IN THE SUPREME COURT OF OHIO

LEAGUE OF WOMEN VOTERS OF OHIO, *et al.* ***Relators,*** ***v.*** **OHIO REDISTRICTING COMMISSION, *et al.*,** ***Respondents.***	**Case No. 2021-1449** **Original Action Filed Pursuant to Ohio Const., art. XIX, Sec. 3(A)**

RELATORS' REPLY IN SUPPORT OF MERITS BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Republican Legislators have unduly favored their party by enacting a plan that provides them with a clear advantage in 80% of the congressional districts, despite the fact that Republicans commanded only 55% of the statewide vote over the last ten years. Absent any compelling justification for this lopsided result, the Enacted Plan "unduly" favors the Republican Party.

No such justification exists. Respondents' official justification—that the map creates seven competitive districts—has been exposed as a sham. They do not spend one word in their brief even attempting to rebut the evidence establishing that they were keeping two sets of books, one for the public (trumpeting the "seven competitive seats") and one for internal use (documenting just how strongly the Enacted Plan favors the Republican Party).

Nor does the natural political geography of Ohio justify the Enacted Plan. Thousands of maps that are fully compliant with Article XIX—and reflect the political geography of Ohio—demonstrate that the Enacted Plan is a statistical outlier when it comes to its partisan bias. Again, Respondents do not attempt to rebut this point.

Respondents' contention that Relators have failed to articulate a "manageable standard" falls flat. As set forth below, Relators have explained how the Enacted Plan violates a clear standard: (i) the Enacted Plan is more unbalanced than the 2011 plan, which was condemned not only by a federal court, but also by the voters of this state in passing Article XIX, (ii) it violates redistricting criteria in the service of increased partisan gain, and (iii) it grossly departs from proportional representation without any justification.

It is the province of this Court to determine what "unduly" means. To find otherwise would allow the Legislature to declare any grossly partisan plan to be constitutional, thereby vitiating the fundamental rights of voters. That is not the law.

ARGUMENT

I. This Court Need Not Defer to the Legislature Regarding What the Bar on Undue Partisan Advantage Means Under Article XIX, Section 1(C)(3)(a)

Relying primarily on *Wilson v. Kasich*, 2012-Ohio-5367, 134 Ohio St. 3d 221, 981 N.E.2d 814 (2012), Respondents contend that this Court "must defer" to the General Assembly's interpretation of "unduly" because that term is not further defined in Article XIX. Merits Brief of Respondents Huffman & Cupp ("HC Br.") at 16.[1] As this Court has affirmed, however, "the judicial branch is the final arbiter in interpreting the Constitution." *State ex. rel. Ohio Acad. of Trial Laws v. Sheward*, 86 Ohio St. 3d 451, 467, 1999-Ohio-123, 715 N.E.2d 1062, 1079 (1999). To find otherwise would vitiate "[t]he power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government." *Id.* at 462.

Unable to deny this Court's role in determining the meaning of "unduly," Respondents resort to a diversionary discussion of the standard of proof in *Wilson* (the purported "beyond a reasonable doubt" standard). Respondents thereby seek to avoid a judicial determination of what "unduly" means by changing the subject.

Respondents' implausible reading of *Wilson*, however, cannot save their claims of deference. *See* HC Br. at 13–17. In *Wilson*, this Court held that the now-repealed Article XI had conflicting, co-equal provisions that required the exercise of some discretion by the General Assembly when drawing the map. *See* 134 Ohio St. 3d at 231. By contrast, Article XIX contains

[1] To be clear, Relators do not seek for this Court to sit as a "super[legislature]," as Respondents contend. HC Br. at 16. On the contrary, Relators ask this Court to exercise its duty as arbiter of the Constitution (i) to clarify the meaning of "unduly" as contemplated by Article XIX, and (ii) to determine whether the Enacted Plan violates that constitutional standard.

no such discretionary language. And no other provision in Section 1(C)(3) limits this clear prohibition on unduly favoring. *Wilson* quite simply has no applicability here.

II. Relators Have Set Forth a Manageable Standard to Demonstrate That the Enacted Plan Provides the Republican Party With an Undue Partisan Advantage

Respondents claim that Relators have "failed to provide a judicially manageable standard" to determine whether a plan "unduly" favors a party or its incumbents in violation of Article XIX. HC Br. at 20. In reality, Relators have provided three concrete and textually grounded guideposts that together provide a manageable standard and clear guidance as to whether the Enacted Plan violates the "unduly" provision of Section 1(C)(3). These straightforward guideposts define when a biased distribution becomes unduly partisan. The Enacted Plan's allocation of 12 Republican-leaning seats and three Democratic-leaning seats does not even come close.

The manageable standard proposed by Relators is grounded in the text and legislative history of Article XIX. Three points set its bounds.

First, and as a starting point, a plan, at a minimum, cannot be ***more biased*** than the 2011 plan: that is the clear intent and import of the 2018 constitutional amendment, which enacted the bar on an "unduly" partisan map. *See* Relators' Merits Brief ("Relators' Br.") at 27–30. If "unduly" means anything, it must, ***at minimum***, mean that. Under this test, a plan should not have fewer than four Democratic-leaning seats or more than 11 Republican-leaning seats.

