No. 22-125092-S

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**IN THE SUPREME COURT OF THE STATE OF KANSAS**

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FAITH RIVERA, et al., TOM ALONZO, et al., SUSAN FRICK, et al.,
*Plaintiffs-Appellees*,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and MICHAEL ABBOTT, in his official capacity as Election Commissioner of Wyandotte County, Kansas,
*Defendants-Appellants*,

JAMIE SHEW, in his official capacity as Douglas County Clerk,
*Defendant-Appellee.*

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# BRIEF OF *RIVERA* AND *ALONZO* PLAINTIFF-APPELLEES

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Appeal from the District Court of Wyandotte County
Honorable Bill Klapper, District Judge
District Court Case No. 22-CR-89 (consolidated with No. 22-CV-90 and Douglas County Case No. 22-CF-71)

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## NATURE OF THE CASE

The district court found by "overwhelming evidence" that the Legislature's congressional redistricting plan, Ad Astra 2, intentionally and effectively dilutes the votes of Democratic and minority voters in violation of the Kansas Constitution. J.A. VI, 149. "It is axiomatic that an apportionment act, as any other act of the legislature, is subject to the limitations contained in the [Kansas] Constitution, and where such act . . . violates the limitations of the Constitution, it is null and void and it is the duty of courts to so declare." *Harris v. Shanahan*, 192 Kan. 183, 207, 387 P.2d 771 (1963). The district court properly exercised that duty, holding that legislators do not have "unlimited power to redistrict this state in any way that they want to." J.A. XIV, 25. Rather, as this Court held in *Harris*, the Legislature must redistrict consistent with the Kansas Constitution.

On appeal, Defendants contend that the Kansas Constitution imposes no constraints on the Legislature in drawing congressional districts, and that Kansas courts are powerless to review the Legislature's work. None of their arguments has merit. First, a century of U.S. Supreme Court precedent rebuts Defendants' theory that the U.S. Constitution's Elections Clause licenses state legislatures to enact congressional redistricting legislation in violation of the state's own constitution, without review by the state courts. As the Supreme Court has held time and again, the Elections Clause does not "instruct[] . . . that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S 787, 817-18 (2015). The hodgepodge of dissents and concurrences cited by Defendants only confirm this reality.

Defendants' argument that partisan gerrymandering claims are nonjusticiable under the Kansas Constitution fares no better. "[C]ourts are frequently called upon, and adept at, defining and applying various, perhaps imprecise, constitutional standards." *Gannon v. State*, 298 Kan. 1107, 1155, 319 P.3d 1196 (2014) (per curiam). The district court properly did so here, finding, by overwhelming evidence, that Ad Astra 2 has both the intent and effect of maximizing Republican advantage and diluting the electoral influence of Democratic voters. *See generally* J.A. VI. Although this Court has not previously invalidated a redistricting plan due to partisan gerrymandering, none of the Court's prior opinions suggest that the Court lacks a manageable standard to do so. *Infra* Section I.A.

Defendants' arguments on the actual merits of Plaintiffs' claims fall flat. The district court found as a factual matter that Plaintiffs presented "overwhelming" evidence that Ad Astra 2 intentionally and effectively dilutes the votes of Democratic *and* minority voters. J.A. VI, 105, 149. Those findings are entitled to "great deference" on appeal, and this Court "does not reweigh evidence, assess the credibility of witnesses, or resolve conflicts in evidence." *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (2015). Here, the record amply justifies the district court's conclusion that Ad Astra 2 has both the intent and effect of diluting Democratic and minority votes, violating multiple provisions of the Kansas Constitution that protect the right of *all* Kansans to equal political power and voice.

Defendants' arguments would render the Kansas Bill of Rights a mere "compilation of glittering generalities," contrary to a century and a half of this Court's precedent. *Atchison St. Ry. Co. v. Mo. Pac. Ry. Co.*, 31 Kan. 660, 3 P. 284, 286 (1884). The district court's decision invalidating Ad Astra 2 under the Kansas Constitution should be affirmed.

