IN THE SUPREME COURT OF OHIO

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

BRIEF OF AMICUS CURIAE, AMERICAN REDISTRICTING PROJECT, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The American Redistricting Project ("ARP") is a nonprofit, nonpartisan organization working to strengthen our republic by supporting constitutional redistricting, open elections, and accountable government through research, education, and litigation. ARP is familiar with the evolution, over the past few decades, of political and legal efforts to attempt to develop judicially manageable standards to evaluate claims of gerrymandering.

Issue 1, a proposed constitutional amendment on November's ballot, would create an independent redistricting commission and then require it to prioritize the drawing of specific numbers of districts for the two major parties over compliance with traditional redistricting criteria, like keeping counties and cities whole. This requirement—vaulting a partisan goal *above* neutral rules—is consistent with the notion of gerrymandering that has emerged from the redistricting litigation battles of the past decades.

A key claim asserted in this action is that the Ohio Ballot Board's summary for Issue 1 improperly refers to Issue 1's proportional-representation requirement as gerrymandering. Because ARP's educational mission is advanced by a clear public understanding of redistricting issues, it has an interest in articulating for this Court how the claim before it asks the Court to interpret the ballot summary language in a way not consistent with how gerrymandering is understood.

INTRODUCTION

This November, Ohio's voters will vote on Issue 1 and will be asked to decide whether to substantially change the way Ohio's congressional and state legislative districts will be drawn. One of Issue 1's changes would subordinate traditional criteria to a partisan requirement that the commission draw specific numbers of legislative and congressional

districts that favor one of the two major political parties. This may be the most expansive mandate in any state constitution for partisan considerations to control district line-drawing. Most partisan considerations in redistricting occur in settings where legislatures are constrained only by their own deliberation of political opportunity and peril, not by any legal dictate that compels political outcomes. Those states that have so far attempted to curtail gerrymandering have done so either by forbidding *any* partisan consideration or by setting a partisan-fairness goal as one of many factors, such that statewide fairness objectives retain a healthy tolerance for geographic reality and communities of interest.

Issue I proposes something quite different. The amendment will, if adopted, command a redistricting commission to achieve proportional representation among the major political parties (presently the Democratic and Republican Parties) within a narrow range of error. The command will apply regardless of the geographic distribution of parties' supporters, the shapes of resulting districts, or the communities that will be carved up to achieve numerically defined partisan goals. And it will, in practice, require single-minded focus in favor of just *one* political party: when one parties' supporters are not evenly dispersed in Ohio (or anywhere), the commission will be compelled to prioritize the political fortunes of the party with concentrated support over parties with dispersed support. In summary, the amendment will require the proposed commission to prioritize one political party's electoral interests over other parties' interests at the expense of traditional districting principles like compactness, communities of interest, and political-subdivision boundaries. The good news is that the English language has a word to describe this practice: "gerrymandering." Indeed, a Connecticut plan the U.S. Supreme Court considered, which was drawn to achieve *rough* proportionality, *Gaffney v. Cummings*, 412 U.S. 735 (1973), has been

repeatedly—and without argumentation or irony—been called a "bipartisan gerrymander," *Gill v. Whitford*, 585 U.S. 48, 61 (2018).

It should come as no surprise, then, that the Ohio Ballot Board, in adopting ballot summary language for Issue 1, described it as requiring the proposed commission to "gerrymander the boundaries of state legislative and congressional districts to favor either of the two largest political parties in the state of Ohio, according to a formula based on partisan outcomes as the dominant factor[.]" RELATORS_034 (Aug. 16, 2024, adopted ballot statement, at ¶ 2). Relators bristle at this description, asserting that it is misleading because they believe Issue 1 is intended to prohibit gerrymandering, not engage in it. Relators' Br. at 18. But that view is itself inaccurate: gerrymandering occurs when a redistricting authority casts neutral criteria aside to assist one party's fortunes over another, unconstrained by geography, community, and common sense. That is exactly what Issue 1 would compel. Relators' contention that this prohibits gerrymandering is itself a redefinition of the term: neither states nor courts have heretofore dictated uncompromising proportionality as a gerrymandering cure. The Ohio Ballot Board's text will "fairly and accurately present the question or issue to be decided" to allow Ohio voters to "know what it is [they are] being asked to vote upon." *State ex rel. Bailey v. Celebrezze*, 67 Ohio St.2d 516, 519 (1981). The Court should permit the electorate to make its choice with this accurate description.