Second, Relators have articulated a test that goes beyond merely marginally improving on the 2011 map; they have identified specific counties where the Enacted Plan has favored the Republican Party through districts that flout Article XIX's compactness requirement. *See id.* at 41–44. Sacrificing other neutral redistricting criteria to increase partisan gain unduly weights partisanship in drawing the map. Respondents' improper enhancements to Republican political

strength in these particular districts must be reversed if the plan is not to "unduly" favor a political party.

Third, the parties agree that "unduly" means "excessive," *see* HC Br. at 13—and among possible indicia of "excessive" partisanship, the Enacted Plan's gross departure from proportional representation (under which only 55% of the seats would favor Republicans), without explanation or justification, is a clear indicator. Relators do not contend that proportionality is an ironclad rule (that is a red herring). Nor do they dispute that political geography and other neutral redistricting factors could result in some departure from a strictly proportional distribution of seats. Dr. Imai, however, has taken political geography into account and estimated that the Enacted Plan is an outlier and provides Republicans with an unearned bonus of approximately three seats. Imai Rpt. at ¶¶ 3, 26, Supp. Vol. 1 at 5, 12–13; *see also* Relators' Br. at 30–32. An undue advantage of 20% of the congressional seats, inexplicable by other redistricting criteria, violates Section 1(C)(3).

Taken together, these three straightforward guideposts provide a clear and manageable standard for complying with the bar on undue partisanship under Section 1(C)(3) of Article XIX.

A. The Enacted Plan Provides the Republican Party With An Even Greater Partisan Advantage Than Did The 2011 Plan

If Article XIX means anything, it must require that Ohio's congressional map be ***less partisan*** than the map adopted in 2011, under which Republicans consistently won 75% of Ohio's delegation (12 of 16 seats) despite receiving a statewide vote share of only 55%. *See* Relators' Br. at 26. That outcome under the 2011 plan was squarely repudiated as unduly partisan both by a three-judge federal panel, *see Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019), and by a supermajority of Ohio voters, who approved Article XIX by an overwhelming 75-to-25% margin, *see* Relators' Br. at 3, 5. Thus, for any

enacted plan to be constitutional under Section 1(C)(3)(a), that plan must—***at a minimum***—exhibit materially less partisan bias than the repudiated 2011 plan.

The Enacted Plan flunks this baseline test. Under the 2011 plan, Republicans consistently prevailed in 12 of 16 districts, never allowing Democrats to hold more than 25% of Ohio's congressional seats, even as Democratic candidates were winning 45% of votes statewide. *See id.* at 26, 28. Yet under the Enacted Plan, Republicans are most likely to hold 80% of the congressional seats (12 of 15), a larger partisan advantage than their 75% seat share under the 2011 plan. *Id.* at 27–29. In this respect, there can be no doubt that the Enacted Plan flouts Article XIX.

To avoid being "unduly" partisan in the same manner as the 2011 plan, any map—again, at a minimum—has to be at least more balanced than the status quo *ante* under which Democrats won no more than 25% of the available 16 seats for a decade. *Id.* at 1, 26–27. In the context of a 15-seat congressional map, there must be at least four districts favoring Democrats (or 26.7% of the seats) and no more than 11 districts favoring Republicans. That allocation, however, would be only trivially distinct from the 2011 map and therefore only a starting point. To determine the appropriate allocation of seats one must also consider both (i) the improper manner in which districts were drawn at the local level, and (ii) the degree to which the Enacted Plan deviates from proportionality without any justification based on political geography.

B. The Enacted Plan Draws Non-Compact Districts to Pack and Crack Four Specific Counties Resulting in an Undue Bonus of Over Three Republican Seats

Analysis from several experts—Drs. Rodden, Imai, Chen, and Warshaw—provides overwhelming evidence that the Enacted Plan's districts around Hamilton, Cuyahoga/Summit, Franklin, and Lucas counties are drawn in a way that unduly favors the Republican Party. This undue favoritism results from deliberate packing and cracking to create (i) Republican-leaning

districts that would otherwise have been competitive or Democratic-leaning, and (ii) competitive districts that would otherwise be safe Democratic seats.

Respondents' packing and cracking within the Enacted Plan violates an express requirement of Article XIX, Section 1(C)(3)(c), which states that "the general assembly shall attempt to draw districts that are compact." Instead, the Enacted Plan provides for egregiously non-compact districts either within or around heavily Democratic metropolitan areas so as to achieve unduly partisan results. In particular, the Enacted Plan deprives the Democratic Party of:

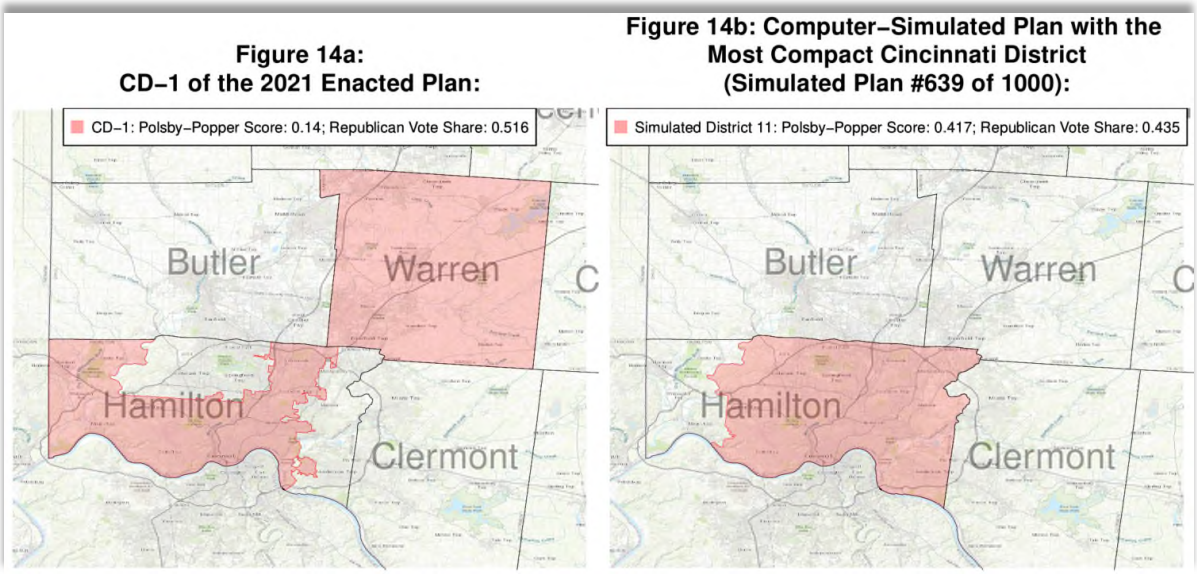
- one Democratic-leaning seat in Hamilton County;
- one additional Democratic-leaning seat in Franklin County (in addition to District 3);
- one Democratic-leaning seat in the Akron area; and
- one competitive seat around Toledo.

Thus, if one corrects for the undue packing and cracking across these four localized areas, and instead prioritizes compactness, the result would be a map that has nine Republican-leaning districts, five Democratic-leaning districts (Cleveland, Columbus, Cincinnati, suburban Franklin County, and Akron), and a competitive seat (around Toledo). *See* Imai Rpt. at ¶¶ 39–44, Supp. Vol. 1 at 16–21; Levenson Rpts. Appx. at RPTS_0134–49, Supp. Vol. 1 at 182–97 ("Second Rodden Rpt."); Levenson Rpts. Appx. at RPTS_0207–27 ("Chen Rpt."); Levenson Rpts. Appx. at RPTS_0038–39, Supp Vol. 1 at 86–87 ("Warshaw Rpt.").

Hamilton County (Cincinnati). Drs. Imai, Rodden, and Chen each demonstrated that the Enacted Plan cracks Democratic voters around Cincinnati to prevent the otherwise very likely emergence of a Democratic-leaning district in Hamilton County. *See* Second Rodden Rpt. at ¶¶ 83–84, Supp. Vol. 1 at 182–83; Chen Rpt. at ¶¶ 75–77; *see also* Relators' Br. at 42. Dr. Imai found that "in Hamilton County alone, cracking of Democratic voters nets Republicans an entire

seat." Imai Rpt. at ¶ 41, Supp. Vol. 1 at 19; *see also* Relators' Br. at 42. Dr. Chen's analysis similarly confirmed that in order to achieve this Republican advantage, the General Assembly drew an irregularly shaped District 1 that scores very poorly in terms of compactness. Chen Rpt. at ¶ 77.

Figure 14a of Dr. Chen's report, reproduced below, shows District 1 in the Enacted Plan, which connects an irregularly shaped portion of Hamilton County with Warren County (marked in red) by inventing a narrow corridor in northeast Hamilton County.[2] Indeed, using the well-accepted Polsby-Popper metric for compactness, Dr. Chen concluded that District 1 "exhibits a very non-compact shape, as evidenced by a compactness score much lower than the Cincinnati-based district in virtually all of the computer-simulated districts." Chen Rpt. at ¶ 77.



Dr. Imai's analysis of Hamilton County and Cincinnati likewise found that "the enacted plan has no Democratic seats under the average statewide federal contest, whereas the simulated

[2] Figures 14a and 14b in Dr. Chen's report provide a comparison of District 1 as drawn in the Enacted Plan against a district containing most of Hamilton County in one of his simulated plans. Chen Rpt. at ¶ 74 & Figs. 14a, 14b.

