IN THE SUPREME COURT OF OHIO

BRIA BENNETT, *et al.*	)	
	)	**CASE NO. 2021-1198**
Relators,	)	
	)	
OHIO REDISTRICTING COMMISSION, *et. al.*,	)	
	)	
	)	
Respondents.	)	**APPORTIONMENT CASE**
	)	**PURSUANT TO ART. XI, SECT. 9**

MOTION FOR LEAVE TO FILE, *INSTANTER*, AMICUS BRIEF OF DAVID NIVEN, Ph.D. IN SUPPORT OF RELATORS

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David Niven, Ph.D. ("Dr. Niven") respectfully requests leave to file, *instanter*, an Amicus Brief urging the Court to determine that the apportionment plan adopted by the Ohio Redistricting Commission is invalid.

Dr. Niven is a professor of political science and researcher at the University of Cincinnati. He conducts research on redistricting and gerrymandering, particularly in the State of Ohio. Dr. Niven seeks to assist the Court by providing social-science evidence regarding the implications of the 2021 drawing of the electoral map challenged in this case.

Accordingly, Dr. Niven seeks leave of Court to file an amicus brief in this matter to support Relators. In other original actions, this Court has granted leave to *amici curiae* to submit briefs before the Court has ruled on motions directed at the pleadings. *State ex rel. Vaughn Industries, LLC. v. Reece*, 116 Ohio St.3d 1212, 2007-Ohio-6670, 878 N.E.2d 1050, ¶ 3 (granting motion of amicus curiae for leave to file a memorandum regarding respondents' motion to dismiss in prohibition case). A copy of Dr. Niven's Amicus Brief is attached hereto as Exhibit A.

Respectfully submitted,

/s/ Stephanie M. Chmiel

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EXHIBIT A

IN THE SUPREME COURT OF OHIO

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TABLE OF CONTENTS

INTRODUCTION

Responsiveness is a defining aspect of democracy. "Responsiveness of government policies to citizens' preferences is a central concern of various normative and empirical theories of democracy." Page, Benjamin I., and Robert Y. Shapiro., *Effects of Public Opinion on Policy*, 77 American Political Science Review No. 1, 175 (1983). This responsiveness is facilitated by the feedback loop elections provide in which officeholders are rewarded for responding to the public will or replaced if they stray too far from it. Gerrymandering – drawing of electoral districts based on party lines – interrupts this feedback loop by rendering some citizens' opinions superfluous, disrupting accountability, and disconnecting representatives from popular sentiment. At its most fundamental level, then, gerrymandering is a threat to majority will and to the very premise of democracy.

Ohioans overwhelmingly voted in favor of requiring proportional districts. The data presented herein illustrate the disconnect between the Ohio electorate and its legislature, the close connection between Ohio legislators' policy preferences and the partisan bias built into the 2011 state legislative maps, and the likelihood that the 2021 map would produce a legislature with priorities well separated from that of Ohio's electorate. The data presented herein also underscores that the failure of the 2021 map to conform to the partisan proportionality standard established in the Ohio Constitution is no mere technical violation, but rather an affront to democratic norms, the vision of the country's founders, and the will of the Ohio people.

STATEMENT OF INTEREST

Amicus David Niven, Ph.D. is a political science professor at the University of Cincinnati who studies elections and representation. Dr. Niven submitted a report and testified as an expert witness for the plaintiffs in *Ohio A. Philip Randolph Institute et al. v. Larry Householder*, 373 F.

Supp. 3d 978 (S.D. Ohio 2019), which similarly dealt with alleged gerrymandering in Ohio. Dr. Niven has published numerous peer reviewed papers on voting, public opinion, and matters of representation.[1] Dr. Niven's most recent work on gerrymandering has appeared in *Social Science Quarterly* and is forthcoming from the *Harvard Law and Policy Review*.[2]

Dr. Niven seeks to assist the Court by providing social-science evidence demonstrating the consequences of the lack of partisan proportionality in Ohio's previous state legislative map (the 2011 map) and in the map adopted by the Ohio Redistricting Commission (the 2021 map). In short, the evidence suggests the lack of partisan proportionality in Ohio's legislative maps produces a legislature with policy priorities unmoored from the preferences of Ohio's electorate, and that the bias of the map is more influential than voter preferences themselves.