STATEMENT OF FACTS

ARP adopts the Respondents' statement of facts in the Ohio Ballot Board's briefing.

ARGUMENT

The Ballot Board's "condensed ballot statement" for a proposed constitutional amendment must "fairly and accurately present the issue to be decided so as 'to assure a free,

intelligent and informed vote by the average citizen affected.'" *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St.3d 257, 2012-Ohio-4149, ¶ 41 (quoting *Bailey*, 67 Ohio St.2d at 519). Under the constitutional standard, ballot language "shall not be held invalid unless it is such as to mislead, deceive, or defraud the voters." Ohio Const., art. XVI, § 1. If the Court identifies any "defects in ballot language, [the Court will] examine the defects as a whole and determine whether their cumulative effect violates the constitutional standard." *State ex rel. One Person One Vote v. Ohio Ballot Bd.*, 173 Ohio St.3d 15, 2023-Ohio-1928, ¶ 8. Only if the cumulative effect of any defects violates the constitutional standard can the Ballot Board's statement be invalidated, *see State ex rel. Ohioans United for Reproductive Rights v. Ohio Ballot Bd.*, 174 Ohio St.3d 285, 2023-Ohio-3325, ¶¶ 12, 47–48.

This fair-and-accurate standard requires a ballot statement to accurately describe a proposed amendment's changes to law. For example, in deciding a challenge to a prior proposed redistricting amendment, the Court found that the proposed amendment would have made several changes to redistricting standards and requirements, and it was vital that the ballot language "describ[e] those changes [to the constitutional standards and requirements]" as well as "the pertinent redistricting criteria[.]" *Voters First* at ¶ 40. *See also One Person One Vote*, 2023-Ohio-1928, at ¶ 17 (acknowledging descriptions of current law and/or how proposed amendment would change current law are important where they are "essential for voters to understand what the law would be if the proposed amendment is approved" or where the lack of description would "mislead, deceive, or defraud the voters."). And as it relates to the use of words or phrases in a ballot statement, the relevant question is how the average voter would understand those words. *See, e.g., Ohioans United for Reproductive Rights*, 2023-Ohio-3325, ¶ 26 (deciding whether term "citizens of the State of

Ohio" would be "misleading to the average voter"); *State ex rel. Cincinnati Action for Housing Now v. Hamilton Cty. Bd. of Elections*, 164 Ohio St.3d 509, 2021-Ohio-1038, ¶ 20 (assessing how "the average citizen" would interpret disputed ballot language).

As applied here, the question is whether Issue 1's rigid proportional-representation requirement, which takes precedence over the neutral, geographic-focused criteria that in one form or another have governed Ohio reapportionment since the 1800s, requires gerrymandering, as the public would understand that term. Because it does, the Ballot Board's statement does not violate the constitutional standard.

A. Gerrymandering is Understood to Constitute Mapdrawing Designed to Achieve a Partisan Political Result, at the Expense of Neutral Criteria.

"Partisan gerrymandering is nothing new. Nor is frustration with it." *Rucho v. Common Cause*, 588 U.S. 684, 696 (2019). While federal courts were ultimately unable to identify "discernible and manageable standards for deciding" when gerrymandering violates constitutional rights, *id.* at 708, the case law exhibits a discrete, stable, identifiable understanding of what gerrymandering is: the prioritization of partisan goals at the expense of neutral criteria that preserve values of geographic representation. But proportional representation is not a necessary condition of a non-gerrymandered plan, so seeking proportional representation is not ordinarily understood as a means to avoid gerrymandering. It is the reverse: proportional-representation efforts—if strictly applied—discard neutral criteria for partisan ends. The Supreme Court has without irony or argumentation called that gerrymandering. *Gaffney*, 412 U.S. at 752; *Gill*, 585 U.S. at 61.

