of section 3" [emphasis added]); Article XI, Section 7(B) (requiring that house districts be formed by combining the areas of governmental units in the order specified where Section 3 population requirements "cannot *feasibly* be attained" by forming a district from a whole county or counties [emphasis added]); Article XI, Section 7(C) (requiring the division of only one governmental unit in the order specified when the Section 3 population requirements "cannot *feasibly* be attained" by combining the areas of governmental units in accordance with Section 7(B) [emphasis added]); ***231** Article XI, Section 7(D) (requiring the adoption of district boundaries established by the preceding apportionment "to the *extent reasonably consistent* " with the Section 3 population requirements [emphasis added]).

{¶ 31} This court does not sit as a super apportionment board to determine whether a plan presented by the relators is better than the plan adopted by the board. Instead, we determine whether the board acted within the broad discretion conferred upon it by the provisions of Article XI when it adopted its plan. As respondents observe, whether relators have presented a "better" apportionment plan is irrelevant in determining whether relators have met their burden to establish that the board's September 30, 2011 apportionment plan is unconstitutional. The role of a supreme court in considering constitutional challenges to an apportionment plan is restricted to determining whether relators have met their burden to prove that the plan adopted by the board is unconstitutional beyond a reasonable doubt. *See State ex rel. Cooper v. Tennant,* 229 W.Va. 585, 730 S.E.2d 368 (2012), paragraph twelve of the syllabus ("The only role of the Supreme Court of Appeals of West Virginia in determining whether a state legislative redistricting plan is constitutional is to assess the validity of the particular plan adopted by the Legislature under both federal and state constitutional principles, rather than to ascertain whether a better plan could have been designed and adopted"); *Wilson v. State ex rel. State Election Bd.,* 270 P.3d 155, ¶ 1 (Okla.2012) (litigant's mere statement that his redistricting plan is better than the plan passed by the state legislature and signed by the governor was insufficient to support claim that the plan was invalid); *Arizona Minority Coalition,* 220 Ariz. 587, 208 P.3d 676, at ¶ 46 ("the fact that a 'better' [redistricting] plan exists does not establish that this plan lacks a reasonable basis").

{¶ 32} In fulfilling our limited role, we read together the constitutional provisions that are in pari materia, and we attempt to give full application to every ****825** part of each of them unless they are irreconcilable and in hopeless conflict. *See Smith v. Leis,* 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 57. If there is an irreconcilable conflict, the special provision prevails over the general provision, unless the general provision was adopted later and the manifest intent is that the general provision prevail. *Summerville v. Forest Park,* 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 26–27.

{¶ 33} But if the sections are coequal—that is, if neither is more specific and both were adopted at the same time—then the apportionment board is empowered to apply either one of them. *Voinovich,* 63 Ohio St.3d at 200, 586 N.E.2d 1020. Consequently, when coequal provisions of Article XI of the Ohio Constitution are irreconcilable, the apportionment board has the duty to choose the proper course, and this court will not order it to correct one constitutional violation by committing another. *Id.*

***232** {¶ 34} One of the main considerations of the joint secretaries in formulating their proposed plan was preserving the boundaries of existing legislative districts, which is consistent with the requirement of Section 7(D). Moreover, apportionment boards have historically treated the division of noncontiguous local governmental units as not

constituting a violation of Sections 7(A), (B), or (C). In 1981, the apportionment board did not count 16 divisions of noncontiguous governmental units as divisions for purposes of Article XI; in 1991, the apportionment board did not count 25 such divisions; and in 2001, the apportionment board did not count 34 of these divisions. The board considered the division of noncontiguous governmental units as having been accomplished by local officials through annexation rather than by the board through apportionment. This practice of not counting divisions of noncontiguous governmental units has been followed by apportionment boards that have had both Democratic and Republican majorities. Additionally, comparison between the 2011 and 2001 apportionment plans indicates that the number of divisions of counties in both plans is comparable (74 for the 2011 apportionment plan and 73 for the 2001 apportionment plan).

{¶ 35} In fact, by retaining district boundaries similar to those in the previous apportionment plan—and thereby enhancing representational continuity for district residents—the board's plan is more compliant with Section 7(D) than the alternative plan that was timely submitted to the apportionment board by the Joint Democratic Caucuses or, for that matter, the alternative plans submitted by relators' expert, Professor Michael McDonald.

{¶ 36} Relators argue that the board erred in relying on Section 7(D) to justify violations of Sections 7(A), (B), and (C) because Section 7(D) is subordinate to the other subsections. They claim that because Section 7(D) is the last subsection, it is also last in priority.

{¶ 37} A review of the plain text of Section 7, however, dispels that contention. Sections 7(A), (B), and (C) are interconnected so that if the Section 3 population requirements cannot feasibly be attained by drawing the line according to Section 7(A), then Section 7(B) is followed, and if they cannot feasibly be attained by following Section 7(B), then Section 7(C) is followed. Section 7(D), however, is not phrased in a manner that subordinates it to Sections 7(A), (B), and (C). Instead, Section 7(D) is phrased to apply broadly to the board's "new apportionment" and, like Sections 7(A), (B), and (C), is governed by the population requirements of Section 3. There is no language suggesting that Section 7(D) may be followed only if Sections (A), (B), and (C) are inapplicable.