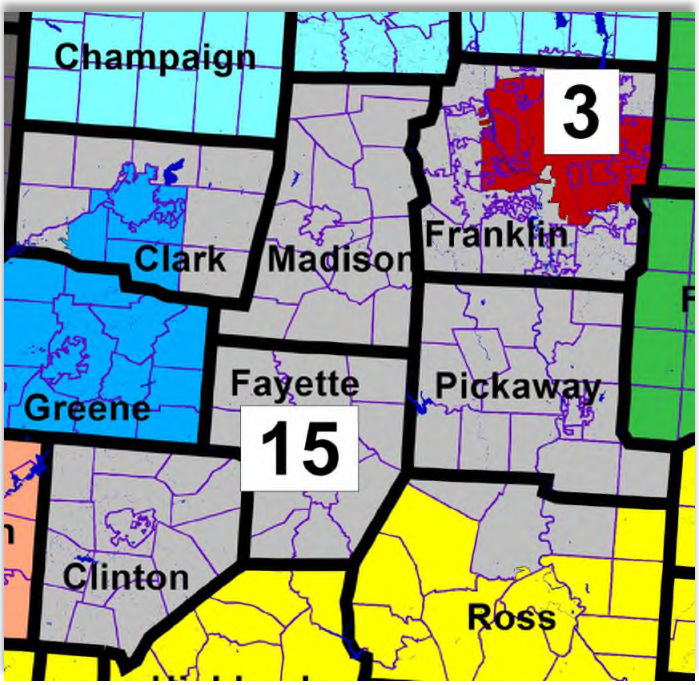
plans are expected to yield a Democratic seat," confirming that the mapmakers, not political geography, dictated the partisan outcome of the Enacted Plan in southwest Ohio. *See* Imai Rpt. at ¶ 41, Supp. Vol. 1 at 17; *see also id.* at ¶¶ 39–41, Supp. Vol. 1 at 16–17.

Franklin County (Columbus). Drs. Imai, Rodden, and Chen each demonstrated that the Enacted Plan packs Democratic voters into District 3 in order to prevent the emergence of a second Democratic-leaning district within and around Franklin County. *See* Imai Rpt. at ¶ 42, Supp. Vol. 1 at 20; Second Rodden Rpt. at ¶ 89, Supp. Vol. 1 at 187; Chen Rpt. at ¶ 64; *see also* Relators' Br. at 42–43. Dr. Imai found that this packing "yields around one additional seat for Republicans, on average, when compared to the simulated plans." Imai Rpt. at ¶ 43, Supp. Vol. 1 at 20; *see also* Relators' Br. at 43.

In particular, Dr. Chen's analysis confirmed that in order to pack Democratic voters into District 3, Respondents drew an irregularly shaped District 3 as well as an even more egregiously shaped District 15 that wraps around the northern, western, and southern edges of District 3—both of which score very poorly in terms of compactness.[3] *See* Chen Rpt. at ¶¶ 64–66; *see also* Levenson Rpts. Appx. at RPTS_0086, Supp. Vol. 1 at 134 (First Rodden Rpt., Ex. A), reproduced below as Figure 1.

[3] Figures 7a and 7b in Dr. Chen's report provide a comparison of Districts 3 and 15 as drawn in the Enacted Plan against the Columbus-area districts in one of his simulated plans. Chen Rpt. at ¶¶ 60–61 & Figs. 7a and 7b;; *see also id.* at ¶¶ 67–69 & Figs. 11, 12.

Figure 1: The non-compact shape of District 15

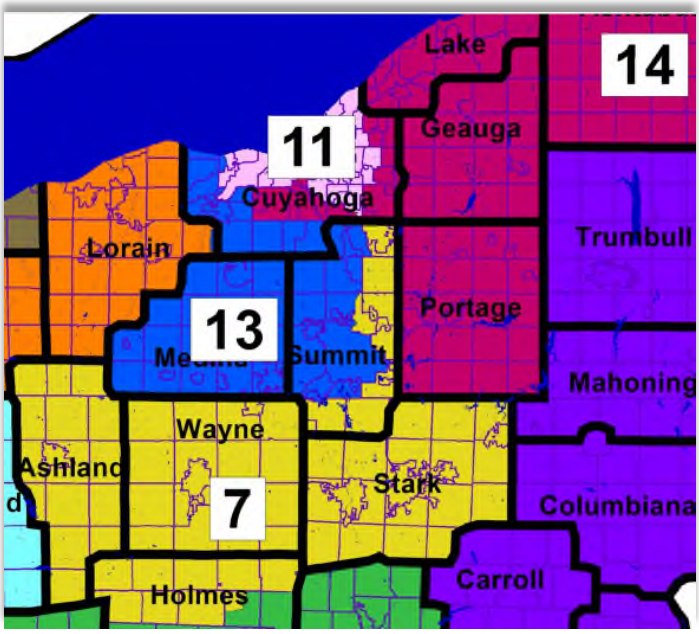


Using the well-accepted Polsby-Popper metric for measuring compactness, Dr. Chen concluded that Districts 3 and 15 "were collectively drawn in a manner that clearly favors the Republican Party, and these two districts are clearly much less geographically compact than one could reasonably expect from a districting process that follows the districting requirements of the Ohio Constitution." Chen Rpt. at ¶ 69.