STATEMENT OF FACTS

Dr. Niven adopts the Statement of Facts presented by Relators.

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[1] Niven, David, Alexis Straka, and Anwar Mhajne. 2020. "Who Reveals, Who Conceals? Candidate Gender and Policy Transparency." *Political Research Quarterly* 73: 396-408; Niven, David. 2017. "Can Republican African American Candidates Attract Democratic African American Votes? A Field Experiment." *Journal of Black Studies* 48: 465-483; Niven, David. 2006. "A Field Experiment on the Effects of Negative Campaign Mail on Voter Turnout in a Municipal Election." *Political Research Quarterly* 59: 203-210; Niven, David. 2006. "Throwing Your Hat Out of the Ring: Negative Recruitment and the Gender Imbalance in State Legislative Candidacy." *Politics & Gender* 2: 473-489; Niven, David. 2004. "The Mobilization Solution? A Field Study on the Effects of Face-to-Face Contact on Turnout in a Municipal Election." *Journal of Politics* 66: 868-884; Niven, David. 2002. "The Mobilization Calendar: The Time Dependent Effects of Personal Contact on Turnout." *American Politics Research* 30: 308-323; Niven, David. 2001. "The Limits of Mobilization: Turnout Evidence from State House Primaries." *Political Behavior* 23: 335-350.

[2] Cover, Benjamin Plener, and David Niven. 2021. "Geographic Gerrymandering." *Harvard Law & Policy Review*, forthcoming; Niven, David, Benjamin Plener Cover and Michael Solimine. 2021. "Are Individuals Harmed by Gerrymandering? Examining Access to Congressional District Offices." *Social Science Quarterly* 102: 29-46.

ARGUMENT

I. Democracy Demands Responsiveness.

The essence of democracy is "responsiveness of the government to the preferences of its citizens, considered as political equals." Robert, Dahl. *Polyarchy: Participation and Opposition,* New Haven: Yale University Press, 1 (1971); *see also* Sen, Amartya, *The Impossibility of a Paretian liberal*, 78 Journal of Political Economy No. 1, 152-157 (1970). In a democracy, there must be a connection between the beliefs and preferences of the people and the decisions of government. Failing that, what we have, as depicted by James Madison in *The Federalist Papers* (#48), is not democracy but "elective despotism" in which government power is used against the people rather than on their behalf.

But the nation's framers were optimistic, even reverent regarding the capacity of state legislatures to reflect the will ("the State legislature, where all the local information and interests of the State are assembled") and the heart of the people ("the present genius of the people of America, the spirit which actuates the State legislatures"). THE FEDERALIST NOS. 56, 55 (Hamilton or Madison).

Research finds that representatives are largely responsive to citizen preferences in the United States and that "public opinion is often a proximate cause of policy, affecting policy more than policy influences opinion." Page and Shapiro, *Effects of Public Opinion*, 175; *See also* Caughey, Devin, and Christopher Warshaw, *Policy Preferences and Policy Change: Dynamic Responsiveness in the American States, 1936–2014*, 112 American Political Science Review No. 2, 249-266 (2018). In cases where the tide of public opinion is strongly in one direction, congruent policy movement almost always follows. *Id.*

There is a caveat to this finding: gerrymandering. Studies have found that the connection between public preferences and policy outcomes is undermined by gerrymandering.

Caughey, Devin, Chris Tausanovitch, and Christopher Warshaw, *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 Election Law Journal: Rules, Politics, and Policy 4, 453-469 (2017). By tilting the electoral scales to effectively give votes for one party more weight in electing representatives, gerrymandering dampens the influence of majority-held opinions. That is, classic theories of democracy assign equal weight to each vote and, thus, render a straight-line connection between a society's majority-held beliefs and the makeup of its legislature. Dahl, *Polyarchy*. By contrast, gerrymandered maps assign weight to votes according by political expediency, situating the legislature's attention not on the center of the overall electorate but on the center of the valued electorate. Indeed, researchers have found that as the severity of gerrymandering in a state legislative map rises, the resultant policies from that legislature become more extreme and less connected to the will of the electorate as a whole. Caughey, Tausanovitch, and Warshaw, *Partisan Gerrymandering*.