## STATEMENT OF THE ISSUES

1. Whether partisan gerrymandering claims are justiciable under the Kansas Constitution, and if so, whether the district court correctly concluded that Ad Astra 2 is an unconstitutional partisan gerrymander.

2. Whether the district court correctly concluded that Ad Astra 2 intentionally and effectively dilutes the voting power of minority voters in violation of the Kansas Constitution's equal protection guarantee.

3. Whether the U.S. Constitution's Elections Clause bars state courts from reviewing the validity of legislatively enacted congressional redistricting plans under the state's own constitution.

## STATEMENT OF FACTS

Ad Astra 2, the congressional redistricting plan challenged in this case, went from introduction to passage to veto to override in less than three weeks. J.A. VI, 25-31. While Plaintiffs do not dispute Defendants' recitation of the basic dates surrounding the plan's passage and the initiation of this case, additional facts are necessary for this Court's full understanding of the process by which the map was passed. Moreover, significant evidence regarding the findings of Plaintiffs' experts, which were essential to the district court's conclusion that Ad Astra 2 violates the Kansas Constitution, is set forth below.

### A. The Legislature passed Ad Astra 2 through a rushed process that ignored public input.

The Legislature's "listening tours" consisted of fourteen public meetings held during the workday, before census data was publicly released. *Id.* at 15, 18-20. Then, during the legislative session, Republican leadership allowed testimony on the map shortly

after its introduction and before the Kansas Legislative Research Department made the data underlying the map available to the public. *Id.* at 25-26. Nevertheless, members of the public overwhelmingly testified against Ad Astra 2. *Id.* at 26.

Ad Astra 2 reconfigured Kansas' congressional districts in two main ways. First, it split Wyandotte County in two, moving large portions of the County's minority and Democratic voters out of CD 3 and into CD 2. *See, e.g.*, *id.* at 95-96. Second, the plan carved the city of Lawrence out of Douglas County and placed it in the CD 1, known as the "Big First." *See, e.g.*, *id.* These moves directly contravened the Guidelines and Criteria for 2022 Congressional and State Legislative Redistricting (the "Guidelines"), a set of principles adopted by the Legislature's bipartisan Redistricting Advisory Group. *Id.* at 22-24. In addition to requiring population equality and contiguity, the Guidelines provided that districts should have neither the purpose nor the effect of diluting minority voting strength, should be as compact as possible, should preserve communities of interest and the cores of existing districts, and should keep counties whole. *Id.* at 23.

Members of the public repeatedly pointed out that Ad Astra 2 split communities of interest in the Kansas City metro area and Lawrence/Douglas County. *Id.* at 26. Democratic legislators further opposed the plan based on its dilution of minority and Democratic voting power. *Id.* at 26-28. Legislative leadership ignored or dismissed these issues. *Id.* Ultimately, the Legislature passed Ad Astra 2 and overrode Governor Laura Kelly's veto without a single Democratic vote. *Id.* at 27-31. These lawsuits followed.

### B. The district court found that Ad Astra 2 intentionally dilutes the voting power of both Democratic and minority voters.

After a four-day trial at which Plaintiffs presented hundreds of exhibits and testimony from six experts and several lay witnesses, the district court concluded that "Ad Astra 2 intentionally and successfully gerrymanders Kansas's congressional districts to ensure that Republican candidates will likely win all four of the state's congressional seats." J.A. VI, 31. The court also found that Ad Astra 2 intentionally and successfully dilutes the voting power of minority voters in Wyandotte County and northern Johnson County. *Id.* at 105. In reaching its factual findings regarding the Legislature's intent in passing the map and its effects on Democratic and minority voters, the district court relied on multiple types of analysis conducted by Plaintiffs' experts, as described below.