****826** {¶ 38} Therefore, the Ohio Constitution, Article XI, Section 7(D) is coequal with Article XI, Sections 7(A), (B), and (C), and in accordance with *Voinovich,* 63 Ohio St.3d at 200, 586 N.E.2d 1020, the court will not order the apportionment ***233** board to correct a violation of Sections 7(A), (B), and (C) by violating Section 7(D).

{¶ 39} Relators next assert that even if Section 7(D) is coequal with Sections 7(A), (B), and (C), that fact does not justify respondents' alteration of previous district boundaries from the 2001 apportionment plan. That is, relators contend that pursuant to Section 7(D), "if a prior district's population is 'reasonably consistent with the requirements of Section 3,' then the 'district boundaries established by the preceding apportionment shall be adopted.' "

{¶ 40} But once again, relators ignore the plain text of Section 7(D), which provides, "In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted *to the extent reasonably consistent* with the requirements of section 3 of this Article." (Emphasis added.) In essence, relators' interpretation replaces the phrase, "to the extent"—a phrase that vests the apportionment board with discretion—with the conditional term "if." But this interpretation changes the meaning of Section 7(D), which we cannot do. *See State ex rel. Russo v. McDonnell,* 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145, ¶ 50 (in construing statutes, court cannot add or delete language); *State ex rel. LetOhioVote.org v. Brunner,* 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 49 (courts are not authorized to add exceptions that are not contained within the express language of constitutional provisions).

{¶41} Therefore, the Ohio Constitution vests discretion in the apportionment board to adopt the prior district's boundaries "to the extent reasonably consistent" with the Section 3 population requirements, and this discretionary language confers the authority on the apportionment board to adopt district boundaries that are not identical to those used in the prior apportionment.

{¶ 42} Relators' claims focus on the board's divisions of governmental units. Because those divisions were warranted by both the bipartisan historical practice of prior apportionment boards and the Section 7(D) requirement of keeping boundaries similar to those used in the prior apportionment, we will not order respondents to correct the alleged violations of Sections 7(A), (B), and (C) by committing a violation of Section 7(D). Similarly, given the discretion accorded respondents under Section 7(D)

and the related provisions, relators have not established by proof beyond a reasonable doubt that respondents' purported failure to use the exact same boundary lines as the 2001 apportionment plan for a few districts constituted a violation of that section.

Relators' Evidence

{¶ 43} Relators primarily rely on the two alternative apportionment plans of their expert, Professor McDonald, to meet their heavy burden of proof in this ***234** special proceeding. For the following reasons, however, these alternative plans are insufficient to carry that burden.

{¶ 44} First, they appear to be based on the same flawed interpretation of Section 7(D) advocated by relators.

{¶ 45} Second, as previously discussed, whether a litigant has presented a "better" apportionment plan is irrelevant to the court's determination of whether the plan adopted by the apportionment board is constitutional. *See Cooper,* 730 S.E.2d 368, at paragraph twelve of the syllabus; ****827** *Arizona Minority Coalition,* 220 Ariz. 587, 208 P.3d 676, at ¶ 46.

{¶ 46} Third, Professor McDonald's affidavits are replete with conclusory statements that lack specific factual support. For example, he states that the apportionment board's plan "split over 250 political subdivisions," while each of his alternative plans "divides less than 100 subdivisions," but he offers no detailed explanation of what he counted as a split or division, and he does not enumerate each of the subdivisions split by the various plans. In the absence of more detailed factual support, we are left to wonder about the analytical choices made by relators' expert and the concomitant viability of his conclusions. And insofar as relators argue that Professor McDonald's plans contain many fewer divisions of governmental units than are contained in the board's plan and do not violate any other constitutional provisions, his affidavits simply contain insufficient evidence to establish the truth of their assertion. Indeed, from his affidavits, it is unclear whether Professor McDonald even considered all the applicable criteria, unlike respondents, who established that they had considered all the applicable criteria in formulating and adopting their plan. Notably, in an unrelated case, a federal district court recently held that Professor McDonald's expert opinion was unreliable because, among other reasons, he failed to consider all the applicable principles that guide redistricting. *Backus v. South Carolina,* 857 F.Supp.2d 553, 562 (D.S.C.2012). His conclusory opinion here appears to be similarly defective.

{¶ 47} Finally, relator claims that courts have regularly relied on a litigant's alternative plans in assessing the validity of an apportionment plan, citing *Holt,* 38 A.3d 711, *Twin Falls Cty. v. Idaho Comm. on Redistricting,* 152 Idaho 346, 271 P.3d 1202 (2012), and *In re Reapportionment of the Colorado Gen. Assembly,* —— P.3d ——, 2011 WL 5830123. But in each of these cases, the alternative plans reviewed by the courts were timely submitted to the state's apportionment body for its review in the process of adopting a plan. *Holt* at 753–754 and fn. 32; *Twin Falls,* at 1206–1207; *Reapportionment of the Colorado Gen. Assembly* at ——, 2011 WL 5830123 at *3–4. By contrast, both of Professor McDonald's alternate apportionment plans were not timely submitted to the apportionment board, but were instead submitted as evidence in a case filed more than three months after the board approved its 2011 plan.

***235 Conclusion**

{¶ 48} The role of this court in adjudicating challenges to apportionment is limited: we consider the plan against the requirements of the United States and Ohio Constitutions, as interpreted by federal and state decisional law. In making our determination, we accord the apportionment board the deference it is afforded by the constitution in attempting to take into account various federal and state requirements by placing the burden on one challenging an apportionment plan to establish its unconstitutionality beyond a reasonable doubt. Relators have failed to adduce sufficient, credible proof to carry this heavy burden. Therefore, relators are not entitled to a declaration that the 2011 apportionment plan is unconstitutional or a prohibitory injunction to prevent elections from being conducted in accordance with that plan, and we accordingly deny the requested relief.