Cuyahoga and Summit Counties (Cleveland and Akron). Drs. Imai, Rodden, and Chen also demonstrated that the Enacted Plan packs Democratic voters into District 11 and additionally cracks Democratic voters into multiple districts south of Cleveland. *See* Imai Rpt. at ¶ 44, Supp. Vol. 1 at 21; Second Rodden Rpt. at ¶ 96, Supp. Vol. 1 at 195; Chen Rpt. at ¶ 84; *see also* Relators' Br. at 48–49. Dr. Rodden concluded that this packing and cracking had a clear partisan effect: "what would otherwise be a comfortable Democratic Akron-based district is instead a toss-up." Second Rodden Rpt. at ¶ 96, Supp. Vol. 1 at 195. Dr. Rodden's analysis further confirmed that in order to pack and crack Democratic voters in Cuyahoga and Summit

counties, the General Assembly drew non-compact districts in Districts 5, 11, 13, and 14. *Id.* at ¶¶ 88 & Fig. 13, 95–96, Supp. Vol. 1 at 186–87, 195. Dr. Rodden specifically found that the Cleveland-based District 11 splits District 14 making it noncontiguous "but for the grace of the one census block." *Id.* at ¶ 96 & Fig. 21, Supp. Vol. 1 at 195;[4] *see also* Levenson Rpts. Appx. at RPTS_0086, Supp. Vol. 1 at 134 (First Rodden Rpt., Ex. A), reproduced below as Figure 2.

Figure 2: The non-compact shapes of Districts 11, 13, and 14

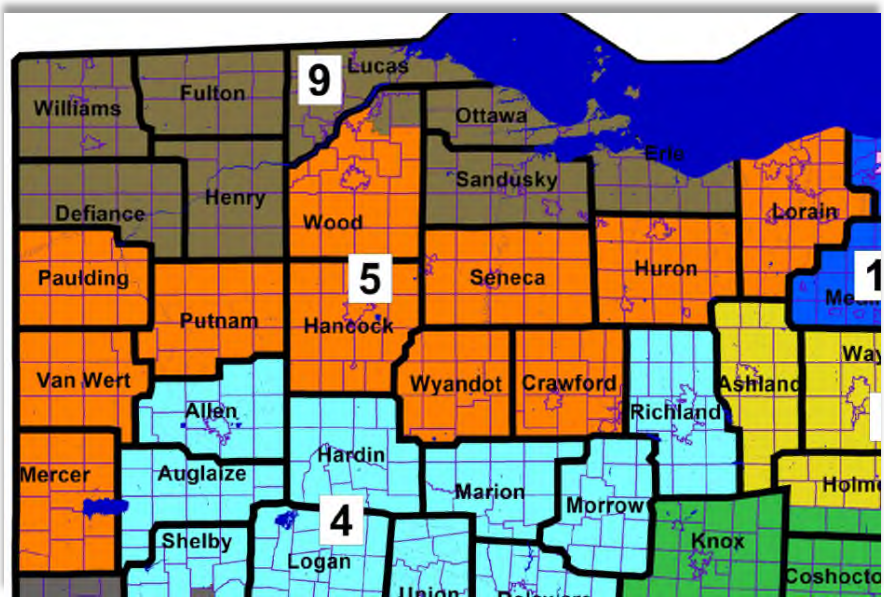


Lucas County (Toledo). Finally, Drs. Rodden and Warshaw demonstrated that the Enacted Plan prevents the emergence around Lucas County of a district that should at least be competitive, if not Democratic-leaning. *See* Second Rodden Rpt. at ¶¶ 97–98, Supp. Vol. 1 at 196–97; Warshaw Rpt. at 25–26, Supp. Vol. 1 at 86–87. Dr. Rodden's analysis confirmed that in order to achieve this partisan aim, the General Assembly drew District 5 to the south of Lucas

[4] Dr. Rodden's Figure 13 further supports these findings using the well-accepted Reock metric for measuring compactness. Second Rodden Rpt. at ¶ 88 & Fig. 13, Supp. Vol. 1 at 186–87.

County to be non-compact. *See* Second Rodden Rpt. at ¶ 97, Supp. Vol. 1 at 196. Thus, as described by Dr. Rodden, District 5 "reaches all the way to Mercer County, along the Indiana border, which is 180 miles away, more than a 3-hour drive from downtown Lorain." *Id.*;[5] *see also* First Rodden Rpt., Ex. A, Supp. Vol. 1 at 134, reproduced below as Figure 3.

Figure 3: The non-compact shape of District 5



In each of these four areas of the state, partisanship clearly predominated over other constitutional requirements. Thus, the Enacted Plan forgoes compliance with neutral redistricting criteria, like compactness, to impose undue partisan advantage instead.

C. The Enacted Plan's Extreme and Unjustified Departure From Proportionality Unduly Advantages the Republican Party

Respondents do not dispute Dr. Warshaw's analysis of the partisan bias of the Enacted Plan, which used three distinct methodologies, all of which reached the same conclusion: that the Enacted Plan unduly favors the Republican Party. Relators' Br. at 28–30. They have not

[5] Dr. Rodden's Figure 13 further shows that District 5 of the Enacted Plan is the least compact district across the Enacted Plan and each of the other alternative plans he analyzed using the well-accepted Reock metric for measuring compactness. *See* Second Rodden Rpt. at ¶ 88 & Fig. 13, Supp. Vol. 1 at 186–87.

disputed Dr. Warshaw's finding that if the 2020 congressional election occurred under the Enacted Plan, Republicans would have won 87% of Ohio's seats, despite winning only 57% of the statewide vote. *Id.* at 29. And they do not even attempt to engage with the partisan bias analyses of Dr. Imai.