1. Sincere concerns about gerrymandering—which presumably inform efforts to enact state-law gerrymandering bans—begin from "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way

around.'" *Arizona State Legislature v. Arizona Indep. Redistricting Comm.*, 576 U.S. 787, 824 (2015), quoting Mitchell Berman, *Managing Gerrymandering*, 83 Texas L.Rev. 781 (2005). Accordingly, gerrymandering is understood to refer to "manipulating district lines for partisan gain." *Rucho*, 588 U.S. at 744 (Kagan, J., dissenting); *Vieth v. Jubelirer*, 541 U.S. 267, 354 (2004) (Souter, J., dissenting) ("[T]he point of the gerrymander is to capture seats by manipulating district lines to diminish the weight of the other party's votes in elections."). But that definition is too indeterminate to say much. If gerrymandering is political line-manipulation, then "[a]ll districting is gerrymandering." *Vieth*, 541 U.S., 289 (plurality opinion) (quoting R. Dixon, Democratic Representation 462 (1968)). If "a legislature … draws district lines with no objectives in mind except compactness and respect for the lines of political subdivisions," "political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a 'natural' packing effect," as the result of a "natural" packing effect. *Id.* at 289-90 (plurality opinion). But that is not gerrymandering by any serious definition: gerrymandering requires partisan "purpose." *Rucho*, 588 U.S. at 736–37 (Kagan, J., dissenting). The "fact that" "Democratic voters are highly concentrated in cities" is simply "part of the baseline" in a *non*-gerrymandered map that does *not* suggest "partisanship has run amok." *Id.* at 742 (Kagan. J., dissenting).

Accordingly, whether understood legally or linguistically, gerrymandering must be construed against a "fairness baseline." *Id.* (Kagan. J., dissenting); *see also id.* at 715–16 (majority opinion). Various proposed baselines have over time differed in particulars, but they share the basic theory that "gerrymanders … disrupt the representational norms that ordinarily tether elected officials to their constituencies as a whole." *Vieth*, 541 U.S. at 329 (Stevens, J., dissenting). American democracy is founded on geographic representation,

which proposes that voters elect members in a system designed on "the community in which they live," not on voters' racial, political, class, or religious identities. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Geographic representation fosters "'an open and pluralistic political process, where groups bargain among themselves,'" and resists a politics of "'proportional representation by persons beholden for office to discrete ethnic groups.'" *Monroe v. City of Woodville, Miss.*, 881 F.2d 1327, 1329 (5th Cir. 1989), quoting *Houston v. Haley*, 859 F.2d 341, 342-43 (5th Cir. 1988). In that spirit, courts have generally encouraged redistricting authorities to configure districts based on "respect for political subdivisions and communities defined by actual shared interests." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Gerrymandering happens when redistricting authorities refuse to do that. Perhaps the most basic gerrymandering definition takes "a State's own (non-partisan) districting criteria as the baseline" and defines a gerrymander as a map that "substantially deviate[s] from" those criteria "for partisan gain." *Rucho*, 588 U.S. at 743-44 (Kagan, J., dissenting). A related definition proposes that gerrymandering occurs where "the legislature 'subordinated—indeed ignored—all traditional redistricting principles and all legitimate bases for governmental decisionmaking," in favor of partisan goals. *Vieth*, 541 U.S. at 340 (Stevens, J., dissenting). *See also League of Women Voters v. Pennsylvania,* 178 A.3d 737, 817 (Pa. 2018) (recognizing partisan-gerrymandering claim where "neutral criteria have been subordinated … to extraneous concerns such as gerrymandering for unfair partisan political advantage"). That, indeed, is how the Supreme Court has defined *racial* gerrymandering. *See Miller*, 515 U.S. at 916 ("[A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial

considerations."). Both racial and political gerrymandering definitions equally propose "that reapportionment is one area in which appearances do matter."[1] *Shaw*, 509 U.S. at 647. "[I]n the absence of a conflict with traditional principles," it is at least "difficult," if not impossible, to make out a plausible assertion that a map is a gerrymander. *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 190 (2017). In most iterations, gerrymandering is evident in "bizarre" districts. *Shaw*, 509 U.S. at 655.