Relief denied.

WILLAMOWSKI, LANZINGER, and CUPP, JJ., concur.

O'CONNOR, C.J., and PFEIFER and McGEE BROWN, JJ., dissent.

****828** JOHN R. WILLAMOWSKI, J., of the Third Appellate District, sitting for LUNDBERG STRATTON, J.

PFEIFER, J., dissenting.

{¶ 49} There will always be tension between political power and the constraints of the Ohio Constitution when a new map for the boundaries of legislative districts is drawn. Ohio voters Charles Wilson and others have put the question of constitutionality in play by bringing this action. Article XI, Section 13 of the Ohio Constitution places on this court the duty to answer that question without deference to either party. There is no basis in the Ohio Constitution, in fairness, in justice, or in political reality for this court to cloak the apportionment board's actions with a presumption of constitutionality that can be overcome only by proof beyond a reasonable doubt. In doing so, the majority opinion is just plain wrong. It relegates this court to the status of a pawn in a high-stakes political chess match.

{¶ 50} The drafters of Article XI fully understood that they were placing the difficult duty of map drawing in the hands of the state's top partisan office holders, knowing that they would draw the districts to their partisan advantage, limited only by federal law and the Ohio Constitution. Likewise, they understood that when the board's work was done, questions of constitutional compliance could arise and, if they did, they should be answered directly by this court. A ***236** process for the board to correct any constitutional violations found by this court or the United States Supreme Court is also detailed in Article XI, Section 13.

{¶ 51} As we review the adopted maps, the evidence of the process that resulted in the maps, and alternative map choices, it must be with an effort to be strictly neutral in assessing the finished product of the adopted apportionment plan while keeping in mind a fair and normal reading of the constraints found in Article XI of our Constitution.

{¶ 52} Article XI of the Ohio Constitution is well organized and comprehensive in setting out the rules and process for apportionment. The makeup of the apportionment board is set out in Section 1. Determination of the population parameters for each legislative district is to be achieved by following a precise succession of chronological steps found in Sections 2, 3, 4, and 5. Section 6 establishes that the apportionment plan is to be revised after the completion of each federal decennial census.

{¶ 53} Section 7 controls the process to be followed by the apportionment board in mapping the boundary lines of House of Representative districts. The steps are defined in four paragraphs that make sense when read in normal progression, top to bottom. Sections 8 and 9 address issues not being contested in this litigation. Section 10 provides instruction for numbering House of Representative districts when the mapping process is completed.

{¶ 54} The question before us is this: Does the apportionment plan adopted by the board comply with the mandates of the Ohio Constitution? Our determination should not be influenced by evidence that persons who were tasked with drawing the boundaries sent self-promoting e-mails proclaiming success in drawing legislative boundaries that favor the political party controlling the board. That such an effort was undertaken should be presumed and is no more shocking than gambling in Rick's Cafe. Nor is it our function to choose an alternative apportionment plan. Alternative plans are useful, however, in assessing whether the adopted plan was designed to achieve compactness and minimization of splits of governmental units, as required ****829** by Article XI, Section 7 of the Ohio Constitution.

{¶ 55} Having reviewed the adopted plan and compared it with the submitted evidence, I reluctantly conclude that the constitutional challenge has merit. The board should be directed to reconvene pursuant to Section 13 for the purpose of adopting a revised plan that more nearly optimizes the mandates of Section 7 with respect to compactness and minimization of splits of governmental units. In her dissent, Justice McGee Brown has well documented many of the splits that should have been avoided. In total, 39 counties (out of 88) have been split 74 times. The lack of compactness of the current map is self-evident.

***237** {¶ 56} The majority, having reviewed the same evidence, concludes that the plan is constitutional. I agree with the majority opinion's implicit rejection of the board's principal argument supporting constitutionality: that Section 10, which relates to numbering of districts, somehow can be used to guide mapping. In order to justify its finding of constitutionality, the majority opinion expresses two conclusions of questionable legitimacy; these anchors of the majority opinion fail the tests of logic and fairness. First the majority opinion erects a nearly insurmountable barrier to a successful constitutional challenge by assigning to the board's actions a blanket presumption of constitutionality and requiring proof beyond a reasonable doubt to establish that

the plan fails to meet all constitutional requirements. Majority opinion, paragraph two of the syllabus.

{¶ 57} The two cites given by the majority opinion as authority for that standard stand for the proposition that public officials are presumed to have acted lawfully, not that the constitutionality of their work product can be overcome only by proof beyond a reasonable doubt. *See State ex rel. Skaggs v. Brunner,* 120 Ohio St.3d 506, 2008-Ohio-6333, 900 N.E.2d 982, ¶ 51, and *State ex rel. Speeth v. Carney,* 163 Ohio St. 159, 186, 126 N.E.2d 449 (1955). Proof beyond a reasonable doubt is typically necessary only in criminal cases. Such a high burden of proof in the current constitutional matter turns this court into a rubber stamp, not the guardian of the constitution that it is designed to be.