Instead, Respondents mischaracterize Relators' position as "requir[ing] this Court to mandate some measure of proportional representation." *See* HC Br. at 18. Relators have never advocated that strict proportionality is required by Article XIX, Section 1(C)(3)(a). Indeed, it is not. But it goes too far in the other direction to suggest that in considering whether a plan is unduly partisan, the Supreme Court should simply ignore a gross departure from proportionality. Rather, evidence of an egregious departure from proportionality is an important starting point for any analysis of undue partisanship. Once that starting point has been established, Respondents must then explain why a departure is warranted.

Contrary to what Respondents may argue, the partisan bias of the Enacted Plan cannot be explained by their purported attempts to "create[] safe districts where it is impossible not to do so because of the residential and voting patterns of Ohioans," *see id.* at 18, and to "draw competitive congressional districts anywhere in the state where it is possible to make such districts," *see id.* at 25. As shown by Dr. Imai's and Dr. Chen's simulation analyses, Ohio's geography did not require the General Assembly to enact a plan that would give Republicans 80% of Ohio's congressional seats, despite being expected to win only 55% of the statewide vote. *See* Imai Rpt. at ¶¶ 3, 13, Supp. Vol. 1 at 5–6, 8; Chen Rpt. at ¶ 35.

Indeed, ***all*** of Dr. Imai's 5,000 simulated plans are bound by the same geographical and statutory constraints as the Enacted Plan, leaving intact every county that the Enacted Plan does not split. Moreover, all 5,000 plans are at least as compliant with Article XIX as the Enacted

Plan, in that all are more compact and split fewer districts than the Enacted Plan. Thus, even when political geography is taken into account, the Enacted Plan gives Republicans 2.8 additional seats in comparison to Dr. Imai's average simulated plan. *See* Relators' Br. at 31; Imai Rpt. at ¶ 3, Supp. Vol. 1 at 3.

Notably, Respondents do not dispute that Dr. Imai's analysis demonstrated that maps constructed on the very same political geography, keeping intact the very same subset of counties, could be fully compliant with Article XIX while exhibiting better compactness and performing far better than the Enacted Plan under all traditional partisan metrics.[6] Indeed, Respondents' purported criticism of Dr. Chen's simulation analysis (that Dr. Chen used different election data than the General Assembly's limited set of federal elections) is entirely inapplicable to Dr. Imai, who gave the General Assembly the benefit of the doubt by using the very same election data as the General Assembly in his own analysis. HC Br. at 16, 17 n.3; *see also* Imai Rpt. at ¶ 17, Supp. Vol. 1 at 9.[7]

III. Respondents' Contention That the Enacted Plan Satisfies the Ban on Undue Partisanship by Creating Seven "Competitive" Districts Is Baseless

Respondents contend that "it was clear that the people of Ohio wanted more competitive districts" in passing the constitutional amendment that led to Article XIX. HC Br. at 7. They then argue that the Enacted Plan meets this test because it creates more "competitive" districts

[6] To the extent Respondents argue that Dr. Imai's simulated maps "provide exact proportionality by making exact proportionality one of their criteria for drawing maps," *see* HC Br. at 20, such an argument has no basis in fact, as Dr. Imai did not make proportionality a criterion for any of his 5,000 simulated maps. *See* Imai Report at ¶¶ 14–19, Supp. Vol. 1 at. 8–10.

[7] Respondents' expert, Dr. Barber, fails to provide any credible evidence to the contrary. According to Dr. Barber, "[d]istricts that are largely (or nearly entirely) composed of the largest cities in Ohio, will be overwhelmingly Democratic." HC Evid. Vol. 4 at 789. Despite this geographic expectation, neither Toledo (Ohio's fourth largest city) nor Cincinnati (Ohio's largest metropolitan area and third largest city) are in safe Democratic districts in the Enacted Plan.

than the 2011 Plan. By their account, the Enacted Plan includes seven competitive districts, while the 2011 map only includes two. *Id.* at 11. This claim lies at the heart of the justification for the Enacted Plan set forth in Respondents' Section 1(C)(3)(d) Statement. *See* SB 258, § 3(A) ("The plan contains six Republican-leaning districts, two Democratic-leaning districts, and seven competitive districts.").

But Respondents' Section 1(C)(3)(d) statement of seven "competitive" districts finds no support in the record. On the contrary, Respondents' purported justification rests on a flawed electoral index and an arbitrary definition of "competiveness." And upon closer inspection, the allegedly "competitive" districts that the Enacted Plan creates in fact skew heavily in favor of Republicans. Relators' Br. at 35.

A. The Enacted Plan Does Not Create Seven "Competitive" Districts

Respondents' contention that the Enacted Plan creates seven competitive districts is based on two premises: (i) applying the FEDEA index of federal-only elections since 2012, and (ii) using Respondents' +/- 4% definition of competitiveness. HC Br. at 11. That justification was baseless when it was first articulated in their Section 1(C)(3)(d) Statement. Respondents have not disputed this point.