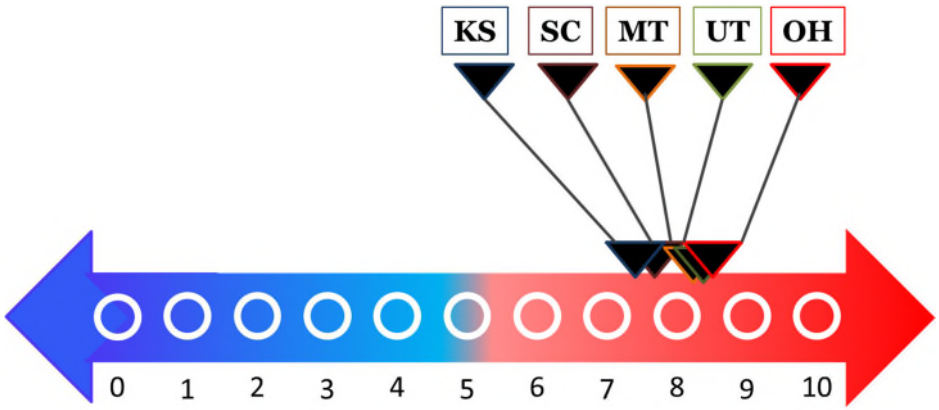
II. Because of the Way Ohio's Electoral Maps are Drawn, The Ideology of the Ohio General Assembly Does Not Reflect The Ideology Of Ohio's Electorate.

A. Ohio's Electoral Maps Have Greater Influence on Policy Than Ohio's Voters.

Political scientists Boris Shor and Nolan McCarty have measured the ideological preferences of state legislators and state legislatures across the country over the last two decades. *See* Shor, Boris, and Nolan McCarty "The ideological mapping of American legislatures" *American Political Science Review* 105, no. 3 (2011): 530-551 (introducing their work). The Shor-McCarty data have been rescaled here for ease of understanding into a 0-10 scale (0=extremely liberal, 5=balanced, 10=extremely conservative). The cumulative ideological scores of states are based on the combined mean of all members of the state house and senate from 2013-2018 (scores indicate Oklahoma has had the most conservative legislature, with California having had the most liberal legislature). Belying the competitive elections that have

long defined Ohio politics, the Shor-McCarty data place Ohio's legislature among the twelve most conservative in the nation, to the right of states with more reliably Republican electorates such as Utah, Montana, South Carolina, and Kansas.

Figure 1
Ideology of State Legislatures



The relative influence of voters and mapmakers in the resulting ideological makeup of the legislature can be demonstrated with a regression equation. The partisan inclination of voters is captured by using the Partisan Voting Index score for each state. The Partisan Voting Index reflects the tendency of a state to vote in a more Republican direction than the nation as a whole. Presently the range of PVI scores is 26 (Wyoming) to -15 (Hawaii). This national voting measure allows for a meaningful comparison of voter inclination across states, and avoids the limitation of using any measure of legislative voting that could be shaped by the availability of candidates and by the effects of gerrymandering itself. The Partisan Bias ("PB") of each legislative map is expressed in the seat share advantage achieved in a tie vote. That is, if one party wins 60% of the

seats when receiving 50% of the vote, the partisan bias of such a map is 10%.[3] The dependent variable is the ideological mean of each state legislature.

Table 1
Sources of Legislative Ideology
Regression Analysis

	Coefficient	Standard Error
Partisan Voting Index (PVI)	.155*	.024
Partisan Bias of Map (PB)	.247*	.041
Constant	4.135*	.274
r^2=.837		

*p<.001

Regression models allow us to compare how much independent variables (such as voter preference and map bias) influence a dependent variable (such as state legislative ideology). The explanatory success of a regression model is measured in r^2. In basic terms, r^2 measures the ability to predict the dependent or outcome variable by virtue of the independent or predictor variables. Regression models produce an r^2 between zero and one, with an r^2 of .05 indicating 5% predictive success, an r^2 of .50 indicating 50% predictive success, and so on. It is not uncommon in published, peer-reviewed social-science research to see models with an r^2 at or below .10.[4] In this case, the model achieves an extraordinary r^2=.837, indicating the model is 83.7% accurate in assessing state legislative ideology based entirely on voter preferences and map bias. Both the voter preference and map bias variables are statistically significant components of the resulting state legislative ideology, and are unequivocally the two most potent explanatory factors of state legislative ideology.