#### 1. Dr. Jowei Chen

Dr. Chen conducted a simulation analysis, comparing Ad Astra 2 to 1,000 random simulated plans that respected Kansas's political geography to evaluate the extent to which the new plan could be explained by neutral redistricting criteria rather than partisan intent. *Id.* at 34. Significantly, he demonstrated that Ad Astra 2 was not motivated by compliance with the Guidelines—compared to these simulated plans, Ad Astra 2 split more counties and voting district ("VTDs"), contains less compact districts, and retains less of the "core" of the previous map. *Id.* at 39-41. Dr. Chen further analyzed Ad Astra 2 along several metrics of partisan bias, finding that the new map was more pro-Republican in terms of expected seat counts than *98.8%* of his simulated plans, making it "an extreme pro-Republican statistical outlier." *Id.* at 52. This partisan bias persisted when Dr. Chen

analyzed the map on a district-by-district level and when he compared the plan only to the simulated plans that kept Johnson County whole in a single district. *Id.* at 46-52, 60-64.

Dr. Chen also used his simulation analysis to evaluate the new map's impact on minority voters' ability to elect their preferred candidates, comparing the "minority [voting-age population ("VAP")] in the most-Democratic district under Ad Astra 2 . . . to the minority VAP in the most Democratic district in each of his 1,000 simulated plans." *Id.* at 125. Dr. Chen found that Ad Astra 2's strongest-performing minority district had a lower minority VAP than the best-performing districts in 94.9% of his simulated plans, from which he "concluded that Ad Astra 2 has the effect of diluting minority votes." *Id.* at 126.

The district court credited Dr. Chen's analysis and found that "partisan intent predominated over the Guidelines and traditional redistricting criteria in the drawing of Ad Astra 2 and is responsible for the Republican advantage in the enacted plan." *Id.* at 35. It further found "that the plan's Republican advantage [is] an extreme partisan statistical outlier on every level—statewide, regionally, and on a district-by-district basis—and by every measure analyzed—overall seat share, partisan vote-share ranges, and a widely-used quantitative measure of partisan bias." *Id.* And the court found that "Ad Astra 2 has the effect of diluting minority vote strength by exporting minority voters out of the district in which they have the best opportunity to elect their preferred candidate." *Id.* at 127.

**2. Dr. Christopher Warshaw**

Dr. Warshaw analyzed Ad Astra 2's partisan bias using the efficiency gap—a measure of "the efficiency with which political parties are able to translate votes into legislative seats." *Id.* at 78. He showed that by cracking Wyandotte County's Democratic

voters across two districts, "Ad Astra 2 results in a significantly higher Republican vote share in CD 3 than existed under the 2012 plan or would result under other proposed plans." *Id.* at 86. Dr. Warshaw also showed that Ad Astra 2's excision of Lawrence from Douglas County "show[s] clear signs of cracking Democratic voters between districts to prevent them from achieving majority status." *Id.* At the statewide level, Dr. Warshaw demonstrated that "Ad Astra 2 exhibits more extreme partisan bias, as measured by the efficiency gap, than 95% of historical congressional plans with four or more seats, and is more Republican-favoring than 98% of historical plans [nationwide]." *Id.* at 88.

The district court credited Dr. Warshaw's analysis and found that "Ad Astra 2 exhibits signs of partisan bias in its treatment of CD 3 and its construction of district lines in the area around Kansas City and Lawrence." *Id.* at 83, 86, 92. The court further found that "Ad Astra 2 exhibits 'an extreme level of pro-Republican bias'" at the statewide level. *Id.* at 87 (quoting J.A. XXI, 56).

**3. Dr. Patrick Miller**

Dr. Miller demonstrated that Ad Astra 2's Republican bias substantially dilutes Democratic voting power across Kansas. By surgically removing Lawrence from Douglas County, he explained, the Legislature produced a CD 2 that is "'so strongly Republican that the votes of Democratic-leaning and minority residents from Wyandotte are diluted to practical electoral irrelevance'"; the map "drowns [Lawrence's] Democratic voters in the overwhelmingly Republican Big First, leaving them with effectively no opportunity to influence the district's electoral outcomes." *Id.* at 95-96 (quoting J.A. XX, 200). Dr. Miller also testified that by "separating northern Wyandotte County from CD 3," Ad Astra 2

makes that district "significantly more Republican and dilutes the votes of Democratic voters" who remain there. *Id.* at 96. As for CD 1 and CD 4, Dr. Miller testified that they "are 'strongly and safely Republican' districts." *Id.* at 97 (quoting J.A. XX, 258).