As Relators explained in their opening brief, Respondents worked from two sets of books when drawing their map: one presented to the public (making the map look less favorable to Republicans) and another that they relied upon internally (showing how districts would ***actually*** perform in their favor**)**. Relators' Br. at 19–24. It bears emphasis that Respondents do not even attempt to dispute this point. To recap:

- As they drew in Maptitude, Republican map-drawers DiRossi and Springhetti paid careful mind to the districts' partisan performance, calculating it under multiple election indices. *Id.* at 19.

- Internal memoranda reveal that Senator McColley considered the Enacted Plan under at least two partisan election indices. *Id.* at 24.

- But when Respondents pitched their map to the public, they presented only one set of data: FEDEA, an index that included ***only*** U.S. presidential and Senate statewide elections from 2012 to 2020. *Id.* at 19.

- The core feature of the FEDEA index is that it captured two of the strongest Democratic election years—2012 and 2018—without balancing out the data with other statewide elections that had taken place over the prior decade. *Id.* at 33.

- Thus, as DiRossi confirmed, the FEDEA index made all but one of the Enacted Plan's districts appear to have a weaker Republican performance than was revealed by his other index, EA53, which included all statewide state and federal elections from 2016 to 2020. *Id.*

- The difference was substantial: under the EA53 index, four of the Enacted Plan's districts had 1 to 3% stronger Republican performance. *Id.* at 20. Under another index that Springhetti used, EA51—which included all statewide state and federal (U.S. presidential and Senate) elections from 2012 to 2020—***all*** of the allegedly competitive districts showed 1 to 3% stronger performances for Republicans. *Id.* at 21.

- Notably, the FEDEA index was chosen ***after*** Respondents first drew their map, confirming that Respondents' justification was nothing more than a post-hoc rationalization. *Id.* at 22.

- Likewise, Respondents tested out multiple definitions of "competitiveness"—including, at least, within "3.75% or less," between 3.75% and 3.8%, and within 4% of a 50% partisan split—and progressively broadened what they considered "competitive" until they reached a number that allowed them to make their exaggerated claim about the Enacted Plan's competitiveness. *Id.* at 22–23. They settled on their +/- 4% competitiveness definition, too, only ***after*** designing the map that would be enacted. *Id.* at 23.

Taken together, these differences in election indices and competitiveness metrics are consequential. By way of example, Respondents claim that their map includes seven competitive districts—but that result holds only if one applies a +/- 4% competitiveness definition ***and*** only considers U.S. presidential and Senate elections from 2012 to 2020. Even applying Respondents' competitiveness definition, using both state ***and*** federal elections from 2016 to 2020 (as DiRossi did), there are only five competitive districts (two fewer than what

Respondents proclaimed in their public statement). *Id.* at 20. And if one considers both state and federal elections from a broader time period of 2012 to 2020 (as Springhetti did), the map only includes ***three*** competitive districts. *Id.* at 21–22. Finally, by applying the other competitiveness definitions highlighted in Respondents' internal analyses, the number of "competitive seats" ***ranged all the way down to two districts***. *Id.* at 23.

Tellingly, Respondents make no attempt to rebut these facts. Instead, they simply try to bolster their FEDEA index, arguing that it was an "'easy' decision" to rely on it, "because members of Congress interact with 'our U.S. Senators' and 'President of the United States.'" HC Br. at 8. Not only does that justification ignore the fact that the FEDEA index ***omitted*** statewide election results for U.S. House representatives, but the notion that voters may support a member of Congress based upon who she interacts with strains credulity. Indeed, the pretextual justification for Respondents' use of the FEDEA index is underscored by the fact that Springhetti did not even ***consider*** the FEDEA index when drawing his map—and that ***none*** of his election indices excluded state elections. Relators' Br. at 15–16.

Sensing that they are on thin ice, Respondents contend that their choice of election index was "not very consequential" anyway. HC Br. at 8. But a few pages later, they contradict themselves, stating that "different persons with different ideas can score districts in a different manner in order to support their ideas. Much of this depends on the elections that are used to score a district." *Id.* at 23. Quite so—and that is the very point. Respondents have cherry-picked a set of elections—and carefully selected their competitiveness definition—to mislead the public.

Virtually conceding defeat, Respondents contend that "There is No Single Accepted way to Determine when a District is Competitive[.]" *Id.* at 22. Yet their entire justification for the

Enacted Plan hinges on their FEDEA index being the only way to show a district's competitiveness. It is the basis for their Section 1(C)(3)(d) statement. It is the basis for their entire case.

B. The Focus on the Number of Allegedly Competitive Seats in the 2011 Plan Is a Diversion

Respondents do not, and cannot, claim that the Enacted Plan is less biased than the 2011 plan. *See supra* § II.A. To support this contention they assert that under "the FEDEA standard," the Enacted Plan has six safe Republican districts, two safe Democratic districts, and seven so-called "competitive" districts, while "[u]nder this same standard, the 2011 Congressional Plan had only 2 competitive seats." HC Br. at 11.