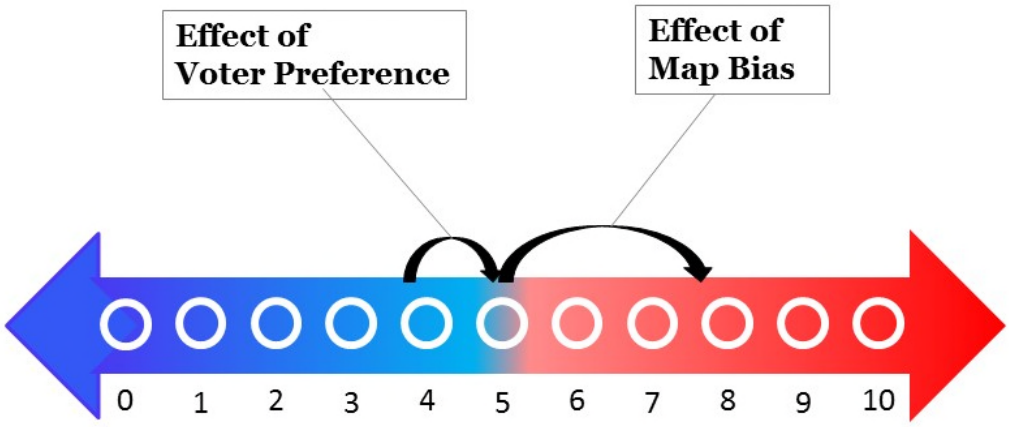
[3] Data on the Partisan Bias of existing maps was calculated by the nonpartisan Campaign Legal Center. Campaign Legal Center, https://campaignlegal.org/ (accessed Oct. 28, 2021).

[4] For example, the main finding in Burden, Barry C., *Candidate Positioning in US Congressional Elections*, 34 British Journal of Political Science No. 2, 211-227 (2004) has an r^2=.04.

By taking Ohio's PVI and PB and multiplying them by the corresponding coefficient in the model, we can estimate the relative effect voters and the legislative maps themselves are having on legislative ideology. By virtue of Ohio's PVI score of 6, the voting preferences of Ohioans serve to move the legislature an estimated .93 points (6*.155=.93) to the right on a ten-point scale. That is, Ohio moves about 9 percent of the scale's length toward the right because Ohio voters are somewhat more inclined to vote Republican than Democratic. This .93 movement corresponds roughly to the difference between the ideology of the Minnesota and Iowa legislatures.

By virtue of Ohio's PB score of 12.5, the bias in Ohio's legislative maps serves to move the legislature an estimated 3.09 points (12.5*.247=3.09) to the right on a ten-point scale. That is, Ohio moves about 31 percent of the scale's length toward the right because Ohio's legislative maps favor Republicans instead of neutrally reflecting voter preferences. This 3.09 movement corresponds roughly to the difference between the ideology of the Minnesota and Idaho legislatures.

Figure 2
The Relative Effect of Voters and Map Bias on the Ideology of the Ohio General Assembly



What this means is that because the preferences of Ohio voters move the ideological position of the legislature 9 percent, but the bias of the Ohio legislative map moves the ideological position of the legislature 31 percent, the map of Ohio's districts is more influential than Ohio's voters.

This can be seen in practice at the county level. For example, instead of a symmetrical relationship in representation reflecting counties that are partisan to roughly the same degree, we find something very different. In Hamilton County an average of just over 54% of voters have supported Democratic candidates for President of the United States in the last two elections. The state senators representing Hamilton County collectively produce an ideology score just slightly

to the right of center (5.37). In Delaware County, an average of about 54% of voters have supported Republican candidates for President in the last two elections. However, the state senator representing the county has a conservative ideology score of 7.2.

This example illustrates the fundamental power of partisan gerrymandering. A county that votes Democratic like Hamilton County gets representation that is more conservative than its electorate even as a county that votes Republican like Delaware County also gets representation that is more conservative than its electorate. Without a commitment to partisan proportionality in legislative maps, the representation of Ohio is out of balance with its electorate regardless of election results.