Dr. Miller also testified that Ad Astra 2 dilutes the electoral power of minority voters. The map "'has a disastrous effect on minority Kansans' in CD 2" by making it so much "more Republican" that minority voters "have no credible chance to meaningfully impact elections" there. *Id.* at 129 (quoting J.A. XX, 242-43). He further testified that the map "crack[s] Wyandotte County along racial lines and add[s] significant white populations to CD3—transforming it from the most racially diverse district in Kansas to the least racially diverse." *Id.* (quoting J.A. XX, 229).

The district court credited Dr. Miller's analysis and found that "the Legislature created a congressional plan that leans overwhelmingly Republican" by surgically removing the "Democratic stronghold of Lawrence out of Douglas County and CD 2" and by separating northern Wyandotte County from CD 3. *Id.* at 95-98. The court also found that Ad Astra 2 "was enacted intentionally and effectively to diminish the electoral influence of minority voters in the state." *Id.* at 131.

**4. Dr. Jonathan Rodden**

Dr. Rodden analyzed Kansas's political geography and Ad Astra 2's compliance with traditional redistricting principles through comparison with illustrative plans he drew. *Id.* at 65-75. He testified that, as compared to Kansas's prior congressional plan and his illustrative plans, Ad Astra 2 "ha[s] the lowest compactness scores," "splits more political subdivisions," and "relocates more Black, Hispanic, and Native American Kansans." *Id.* at

67-68. Dr. Rodden also testified that Ad Astra 2 violates the Guidelines' instruction to preserve communities of interest: it splits Lawrence from Douglas County and drowns it in the "vast, rural CD 1," and "perhaps most glaringly," splits "Kansas City and Wyandotte County . . . between districts, contravening multiple of the Guidelines." *Id.* at 68.

Dr. Rodden also conducted a partisan and minority "dislocation" analysis to determine the extent to which voters were placed in districts that reflect the political and racial composition of their surrounding communities, or "neighborhoods." *Id.* at 69-74. His analysis showed that under Ad Astra 2, Kansans "across the northeast part of the state are consistently placed in districts that are far more Republican than their neighborhoods." *Id.* at 72. He also testified that Ad Astra 2 dislocates minority Kansans at much higher rates than the overall population, which "serve[s] to crack those communities . . . such that minority voters as a whole and individual minority groups [a]re placed in districts that do not match the racial composition of their neighborhoods." *Id.* at 106-07.

The district court adopted Dr. Rodden's analysis and found that Ad Astra 2's partisan effects cannot be explained by Kansas's political geography or by adherence to the Guidelines. *Id.* at 74-75, 107. The court found that "Ad Astra 2 contains districts that are noncompact and irregularly shaped, includes numerous unnecessary political subdivision splits, breaks up geographically compact communities of interest, and fails to preserve the cores of former districts" and thereby "yields four Republican districts and places Kansans across northeast Kansas—and especially in Wyandotte County, Johnson County, and Lawrence—in districts that are far more Republican than can be explained by any neutral map-drawing considerations." *Id.* at 74. And the court found that Dr. Rodden's

analysis of racial effects supported its finding that Ad Astra 2 "was enacted intentionally and effectively to diminish the electoral influence of minority voters." *Id.* at 107.

**5. Dr. Loren Collingwood**

Dr. Collingwood conducted an analysis of *which* Democratic voters were moved out of the most Democratic district under the prior plan (CD 3), concluding that Ad Astra 2 "excises the census blocks with the most concentrated minority populations from CD 3 into CD 2." *Id.* at 118-20. Using a racially polarized voting analysis, Dr. Collingwood demonstrated that, due to white bloc voting in CD 2 and CD 3, the minority voters "Ad Astra 2 moves from CD 3 into CD 2 and the minority voters who remain in CD 3" will suffer an "extreme dilutive effect on the[ir] ability . . . to elect their preferred candidates." *Id.* at 116-18. Under the prior plan, "minority voters in CD 3 were able to elect their candidates of choice in 75% of the elections," while under Ad Astra 2, these voters "are now able to elect their candidate of choice in only 25% of" elections. *Id.* at 117-18.