{¶ 58} Next, the majority adopts the board's secondary argument, concluding that Section 7(D) can subsume and override the express directives of Sections 7(A), 7(B), and 7(C) regarding the compactness of districts and the requirement to minimize splits. Section 7(D), properly interpreted, directs the board to follow the district lines of the prior apportionment where possible. But unless Section 7(D) is subservient to the paragraphs above it, a board could justify the adoption of an incumbent-protecting apportionment plan and forgo any effort to achieve compactness and minimize splits of governmental units. The majority's interpretation is illogical. Its reading of Section 7 undermines the long-accepted constitutional foundation of Ohio's apportionment process: legislative districts should be compact and respectful of the boundaries of governmental units.

{¶ 59} The majority opinion's conclusion could lead to an absurd result. Based on the majority opinion, provisions of a prior plan that are patently unconstitutional would be protected, possibly forever, by the dominion granted to Section 7(D) over the critically important Sections 7(A), 7(B), and 7(C).

{¶ 60} Remapping by the apportionment board would certainly bring no pleasure to the members of the General Assembly in either political party. All incoming House members and half of the incoming Senate ****830** members recently won elections in the newly drawn districts. Because of this plan's serial violations of ***238** the Section 7 constitutional mandate for compactness of legislative districts and minimization of governmental-unit splits, however, remapping is required.

{¶ 61} I dissent.

O'CONNOR, C.J., concurs in the foregoing opinion.

McGEE BROWN, J., dissenting.

{¶ 62} "The achieving of fair and effective representation for all citizens is * * * the basic aim of legislative apportionment." *Reynolds v. Sims,* 377 U.S. 533, 565–566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In 1967, the people of this state amended Article XI of the Ohio Constitution to provide exacting detail on how legislative districts are to be drawn. Article XI outlines at length the priority to be given to keeping counties and local-government units whole and keeping existing district lines. However, today the majority upholds a redistricting scheme that Article XI was specifically designed to prevent. By elevating Section 10 (prescribing procedure for creating house districts) over the clear mandates of Sections 3 (population mandates) and 7 (retaining whole counties and governmental units), the majority permits respondents to elevate political considerations over Article XI.

{¶ 63} In a Maryland case involving a redistricting plan, the highest court in that state noted that "[b]ecause it involves redrawing the lines of legislative districts, the process of reapportionment is an intensely political process. But it is also a legal one, for there are constitutional standards that govern both the process and the redistricting plan that results from it." *In re Legislative Redistricting of the State,* 370 Md. 312, 320, 805 A.2d 292 (2002). The statement applies equally to Ohio's reapportionment process. Although political considerations may affect the determination, they cannot control it in contravention of the specific standards set forth by the people of the state in Article XI.

The Recurring Apportionment Problem

{¶ 64} Relators claim that the apportionment plan adopted by respondents violates Article XI, Sections 7 and 11. These sections were adopted in 1967, and since their adoption, this court and federal courts have regularly addressed challenges concerning the apportionment plans adopted by the Ohio Apportionment Board following the decennial federal census. *See, e.g., Parker v. State,* 263 F.Supp.2d 1100 (S.D.Ohio 2003) (2001 apportionment plan); *Voinovich v. Ferguson,* 63 Ohio St.3d 198, 586 N.E.2d 1020 (1992) (1991 apportionment plan); *Quilter v. Voinovich,* 981 F.Supp. 1032 (N.D.Ohio 1997) (1991 apportionment plan); *Armour v. State,*

775 F.Supp. 1044 (N.D.Ohio 1991) (1981 apportionment plan).

***239** {¶ 65} Former United States Senator William L. Marcy once said that "to the victors belong the spoils of the enemy." http://www.bartleby. com/100/690.63.html. At the September 26, 2011 apportionment-board hearing, Auditor Dave Yost submitted for the record a portion of *A Columnist's View of Capitol Square,* written by Lee Leonard, which observes that in 1971, when Democrats controlled the apportionment board, they created legislative districts that resulted in their party's gaining control of both houses of the General Assembly, and that in 1981 and 1991, when Republicans controlled the board, they created legislative districts that eventually resulted in their controlling both houses of the General Assembly. *Id.* at 45-46.

{¶ 66} Consequently, neither party stands before this court with clean hands or intellectual purity. Each party has ****831** used the apportionment process for political gain with almost utter disregard for the dictates of Article XI.

General Principles

{¶ 67} Before turning to those matters upon which I disagree with the majority, I first note those matters with which I agree. I agree that we have jurisdiction over the merits of this case even though neither the apportionment board nor all of the board members are named as respondents. Ohio Constitution, Article XI, Section 13. I also agree with the general propositions specified in the syllabus concerning political neutrality; the initial burden of proof; the principle that when coequal Article XI provisions are irreconcilable, we will not order the apportionment board and its members to correct one constitutional violation by committing another; and the holding that Article XI, Section 7(D) is coequal with Article XI, Sections 7(A), (B), and (C).

{¶ 68} However, I respectfully dissent from the majority's implicit determination that the subordinate procedure set forth in Section 10 takes priority over Sections 7(A) through (D). In other words, I disagree that Section 10's procedure for creating house districts takes priority over Section 7's requirements for keeping whole counties and governmental units together.

{¶ 69} The 1967 amendment set forth a specific process for apportionment that would protect the integrity of governmental units by minimizing their division. By allowing respondents to elevate Section 10 over Section 7, the majority ensures that the apportionment process will become more political with each decennial plan.