B. Ohio's 2021 Electoral Map Will Produce A Legislature That Fails To Reflect The Ideology Of Ohio Voters.

This same applied regression procedure can be performed with the 2021 electoral map to estimate the likely ideological makeup of the resulting legislature. In the Ohio House of Representatives, for example, if a neutral map (PB=0) were to be adopted, the model estimates Ohio's House of Representatives would have an ideology score of 5.06, resembling the ideology recently produced by the New Hampshire House of Representatives, a state with competitive elections. However, with the 2021 map as drawn, which has a PB of 11.6,[5] the model estimates that the Ohio House of Representatives would have an estimated ideology score of 7.93, resembling the ideology recently produced by the Mississippi House of Representatives.

Neutral maps restore the relevance of the beliefs and preferences of Ohioans. This is the purpose of the proportionality requirement in the Ohio Constitution. Proportionality is not

[5] *See* Princeton University Gerrymandering Project, https://gerrymander.princeton.edu/redistricting-report-card?planId=rec1ovrNKW7xjVsKb (accessed Oct. 28, 2021) (used in calculating the Partisan Bias score)

merely some standard of political accounting – rather it is designed to ensure equal rights under the law for all Ohioans. A legislature that better represents the sentiments of the electorate of Mississippi than that of Ohio is failing to be responsive to, and protect, the will of the Ohio people.

C. As A Result Of Partisan Electoral Maps, The General Assembly Has Not Passed Laws That Reflect Voter Preferences.

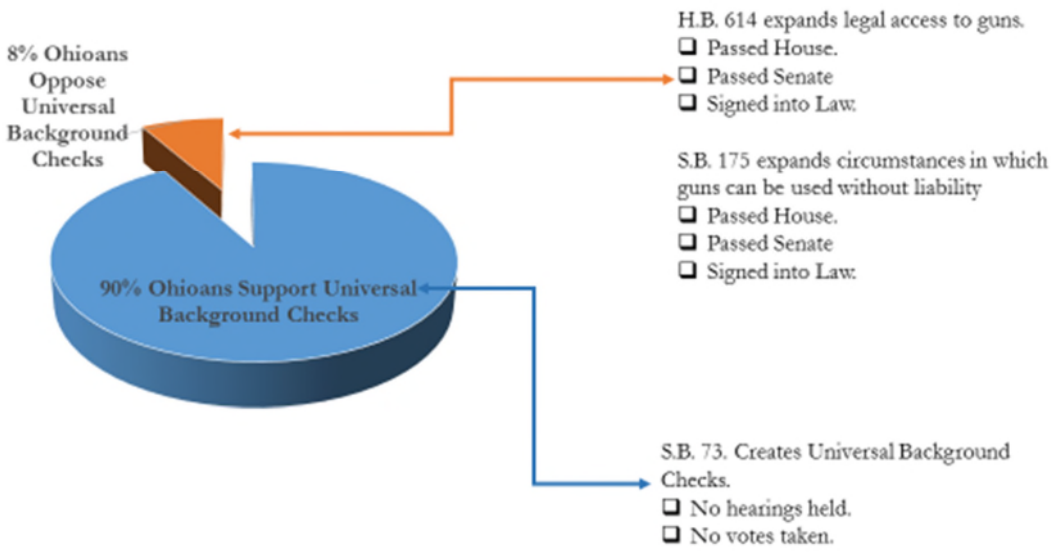
Whether Ohio's electoral maps create a disconnect between policies passed by the General Assembly and the policy preferences of Ohio voters is not a theoretical problem. Rather, the partisan electoral districts created by Ohio's 2011 map have resulted in legislative policies that fail to reflect – and even contradict – the position of Ohio voters. Indeed, there are concrete examples of issues where an overwhelming majority of voters have sought policy solutions, but the legislature has responded, instead, with policies moving in the opposite direction.

For instance, a 2019 Quinnipiac University poll found that 90% of Ohioans favored universal background checks for gun purchases. Quinnipiac University, *Ohio Voters Oppose Fetal Heartbeat Abortion Ban, Quinnipiac University Poll Finds; 90 Percent Support Universal Gun Background Checks* (July 26, 2019), https://poll.qu.edu/Poll-Release-Legacy?releaseid=3634 (accessed Oct. 28, 2021). More than 85% support was found among Democrats, Republicans, and independents – among all age groups, races, and regions of Ohio. Even among gun-owning respondents, 87% expressed support for universal background checks for gun purchases. These numbers reflect that this is not a close issue. The natural expectation, then, would be that Ohio's legislature would pass laws that reflect the overwhelming majority of Ohioans' preferences on background checks.