That is how notable voting-rights organizations have defined gerrymandering. The Brennan Center defines gerrymandering as occurring "when those [voting district] boundaries are drawn with the intention of influencing who gets elected."[2] Similarly, the ACLU describes gerrymandering as "when the lines are drawn to manipulate the boundaries to predetermine the outcome of elections, hindering voters from voicing their interests through their votes."[3]

2. At the same time, jurists of all viewpoints have been careful to note that "proportional representation" cannot plausibly be a necessary or sufficient condition for a map to avoid the "gerrymander" label. Even when the U.S. Supreme Court recognized gerrymandering claims as justiciable, it adamantly rejected the idea "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

[1] The word "gerrymander" itself illustrates that point. The term is a portmanteau derived from a Massachusetts newspaper in 1812 that depicted a bizarrely shaped district, approved by Governor Gerry, as a salamander. *Arizona State Legislature*, 576 U.S. at 791, fn. 1.
[2] Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, THE BRENNAN CENTER FOR JUSTICE, Aug. 10, 2021, available at https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained (visited Sept. 3, 2024).
[3] American Civil Liberties Union, *Voting Rights—Gerrymandering*, available at https://www.aclu.org/issues/voting-rights/gerrymandering (visited Sept. 3, 2024).

proportion to what their anticipated statewide vote will be." *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality opinion). In the case that overruled *Bandemer* 33 years later, the dissent—which would have recognized gerrymandering claims—equally disclaimed the absence of "proportional representation" as a proper gerrymandering definition. *Rucho*, 588 U.S. at 734 (Kagan, J., dissenting). That opinion rejected the idea that efforts to curb gerrymandering "grew out of a desire for proportional representation." *Id.* at 747 (Kagan, J., dissenting).

A series of important judicial opinions between these two bookends likewise declared "there is no constitutional requirement of proportional representation[.]". *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419 (2006) (op. of Kennedy, J.,) ("equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best" of fairness). *See also Vieth*, 541 U.S. at 338 (Stevens, J., dissenting) ("The Constitution does not, of course, require proportional representation of racial, ethnic, or political groups."). State courts that recognized partisan-gerrymandering claims equally rejected proportional representation as the right definition of a non-gerrymandered map. *Harper v. Hall*, 868 S.E.2d 499, 511 (N.C. 2022) (*Harper II*), overruled in, 886 S.E.2d 393 (N.C. 2023) ("[W]e seek neither proportional representation for members of any political party, nor to guarantee representation to any particular group"). So did lower federal courts that adjudicated gerrymandering claims. *See, e.g.*, *Whitford v. Gill*, 218 F. Supp. 3d 837, 906 (W.D. Wis. 2016), *vacated and remanded on other grounds*, 585 U.S. 48 (2018) ("there is no constitutional requirement of proportional representation"); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 889 (M.D.N.C. 2018), *vacated and remanded*, 588 U.S. 684 (2019) (same). This Court has acknowledged the distinction between "proportional representation" and plans

that "unduly favor or disfavor a political party or unduly split governmental units for partisan advantage." *Adams v. DeWine*, 167 Ohio St.3d 499, 2022-Ohio-89, ¶ 70.

This rejection of a proportionality standard is more than a byproduct of constitutional text or an interpretive method. A "preference for proportionality is in serious tension with essential features of state legislative elections." *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment). "If there is a constitutional preference for proportionality, the legitimacy of districting itself is called into question: the voting strength of less evenly distributed groups will invariably be diminished by districting as compared to at-large proportional systems for electing representatives." *Id.* That definition of gerrymandering would work against itself. Rather than accept uneven distribution of parties' constituents as "part of the baseline," *Rucho*, 588 U.S. at 742 (Kagan, J., dissenting), achieving proportionality "require[s] reverse gerrymandering to ensure greater proportionality for the minority party." *Bandemer*, 478 U.S. at 160 (O'Connor, J., concurring in the judgment). Whether laudable or not, setting traditional redistricting principles aside to achieve proportionality marks a departure from the proposition "'that the voters should choose their representatives, not the other way around.'" *Arizona State Legislature*, 576 U.S. at 824, quoting Berman, *Managing Gerrymandering*, 83 Texas L.Rev. 781 (2005) . Indeed, the Supreme Court recently explained that § 2 of the Voting Rights Act does not compel racial gerrymandering for the precise reason that it does not require proportional representation. *Allen v. Milligan*, 599 U.S. 1, 28 (2023) ("Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2.").

U.S. Supreme Court justices have agreed with striking consistency and unanimity that seeking proportionality (whether desirable or not) is properly called gerrymandering.