Political Neutrality

{¶ 70} Although the text of Article XI does not specifically prohibit the use of political considerations in apportioning state legislative districts, the historical context of the constitutional apportionment provisions indicates that they were adopted to limit the importance of politics. As this court previously explained:

> ***240** Prior to the Constitution of 1851, the apportionments of legislative districts had been made by the General Assembly with the result that oftentimes political advantage was sought to be gained by the party in power. Accordingly Article XI was incorporated in the Constitution for the purpose of correcting the evils of former days by placing the power of apportionment in the hands of a board composed of the Governor, the Auditor of State and the Secretary of State and making the provisions self-acting.
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> * * *
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> The objective sought by the constitutional provisions was the prevention of gerrymandering. By creating a board of *ex officio* members and adopting self-acting provisions it was sought to place the function of apportionment in impartial hands and at the same time mark the way so that in the main at least the provisions of the Constitution would work automatically and the apportioning process ordinarily would be a mere matter of calculation.

State ex rel. Herbert v. Bricker, 139 Ohio St. 499, 508–509, 41 N.E.2d 377 (1942). *See also* Steinglass & Scarselli, *The Ohio State Constitution: A Reference Guide* 279 (2004) (Article XI "was included in the 1851 Constitution to prevent gerrymandering, a common practice in the first fifty years of statehood").

> ****832** The purpose of the people in enacting Article XI is clear. It was to place legislative apportionment in the hands of a separate board not subject to the control of the General Assembly, the board to be composed of representatives of the people, elected by the people and unconnected with the legislative branch of government.

State ex rel. King v. Rhodes, 11 Ohio St.2d 95, 99, 228 N.E.2d 653 (1967).

{¶ 71} Respondents claim that the foregoing precedent is no longer applicable because in 1967, Ohio amended Article XI to comply with the one-person-one-vote principle of cases like *Reynolds v. Sims,* 377 U.S. at 568, 84 S.Ct. 1362, 12 L.Ed.2d 506, and *Nolan v. Rhodes,* 378 U.S. 556, 84 S.Ct. 1906, 12 L.Ed.2d 1034 (1964).

{¶ 72} It is true that the 1967 amendment to Article XI eliminated many of the automatic and self-acting provisions that characterized the version contained in the 1851 Constitution and its 1903 amendment so that General Assembly districts could be apportioned on a substantially equal-population basis. But by no means ***241** did the new provisions harken a return to the old days of political gerrymandering that the Article was originally adopted to eliminate.

{¶ 73} Instead, the 1967 amendment set forth mandatory, nonpartisan criteria to be used by the apportionment board in reapportioning state legislative districts. *See, e.g.,* Article XI, Sections 3 (population of house districts), 4 (population of senate districts), 5 (single member for each district), and 7 (boundary lines for house districts).

{¶ 74} Furthermore, contrary to respondents' assertion, the 1967 amendment's inclusion of "partisanly-elected political official[s]" on the apportionment board did not contemplate a "political process by design" any more than did the 1851 version's inclusion of the governor, auditor, and secretary of state on the apportionment board.

{¶ 75} The 1967 amendment simply did not change the objective of Article XI—to prevent the political gerrymandering engendered by leaving the apportionment process entirely to the political party controlling the General Assembly. And to determine the soundness of the challenged apportionment plan, we "look not only to the letter of the constitutional provisions but to their spirit and purpose." *Herbert,* 139 Ohio St. at 508, 41 N.E.2d 377.

{¶ 76} In sum, then, while Article XI does not require political neutrality in the apportionment process, partisan considerations cannot prevail over the nonpartisan requirements set forth in Article XI.

Burden of Proof

{¶ 77} I agree with the majority that the initial burden of proof is on the party challenging the constitutionality of an apportionment plan to establish that the plan is unconstitutional beyond a reasonable doubt. And I agree that in the absence of evidence to the contrary, we presume that the apportionment board and its members performed their duties in a lawful manner.

{¶ 78} However, as the United States Supreme Court recently observed in a case upholding the individual mandate of the Patient Protection and Affordable Care Act, "[o]ur deference in matters of policy cannot * * * become abdication in matters of law." *Natl. Federation of Independent Business v. Sebelius,* ——U.S. ——, 132 S.Ct. 2566, 2579, 183 L.Ed.2d 450 (2012). I would hold that any presumed validity of the apportionment plan is rebutted when relators establish that the plan violates the provisions of Article XI of the Ohio Constitution. Under these circumstances, we must review the applicable constitutional ****833** provisions without deference to the apportionment board.

{¶ 79} Respondents claim that after proving that the plan is unconstitutional beyond a reasonable doubt, relators must establish beyond a reasonable doubt that the apportionment board also acted without a rational basis. This contention ***242** lacks merit. As relators note, if a plan is unconstitutional, it cannot be resuscitated by reliance on a nonconstitutional criterion, e.g., retention of an incumbent or political composition. Acting on such a factor would not be rational. *See In re Reapportionment of the Colorado Gen. Assembly,* —— P.3d ——, 2011 WL 5830123 (Colo.2011) at *3 ("Other nonconstitutional considerations, such as the competitiveness of a district, are not per se illegal or improper; however, such factors may be considered only after all constitutional criteria have been met").