That is decidedly not the case. Since that 2019 poll was conducted, legislation to implement universal background checks has been introduced in both sessions of the Ohio

General Assembly. But these bills, including Senate Bill 73 (2021), have received no hearings. No committee votes have been held. No floor votes have been taken. They simply die without any action having occurred. Yet, at the same time, bills expanding legal access to guns and expanding circumstances in which guns can be used without liability have been signed into law in the last two years. *See* 2021 Am. S.B. 175 (expanding circumstances in which an Ohioan may legally shoot a person and extending legal protections to organizations that permit the presence of guns); 2020 Am. H.B. 614 (expanding legal access to guns).

Figure 3
Public Opinion and Legislative Action on Background Checks in Ohio



Similarly, a 2020 Yale University poll found that 86% of Ohioans supported funding research into renewable energy, and 82% of Ohioans favored creating a tax rebate for energy efficient vehicles and solar panels. Yale Program on Climate Change Communication, *Yale Climate Opinion Maps 2020* (Sept. 2, 2020), https://climatecommunication.yale.edu/visualizations-data/ycom-us/ (accessed Oct. 28, 2021).

Instead of a *rebate* program for energy efficienct vehicles, the Ohio General Assembly passed a law creating a *surcharge fee* for hybrid and electric vehicles. And, instead of expanding commitment to renewable energy, the Ohio General Assembly abolished renewable energy standards for electric utilities, created a fund to support two coal-burning power plants, and empowered local governments to prevent the construction of renewable energy facilities (while the same local officials are expressly prohibited from having any authority over fossil fuel extraction in their communities). 2019 Am. H.B. 62 (imposing fees on electric and hybrid vehicles); 2019 Am. H.B. 6 (abolishing renewable energy standards for electric utilities and imposing a fee on electricity customers to fund coal power plants); 2021 Am. S.B. 52 (allowing local governments to prevent the construction of renewable energy facilities); 2021 Am. H.B. 201 (forbidding local governments from banning natural gas).

The support for background checks and renewable energy is, admittedly, extraordinary. Typical issues do not garner 80 and 90% majorities. But that is what makes the failure of the General Assembly to pass laws that reflect these sentiments problematic. If a 90% majority is insufficient to warrant congruent legislative action, what possible chance do the majority positions of 70 or 60 or 55 percent of Ohioans have against a legislature built to be insensitive to majority priorities?

These examples stand in stark contrast with the general finding that policy tends to move in a direction congruent with public opinion. That is, while there may be some differences in details between public preferences and the actual legislation passed, policymaking does not typically move in the opposite direction of the public's preferences. However, here, a massive majority in Ohio favors universal background checks on gun purchases, but not only does it not

see universal background checks on gun purchases, or even some small step in that direction, instead gun access policies continue to expand.

Perhaps the best example of the disparity between the beliefs and values of Ohioans and those held by their legislature is the 2021 map itself. In 2015, 3 out of 4 Ohioans approved a constitutional amendment creating a new standard for legislative maps, requiring they be drawn proportional to the support a party enjoys and without favor or disfavor to any party. In defiance of the will of the people, the 2021 map is decidedly disproportional, and consequently enables the continued election of a non-responsive legislature.

CONCLUSION

The founders of this country believed in the capacity of state legislatures to reflect the will and the spirit of the people they represent. Ohioans, in their capacity as framers of their own constitution, created a standard of proportionality to see that state legislative maps reflect election results and that those who are elected remained tethered to the views of their constituents.

Instead, the Ohio General Assembly has been shaped by the partisan bias drawn into the 2011 map. If the partisan bias again built into the 2021 map is allowed to stand, it is likely to produce a legislature that remains nonresponsive to the majority will of Ohioans. A neutral map that is not designed to favor either party is likely to produce a legislature that reflects the priorities of Ohioans and is consistent with the proportionality required under the Ohio Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Motion for Leave to File, *Insanter*, Amicus Brief of David Niven, Ph.D. In Support of Relators was sent by electronic mail upon all counsel of record this 29th day of October, 2021.

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