Gaffney, 412 U.S. 735, cited by another *amicus* in this case, declined to invalidate a Connecticut plan drawn to provide "a *rough* sort of proportional representation in the legislative halls of the State." *Id.* at 754 (emphasis added); *see also id.* at 752 (describing "the conscious intent to create a districting plan that would achieve a *rough* approximation of the statewide political strengths of the Democratic and Republican Parties" (emphasis added)). Supreme Court opinions (and lower-court opinions) have, without irony or argumentation, called the plan *Gaffney* upheld a "bipartisan gerrymander." *Gill*, 585 U.S. at 61 (unanimous); *Vieth*, 541 U.S. at 352 n.6 (Souter, J., dissenting); *Bandemer*, 478 U.S. at 153–54 (O'Connor, J., concurring); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1135–36 (S.D. Ohio), *vacated and remanded*, 140 S. Ct. 101 (2019). The decision itself indicated that all components of gerrymandering were present: the plan contained odd-shaped districts created for an overriding partisan end. *See Gaffney,* 412 U.S. at 737–38, 752 n.18. The Supreme Court upheld the plan, not because it was not a gerrymander, but because gerrymandering is not unconstitutional. *Id.* at 753 ("Politics and political considerations are inseparable from districting and apportionment."). The term "gerrymander" is not a value judgment about the plan; it is a statement of fact.

3. As laboratories of democracy, states may address "excessive partisan gerrymandering" as they see fit, within constitutional constraints. *Rucho*, 588 U.S. at 719. And states "are actively" doing just that. *Id.* at 719–20. But states have not heretofore deemed it necessary to make strict proportional representation a legal requirement. Instead, because gerrymandering refers to purposeful subordination of traditional criteria to a partisan purpose, states can and have tailored their responses to those elements. Those that affirmatively set partisan-fairness goals have balanced those goals with traditional criteria

considerations. Indeed, many gerrymandering prohibitions would equally prohibit the type of bipartisan gerrymander at issue in the *Gaffney* plan.

Perhaps the oldest type of gerrymandering curb is the mandate of traditional criteria, such as compactness or political-subdivision lines.[4] *See, e.g.*, Va. Const., art. II, § 6 (requiring that "electoral district[s] shall be composed of contiguous and compact territory"). For example, North Carolina's constitution imposes a county-boundary requirement, N.C. Const., art. II, §§ 3(1) and 5(1), that the state's courts have read to impose strict traversal and county-grouping rules. *See Stephenson v. Bartlett*, 562 S.E.2d 377, 396 (N.C. 2002) (*Stephenson I*); *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003) (*Stephenson II*). Although the North Carolina Constitution does not forbid partisan motive, *Harper v. Hall*, 886 S.E.2d 393, 419 (N.C. 2023) (*Harper III*), the county-grouping requirements curtail opportunities for gerrymandering by preventing "unnecessarily complicated and confusing district lines," *Stephenson I*, 562 S.E.2d at 392, which goes much of the way to preventing gerrymandering, *see Bethune-Hill*, 580 U.S. at 190 (departure from traditional criteria is typically an element of gerrymandering). This type of redistricting reform limits gerrymandering without requiring partisan line-drawing of any kind, and it may in effect preclude a bipartisan-gerrymandering effort as much as a partisan-gerrymandering effort.

Some states have gone further, including by forbidding partisan considerations outright. Florida's Fair Districts Amendment declares that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an

[4] In fact, the most effective gerrymandering restriction is the one-person, one-vote rule, which forbids so-called rotten boroughs. *See Reynolds v. Sims*, 377 U.S. 533 (1964). It is so well established, however, that it is almost taken for granted. *See Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (calling it "part of the redistricting background, taken as a given").

incumbent." Fla. Const., art. III, § 20; *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 371 (Fla. 2015). The underlying theory of this reform is that gerrymandering entails partisan purpose, *Rucho*, 588 U.S. at 736 (Kagan, J., dissenting), so it can be prevented by a bar on all partisan motive, *see League of Women Voters*, 172 So.3d at 387–88. But the same doctrine would equally condemn the bipartisan gerrymander of *Gaffney*, as the intent to achieve proportionality must be an "intent to favor or disfavor a political party." Fla. Const., art. III, § 20.