{¶ 80} Moreover, one of the cases respondents cite for this proposition is *In re Reapportionment of Towns of Hartland,*

Windsor, & W. Windsor, 160 Vt. 9, 624 A.2d 323 (1993), but the Vermont Supreme Court noted in that case that "once petitioners have shown that the State has failed to meet constitutional or statutory standards or policies with regard to a specific part of the plan, the State then has the burden to show that satisfying those requirements was impossible because of the impermissible effect it would have had on other districts." *Id.* at 16, 624 A.2d 323. Other states have also shifted the burden of proof to the parties responsible for the apportionment plan to justify their departure from certain constitutional provisions once relators established that the plan is unconstitutional in some respect. *See In re Legislative Districting of the State,* 370 Md. at 368, 805 A.2d 292 (when apportionment plan raised sufficient issues with respect to its compliance with state constitutional requirements, court placed burden of proof on the state to justify the plan); *In re Reapportionment of Colorado Gen. Assembly,* 45 P.3d 1237, 1241 (Colo.2002) (court held that if an apportionment plan does not comply with the county-boundary requirement of the Colorado Constitution, the reapportionment commission must make an adequate factual showing that less drastic alternatives could not have satisfied the equal-population constitutional requirement); *In re Legislative Districting of Gen. Assembly of Iowa,* 193 N.W.2d 784, 791 (Iowa 1972) (state failed to sustain burden of proof to show why state legislative reapportionment plan could not comply with state constitution's compactness requirement).

{¶ 81} This approach is logical. The respondents who crafted and approved the apportionment plan are in the best position to know the basis for any noncompliance with Article XI.

{¶ 82} Therefore, I would hold that once relators make a prima facie showing beyond a reasonable doubt that respondents have violated a provision of Article XI of the Ohio Constitution, the burden of proof shifts to respondents to justify that violation based on the avoidance of a violation of another superior or coequal legal requirement.

Article XI, Sections 3, 7, and 10

{¶ 83} In our briefing order, we asked whether tension existed among Sections 3, 7, and 10 of Article XI of the Ohio Constitution, and if so, how these sections should be harmonized. 131 Ohio St.3d 1468, 2012-Ohio-848, 962 N.E.2d 800.

***243** {¶ 84} The plain language of the subsections in Section 7 establishes that Section 7 is subordinate to the population requirements of Section 3: Section 7(A) directs the apportionment board to draw the boundary lines of house districts to delineate an area "containing one or more ****834** whole counties" "[t]o the extent consistent with the requirements of section 3"; Section 7(B) directs the apportionment board to create districts by combining the areas of governmental units in the order specified "[w]here the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties [as prescribed in division (A)]"; Section 7(C) directs the apportionment board to divide only one governmental unit between two house districts in the order specified "[w]here the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section"; and finally, Section 7(D) directs the apportionment board to adopt the house-district boundaries established by the preceding apportionment "to the extent reasonably consistent with the requirements of section 3 of this Article." Consequently, there is no conflict—inherent or otherwise—between the requirements of Sections 3 and 7 because, by its very terms, Section 7 is subordinate to the population requirements of Section 3.

{¶ 85} Similarly, there is no conflict between Section 10 and Sections 3 and 7. The introductory language in Section 10 makes clear that the *substantive* standards set forth in Sections 3, 7, 8, and 9 govern the creation of house districts and that the *procedure* specified in Section 10 applies only insofar as it is consistent with those standards: "The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order *to the extent that such order is consistent with the foregoing standards*." (Emphasis added.) Ohio Constitution, Article XI, Section 10.

{¶ 86} Therefore, under the plain language of these sections, if there is a conflict, Section 3 prevails over Sections 7 and 10 and Section 7 prevails over Section 10.

{¶ 87} I agree with the majority that Sections 7(A) through (C) are coequal with Section 7(D). Sections 7(A) through (C) require that every house district be compact and contiguous and, to the extent it can do so and still meet the requirements of Section 3, that it contain one or more whole counties; and if the district cannot be made out of a whole county or counties

and still meet the requirements of Section 3, then it must be formed by combining the areas of local governmental units in the order specified in Section 7(B), and if the requirements of Section 3 cannot feasibly be attained by combining the areas of local governmental units, then they must be divided, giving preference for division as specified in Section 7(C), and only one local governmental unit may be divided ***244** between two districts. Section 7(D) requires that district boundaries established by the preceding apportionment be used to the extent reasonably consistent with the requirements of Section 3. Because Sections 7(A) through (C) are coequal with Section 7(D), when the sections cannot simultaneously be satisfied, the apportionment board may determine which of the provisions to follow. *See Voinovich,* 63 Ohio St.3d at 200, 586 N.E.2d 1020.

Respondents' Contentions

{¶ 88} Respondents contend that their apportionment plan should not be analyzed on the district-by-district basis set forth in relators' complaint and briefs. According to respondents, with whom the majority implicitly agrees, "the boundaries of districts created at the end of the [apportionment] process are greatly affected by decisions made in districts created earlier," so that any constitutional violations in the latter districts are within the board's discretionary authority to make. This claim—which equates to "because we have ****835** already violated the constitution, we can continue to violate the constitution"—lacks merit. The procedure in Section 10 is subordinate to the substantive constitutional requirements in Sections 3 and 7(A), (B), (C), and (D) of Article XI.

{¶ 89} Nor is there any merit in respondents' claim that the court should not consider Professor Michael McDonald's alternative plans because they were not presented to the board. The court is not determining whether respondents should have adopted one of the alternative plans. Instead, we are determining whether respondents complied with the applicable requirements of Article XI. Nothing in the Ohio Constitution or other applicable law prevents this court from considering all relevant evidence in that regard.