Like their spurious claim that the Enacted Plan has seven competitive seats, this comparison to the 2011 plan rests on Respondents' deliberate decisions to cherry-pick among electoral datasets and competitive vote ranges. Thus, their expert, Dr. Barber, restricted his analysis of the "partisan lean" of the Enacted Plan and the 2011 map to an index of the "six statewide federal elections" from 2012 to 2020. HC Evid. Vol. 4 at 791. In other words, Dr. Barber used Respondents' FEDEA index but did not evaluate alternative indices or defend the FEDEA index as appropriate. Moreover, Dr. Barber acknowledged that his chosen index of statewide federal elections was "not perfect," given that the actual results in contested races in Ohio's 16 districts diverged from the FEDEA index "in some races . . . by more than 15 percentage points," and by an overall average of 5.8 percentage points. *Id.* at 793.

In the end, Dr. Barber fails to acknowledge that even under the misleading FEDEA index, no fewer than five of the seven supposedly "competitive" districts in the Enacted Plan skew distinctly Republican, with average Democratic vote shares between 46.3% and 48.5%, as revealed in Table 3 of his report. *Id.* at 802. Indeed, as Dr. Warshaw has explained, ***all seven***

seats identified as "competitive" by Dr. Barber in reality favor Republicans: four are among the "10 strongly Republican districts," while each of the three remaining "potentially competitive districts" also "leans toward Republicans." Warshaw Rpt. at 5, Supp. Vol. 1 at 66.[8]

IV. A Plan That Complies with Article XIX, Section 1(C)(3), Does Not Violate the Fourteenth Amendment of the United States Constitution

As noted above, and contrary to Respondents' repeated mischaracterizations, Relators do not argue that the General Assembly is "mandated" to adopt a congressional district plan with "strict proportional representation." HC Br. at 25. Instead, Relators argue that egregious departures from proportionality without justification can provide ***evidence*** of undue partisanship. *See supra* § II.C. Out of this straw person, Respondents purport to craft a federal constitutional argument against Relators' claims. It falls short.

As an initial matter, Respondents' argument that the ***federal*** constitution may not require proportional representation of the major political parties is utterly beside the point, as Relators bring this action because the Enacted Plan violates the ***Ohio*** Constitution. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (emphasizing that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply").

Moreover, Respondents' conclusion that precedent "casts doubt" on the federal constitutionality of proportional representation requirements borders on misleading. HC Br. at 26. For example, *Gaffney v. Cummings* held that proportional partisan representation ***did not***

[8] Dr. Barber also offered another facially implausible metric for competitiveness, "Bipartisan Victories," which he claimed indicates that there were no fewer than six competitive districts under the 2011 map. HC Evid. Vol. 4 at 809–10 & Table 6. Dr. Barber counted as "bipartisan" any district in which any Democratic candidate, in a single federal statewide election, won more than 50% of the two-party vote share in that district. *Id.* at 791. Under this approach, a district would qualify as "competitive" if a Democrat squeaked out 50.1% of the two-party vote share in a single statewide election, but where five other federal statewide elections and every congressional election in that same district resulted in a landslide victory for Republicans.

violate the Fourteenth Amendment, finding instead that "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of legislative seats." 412 U.S. 735, 752–54 (1973). And Justice O'Connor's concurrence in *Davis v. Bandemer*, contrary to Respondents' contention, lauded that holding when she recognized that a "requirement of proportional representation" would be "judicially manageable" and expressed "no doubt that district courts would be able to apply this edict." 478 U.S. 109, 158 (1986) (O'Connor, J., concurring), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

Next, Respondents' improperly invoke *Johnson v. Wisconsin Elections Comm'n* to support their quasi-Equal Protection claim, despite the fact that the *Johnson* court declined to consider the partisan makeup of districts because the Wisconsin Constitution (i) says nothing about partisan gerrymandering, and (ii) contains "no plausible grant of authority to the judiciary to determine whether maps are fair to the major parties." No. 2020AP1450-OA, 2021 WL 5578395, at *12 (Wis. Nov. 30, 2021) (internal quotations omitted). By contrast, the Ohio Constitution (i) prohibits the enactment of an "unduly" partisan plan, and (ii) explicitly grants this Court the authority to determine whether the Enacted Plan complies with that prohibition.[9] Ohio Const., art. XIX, §§ 1(C)(3)(a), 3(A).

In sum, the notion that drawing an Article XIX compliant plan "intentionally discriminate[s] against Republican voters" (and third-party candidates) strains credulity. HC Br. at 27–28.

[9] Respondents' invocation of *Cox v. Larios*, 542 U.S. 947 (2004), to support an Equal Protection claim is ironic, particularly when the Court in that case struck down a map where purported "population deviations were designed to allow [a political party] to maintain or increase their representation in the House and Senate," *id.* at 949, as ***Respondents*** have done here. *See supra* § II.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that on this 20th day of December, 2021, I caused a true and correct copy of the following documents to be served by email upon the counsel listed below:

1. **Relators' Reply in Support of Merits Brief**

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