Yet another approach was taken by Michigan, which vests redistricting authority in an independent commission. Mich. Const., art. IV, § 6(2)(f). Michigan compels some consideration of politics by directing that "[d]istricts shall not provide a disproportionate advantage to any political party." Mich. Const., art. IV, § 6(d). But the standard is not proportional representation; it is "accepted measures of partisan fairness," *id.*, such as the efficiency gap, which does not set proportionality as the fairness standard, *see* Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 854 (2015). Moreover, the partisan-fairness criterion is one of many factors ranked in descending "order of priority," *Id.* art. IV § 6(d), and it was ranked *below* a requirement that "[d]istricts shall reflect the state's diverse population and communities of interest," including "populations that share cultural or historical characteristics or economic interests." *Id.* art. IV § 6(c). The criteria also preserve values of geographic representation, such as compactness and preservation of "county, city, and township boundaries." *Id.* art. IV, §§ 6(f) and (g). The Michigan commission assesses these factors in an extensive public-hearing and comment process, which a federal court described "as animated by a principle of self-determinism: public comments on the various plans … drove the Commission to

recognize … particular communities of interest in different parts of the State—which in turn led the Commission to draw the district lines as it did." *Banerian v. Benson*, 597 F. Supp. 3d 1163, 1167 (W.D. Mich. 2022) (three-judge court). This provision did not sacrifice communities and geographic representation for partisan-fairness goals: the Michigan Supreme Court summarily rejected a lawsuit challenging a plan that did not have perfectly ideal partisan-fairness scores. *League of Women Voters of Michigan v. Indep. Citizens Redistricting Comm.*, 971 N.W.2d 595 (Mich. 2022).

B. Section 6 of Proposed Issue 1 Requires the Subordination of Traditional Criteria to a Partisan Objective, A Result Consistent With the Understanding of Gerrymandering.

On their face, Sections 6(B) and 6(C) of Issue 1 would require that the proposed independent redistricting commission comply with a rigid proportional-representation requirement—to draw specific numbers of districts designed to favor a political party—regardless of the geographic distribution of parties' supporters, the shapes of resulting districts, or the communities that will be carved up to achieve numerically defined partisan goals. Issue 1 would command that the commission disregard the traditional, neutral, and geographic-based criteria that have long guided reapportionment in Ohio and in other states. This explicit subordination of neutral criteria to partisan criteria, to benefit one political party, is accurately described as gerrymandering.

1. Ohio has, for most of its history, prioritized traditional, geographic-based redistricting criteria to guide its redistricting process. The 1851 Constitution apportioned state representatives and senators by county, using a population-based formula based on the decennial census to determine how many representatives or senators each county would receive (and whether sparsely populated counties had to be combined with an adjacent

county to form a single district). *See* Ohio Const., art. XI (1851), §§ 2–5, 8–10. In 1967, Ohio voters passed an amendment to Article XI which aligned the apportionment formula to the one-person, one-vote principle, but retained county preservation as a primary legislative apportionment criterion, and further required legislative districts to preserve townships, municipalities, and wards where feasible. *See* Ohio Const., art. XI (1967), §§ 2–10.

The current redistricting Articles of the Ohio Constitution, adopted in 2015 and 2018, kept these traditional, population- and geography-based, criteria at the center, prioritizing county, township, and municipal boundary preservation. *See* Ohio Const., art. XI, §§ 3–5, 7 (state legislative); art. XIX, §§ 2(B)-(C), 3(C)(1)(c) (congressional). It is true that the 2015 and 2018 amendments introduced language that, when they apply, limit or prohibit redistricting plans that favor or disfavor a political party, Ohio Const., art. XI, § 6(A), and art. XIX, § 1(C)(3)(a), and that require the Ohio Redistricting Commission to "attempt" to draw a legislative plan where "the statewide proportion of districts whose voters … favor each political party shall closely correspond to the statewide preferences of the voters of Ohio." Ohio Const., art. XI, § 6(B). However, these provisions are *subordinate* to the traditional, geographic-based criteria that voters expect and understand. *See, e.g., League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 167 Ohio St.3d 379, 2022-Ohio-65, ¶ 88 ("the standards of Section 6 [of Article XI] are subordinate to the map-drawing requirements in Sections 2, 3, 4, 5, and 7"); *Adams v. DeWine,* 167 Ohio St.3d 499, 2022-Ohio-89, ¶ 40 ("Section 1(C)(3)(a) [of Article XIX] prohibits the General Assembly from passing by a simple majority a plan that favors or disfavors a political party or its incumbents to a degree that is in excess of, or is unwarranted by, the application of Section 2's and Section 1(C)(3)(c)'s specific line-drawing requirements").