{¶ 90} Respondents also raise a host of justifications for their violations of various provisions of Article XI, including that they had no duty to minimize divisions of governmental units in adopting their apportionment plan. Their argument completely ignores the plain language of Sections 7(A), (B), and (C), which require minimal divisions to the extent possible without violating the population requirements of Section 3.

{¶ 91} Respondents further contend that they were justified in violating Article XI where they attempted to comply with Sections 3, 7(D), and 10. However, there is nothing in Section 3 that permits respondents to violate Sections 7(A), (B), and (C) to make the populations of districts more "substantially equal." Instead, if the board can make districts that comply with both Section 3 and Sections 7(A) through (C), they have a duty to do so. That is, respondents can violate Sections 7(A), (B), and (C) based on Section 3 only when complying with both sections is not feasibly attainable. Respondents' focus on Sections 7(D) and 10 completely ignores the requirements of Sections 7(A) through (C).

***245** {¶ 92} Section 7(D) does not—as respondents claim—give them license to change district borders any way they see fit in purported compliance with a requirement to keep a district's boundaries substantially similar to the district's previous boundary lines. Instead, as relators note, as long as the Section 3 requirements are met, Section 7(D) specifies that the district boundaries "shall be adopted." And if the Section 3 requirements are not met by the prior district, Section 7(D) does not require that the board adopt substantially similar boundary lines.

{¶ 93} The majority's interpretation of Section 7(D) authorizes innumerable violations of Sections 7(A), (B), and (C) by allowing unnecessary divisions of governmental units based on a nonexistent requirement that the boundaries of new districts be substantially similar to those in the preceding apportionment districts. By applying a malleable standard of substantial adherence to previous district lines, an apportionment board could condone a myriad of violations of Article XI to achieve partisan gain. The citizens of Ohio could not have intended this absurd result when they adopted Section 7(D). *State ex rel. LetOhioVote.org v. Brunner,* 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 50 (court has duty to construe constitutional provision to avoid unreasonable or absurd result).

Article XI, Section 7(A)

{¶ 94} Article XI, Section 7(A) specifies that "[t]o the extent consistent with the requirements of section 3 of this Article [requiring that the population of each house district be

substantially equal to the house's ratio of representation and in no event less than 95 percent nor more than 105 percent of the ratio], the boundary lines of districts shall be so drawn as to ****836** delineate an area containing one or more whole counties."

{¶ 95} Notwithstanding the clear language of this provision, relators have established that for several house districts in the apportionment plan adopted by the board, respondents divided counties when it appears it was unnecessary to do so to meet the population requirements of Article XI, Section 3. [1] In violation of Section 7(A), House Districts 70, 78, 84, 91, 94, and 95 were created by dividing certain counties when such divisions were not necessary to satisfy Section 3 population requirements. As the apportionment board's joint secretaries' own analysis of the board's plan establishes, the division of Holmes County for House District 70, Athens, Pickaway, and Muskingum Counties for House District 78, Auglaize and Shelby Counties for House District 84, Ross County for House District 91, Athens, Vinton, and Washington Counties for House District 94, and ***246** Washington County for House District 95 are not required by the applicable provisions of Article XI. And the alternative apportionment plans submitted by relators' expert, Professor McDonald, prove that an apportionment plan need not violate Section 7(A) by splitting these counties. [2]

1 Because relators have met their burden of proof for these violations, the burden should shift to respondents to show that the violations were necessary to comply with other superior or coequal sections.

2 I am not suggesting that respondents must adopt Professor McDonald's plan, but am merely pointing out that relators have met their burden in demonstrating that violating Section 7(A) was unnecessary.

{¶ 96} Respondents attempt to justify their division of these counties and concomitant violation of Section 7(A) by relying on Sections 10(C) and (D). But Sections 10(C) and (D) should not be applied if they conflict with Section 7(A). The introductory language in Section 10 makes clear that the substantive standards set forth in Sections 3, 7, 8, and 9 govern the creation of house districts and that the procedure provided in Section 10 applies only insofar as it is consistent with those standards. *See also The Ohio State Constitution: A Reference Guide* 286 ("section 10 prescribes the method for creating house districts *subject to* the population requirement of section 3 and *the preference for creating districts out of whole counties in sections 7–9* " [emphasis added]). Because Sections 10(C) and (D)—in the manner that respondents applied them here—are inconsistent with the application of Section 7(A) regarding House Districts 70, 78, 84, 91, 94, and 95, respondents cannot rely on Sections 10(C) and (D) to justify their violation of Section 7(A) in dividing the specified counties. Unlike the provisions at issue in *Voinovich,* 63 Ohio St.3d at 200, 586 N.E.2d 1020, Section 10 is not coequal with Section 7, and thus, respondents were not permitted to remedy the conflict by ignoring Section 7.

{¶ 97} For example, with regard to House District 70, respondents attempt to justify their plan's violation of Section 7(A) based on Section 7(D), citing paragraph 88 of Heather Mann's affidavit in support of this argument. But this paragraph from Mann's affidavit cites only Sections 10(C) and 10(D) and does not support respondents' claim that Section 7(D) required their split of Holmes County in creating the house district. [3]

3 In the interest of brevity, I do not address each of the violations alleged by relators but use House District 70 as an illustration of the apportionment plan's multiple violations of Section 7(A).

{¶ 98} On the record before this court, relators have established beyond a reasonable ****837** doubt that respondents violated Article XI, Section 7(A) by unnecessarily dividing the specified counties in House Districts 70, 78, 84, 91, 94, and 95.

Article XI, Sections 7(B) and (C)

{¶ 99} Article XI, Section 7(B) provides, "Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards." And under Article XI, Section 7(C), "Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of ***247** governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named."

{¶ 100} Respondents contend that their apportionment plan does not violate Sections 7(B) and 7(C), because Article XI does not require the apportionment board to put all noncontiguous portions of a governmental unit into one district. Thus, they claim that their plan divides only 15 governmental units. The board's plan defines a noncontiguous area as an area that is "legally or technically a portion of a geographic unit," but is "surrounded by other land-based geographic units." In formulating their plan, respondents determined that if a governmental unit was noncontiguous, the board could put its separate portions into different districts and not count this as a division of the governmental unit because the governmental unit had been divided by local officials through annexation. Respondents are correct in pointing out that previous apportionment boards followed this same logic, but they admit that this issue has never been resolved in litigation.

{¶ 101} For the following reasons, I disagree with respondents' contention that these divisions of governmental units do not count as divisions.

{¶ 102} First, the plain language of Sections 7(B) and (C) does not authorize differing treatment of contiguous and noncontiguous governmental units. These sections do not distinguish between contiguous and noncontiguous governmental units, including counties, townships, municipalities, cities, city wards, or villages, so the plain, broad language of these constitutional provisions must apply to both. *See State ex rel. Colvin v. Brunner,* 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 49 ("R.C. 3503.06 makes no distinction between entitlement to vote in person or by absentee ballot at an election, so its plain, broad language must apply to both"); *State ex rel. Ohio Democratic Party v. Blackwell,* 111 Ohio St.3d 246, 2006-Ohio-5202, 855 N.E.2d 1188, ¶ 14, quoting *Consumer Electronics Assn. v. Fed. Communications Comm.,* 347 F.3d 291, 298 (D.C.Cir.2003) ("As United States Supreme Court Chief Justice John G. Roberts Jr. previously observed in a unanimous opinion for the United States Court of Appeals for the District of Columbia Circuit, 'the Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application' ").

{¶ 103} Second, notwithstanding respondents' argument, "[c]ourts are not authorized to add exceptions that are not contained in the express language of ***248** these constitutional provisions." *State ex rel. LetOhioVote.org v. Brunner,* 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 49. Therefore, we cannot except noncontiguous governmental units from the application of Article XI, Sections 7(B) and (C) ****838** when the express language of those provisions does not contain such an exception.

{¶ 104} Third, although Section 7(A) requires that every house district be "composed of contiguous territory" with the boundary of each district being a "single nonintersecting continuous line," there is no evidence—or argument by respondents—that applying the plain language of "governmental units" in Sections 7(B) and (C) to include both contiguous and noncontiguous would result in a violation of Section 7(A) for the creation of house districts. *See Parella v. Montalbano,* 899 A.2d 1226, 1253 (R.I.2006) ("Contiguity generally means that districts are bordering, adjoining, or touching"). To the contrary, relators' reapportionment and redistricting expert, Professor McDonald, created two apportionment plans that each split less than half the number of political subdivisions split by respondents' apportionment plan, without violating Section 7(A).

{¶ 105} Fourth, this plain-language construction of Sections 7(B) and (C) to prefer the inclusion of whole governmental units and to avoid the splitting of even noncontiguous governmental units in apportioning state legislative districts is logical. As relators note, although noncontiguous political subdivisions may be separated geographically, "they share common issues, services, and political concerns." And they are generally represented by the same officials.

{¶ 106} Fifth, we need not approve an erroneous construction of a constitutional provision simply because it has always been construed erroneously, particularly when it has not previously been litigated. Doing so would protect an unconstitutional practice.

{¶ 107} Sixth, respondents' claim that invalidating their apportionment plan in this case "would wreak havoc on the apportionment process now and in the future" by jeopardizing the state's compliance with the Voting Rights Act, 42 U.S.C.1973, is simply not true.

{¶ 108} Relators have met their burden of proof.

Article XI, Section 7(D)

{¶ 109} Section 7(D) provides that "[i]n making a new apportionment, district boundaries established by the preceding apportionment *shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article*." (Emphasis added.)

{¶ 110} Relators have established that respondents violated Section 7(D) in creating new House Districts 60, 61, 84, and 91 by altering the boundaries for ***249** house districts established by the 2001 apportionment. The preceding district boundaries did not require modification to comply with the population requirements of Section 3. In fact, respondents' evidence does not suggest that Section 3 mandated an alteration of the prior district boundaries for these districts.

Conclusion

{¶ 111} "The purpose of the people in enacting Article XI is clear. It was to place legislative apportionment in the hands of a separate board not subject to the control of the General Assembly, the board to be composed of representatives of the people, elected by the people and unconnected with the legislative branch of the government." *King,* 11 Ohio St.2d at 99, 228 N.E.2d 653. "The objective sought by the constitutional provisions was the prevention of gerrymandering." *Herbert,* 139 Ohio St. at 509, 41 N.E.2d 377. In practice, however, whichever political party has a majority of the members of the apportionment board uses apportionment to favor its partisan interests. The majority's ****839** decision today ensures this will continue.

{¶ 112} I respectfully dissent.

O'CONNOR, C.J., concurs in the foregoing opinion.

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CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that on October 29, 2021, I caused a true and correct copy of the following documents to be served by email upon the counsel listed below:

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