2. Issue 1 proposes a substantial change to the existing geographically-focused set of criteria. Specifically, it expressly demotes and subordinates the existing criteria in favor of an express partisan goal: a requirement that each plan contain specific numbers of districts that "favor[] each political party," based on a formulaic calculation of "statewide partisan preferences" of Ohio voters. RELATORS_016 (Issue 1 Text, §§ 6(B)(1), (2)). Specifically, Issue 1 would require that "the statewide proportion of districts in each redistricting plan that favors each political party may deviate by no more than three percentage points" from "the statewide partisan preferences of the voters of Ohio." *Id.* (Issue 1 Text, § 6(B)(3)). This requirement to achieve proportional-representation (within a narrow 3% tolerance) is a mandatory criterion that must be satisfied, with the proposed independent redistricting commission only being permitted to consider the traditional, population- and geographic-based redistricting criteria found in Sections 6(C)(1)-(3) "to the extent possible." RELATORS_017.

This proportional-representation requirement takes priority over neutral redistricting criteria. To implement it "require[s] reverse gerrymandering to ensure greater proportionality for the minority party." *Bandemer*, 478 U.S. at 160 (O'Connor, J., concurring in the judgment). That is because the political parties' supporters are not evenly distributed throughout a state, so a plan configured using neutral criteria exhibiting some natural deviation from proportionality. *Vieth*, 541 U.S., 289–90. At present, for example, Democratic voters in Ohio tend to be concentrated in urban counties, and as this Court has acknowledged, "Ohio's political geography poses challenges." *LWV*, 2024-Ohio-65, at ¶ 128. In *Adams,* this Court similarly observed that "Ohio's natural political geography" may result in a congressional plan that, applying "neutral criteria," still "favor[s] or disfavor[s] a political

party or its incumbents" to some degree. *Adams*, 2022-Ohio-89, at ¶ 40. (acknowledging that). That outcome is not, without some improper purpose, a gerrymander by any serious definition: the political geography of the state is "part of the baseline" that defines fairness. *Rucho*, 588 U.S. at 736–37 (Kagan, J., dissenting). By subordinating that baseline, Issue 1 requires a "bipartisan gerrymander." *Gill*, 585 U.S. at 61. It is not misleading, deceptive, or argumentative to make that simple point.

3. Relators challenge the ballot language, contending that the amendment's operative text cannot be fairly described as requiring gerrymandering. Proposing that Issue 1 bars gerrymandering, they seek to draw an analogy to an "amendment banning drunk driving" being described as an amendment that "*permits* drunk driving." Relators' Br. at 17.

But Relators' argument ignores what Issue 1 does and what the term "gerrymander" means. As shown, a measure can arguably be said to "ban" gerrymandering if it forbids partisan motive or sets partisan-fairness goals consistent with communities of interest and other principles of geographic representation. If Issue 1 did those things, and nothing more, Relators would have a fair point that the label "gerrymander" is a misfit. But Issue 1 presents an expansive and unprecedented command of predominant partisan motive in redistricting. It affirmatively requires proportional representation at a strictly defined level, regardless of the geographic distribution of each party's supporters, the shapes of resulting districts, or the communities that will be carved up to achieve numerically defined partisan goals. Gerrymandering means subordinating traditional criteria to partisan motive, and Issue 1 demands that.

Relators appear to believe that Issue 1 does not require gerrymandering because it requires proportional representation, but they have it backwards. The proportional-

representation demand of Issue 1 is what merits the label gerrymander. Issue 1 does not need to command proportionality at the expense of everything else to forbid gerrymandering. The constitutions of other states that have enacted gerrymandering reforms have not taken this step, and the proportionality demand of Issue 1 would violate those states' gerrymandering prohibitions in many, even all, instances. And, because it is fair to call an effort at "rough" proportionality, *Gaffney*, 412 U.S. at 754, a "bipartisan gerrymander," *Gill*, 585 U.S. at 61, the term gerrymander is an accurate fit for Issue 1's strict and unforgiving proportionality demand. It is not misleading to use this terminology when a unanimous Supreme Court (and many judicial opinions) did so without irony or argumentativeness.

CONCLUSION

ARP encourages the Court to find that the word "gerrymandering" fairly encompasses and describes the effort in Sections 6(B) and (C) of the text of proposed Issue 1 to subordinate traditional, geographic-based criteria to an expressly partisan requirement to draw specific numbers of legislative and congressional districts that favor political parties.

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Respectfully submitted,

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