The district court credited Dr. Collingwood's analysis and found that "Ad Astra 2 has an extreme dilutive effect on the vote share of minority voters in both CD 2 and CD 3," and that "the minority vote dilution in Ad Astra 2 has the effect of eliminating a performing crossover district for minority voters and replac[ing] it with a plan that will not perform for minority voters in any congressional district." *Id.* at 120-21. The court also found that "the racially discriminatory effects of Ad Astra 2 are particularly pronounced—and entirely distinct from its partisan effects—because the plan treats Democratic minority voters considerably worse than it treats white Democratic and white Republican voters." *Id.* at 121. The court found that this was "persuasive evidence that the Legislature intended

to dilute minority voting strength by cracking minority voters in northern Wyandotte into CD 2 and by drowning the minority voters who remain in CD 3 in an overwhelmingly white district." *Id.* at 121.

**6. Dr. Michael Smith**

Dr. Smith testified that Ad Astra 2 disrupts three decades of redistricting continuity by "scooping" Lawrence out of Douglas County and submerging it in the Big First, "one of the most Republican districts in the United States." *Id.* at 98-100 (quoting J.A. XIII, 24, 27). He explained that this change moved far more Kansans between districts than was necessary to balance populations and "could not be explained by compliance with the Guidelines." *Id.* at 98-99. Dr. Smith testified that "[t]he redrawing of Lawrence into a noncompetitive district is predicted to suppress voter turnout and other forms of political activity." *Id.* at 100 (alteration in original) (quoting J.A. XXI, 140). The district court credited Dr. Smith's analysis as further evidence of the "partisan intent and the pro-Republican effect Ad Astra 2 will have." *Id.* at 101.

Based on this extensive expert evidence—and on fact-witness testimony from lawmakers, government officials, and voters who experienced firsthand the deleterious effects of the new plan and the rushed and undemocratic process that produced it—the district court concluded that Ad Astra 2 is an unconstitutional partisan gerrymander that also unconstitutionally dilutes minority voting power. The court thus permanently enjoined use of Ad Astra 2 and gave the Legislature an opportunity to enact a remedial plan that complies with the Kansas Constitution "as expeditiously as possible." *Id.* at 208. Defendants appealed. *Id.* at 210.

## ARGUMENTS AND AUTHORITIES

### I. The District Court Correctly Invalidated Ad Astra 2 as an Unconstitutional Partisan Gerrymander.

The district court correctly concluded that partisan gerrymandering claims are justiciable under the Kansas Constitution, and that Ad Astra 2 intentionally and effectively maximizes Republican advantage and dilutes the voting power of Kansas's Democratic voters in violation of Sections 1, 2, 3, and 11 of the Kansas Bill of Rights and Article 5, Section 1 of the Kansas Constitution. J.A. VI, 165-87.

#### A. Partisan gerrymandering claims are justiciable under the Kansas Constitution.

The district court correctly concluded that partisan gerrymandering claims do not raise a political question under the Kansas Constitution. As Defendants note, this legal determination is subject to de novo review, *Gannon*, 298 Kan. at 1136, but to the extent Defendants' arguments challenge the district court's factual findings, those findings are reviewed under the deferential substantial-competent-evidence standard, *see id.* at 1180.

Justiciability is a question of Kansas law. *Gannon*, 298 Kan. at 1119. Although this Court looks to six political question factors derived from *Baker v. Carr*, 369 U.S. 186 (1962), the Court makes its own determination regarding justiciability under the Kansas Constitution, mindful that the political question doctrine must not be applied so broadly as to "manipulate [constitutional rights] out of existence," *Kan. Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 668, 359 P.3d 33 (2015) (citation omitted). The district court rigorously analyzed these factors and correctly concluded that none applies here. J.A. VI, 165-77. Defendants now argue that three factors—a textual commitment to another branch,

a lack of judicially manageable standards, and an inherent policy determination—foreclose adjudication of partisan gerrymandering claims in Kansas. Br. 24. They are wrong.

**1. Redistricting is not textually committed to the Legislature.**

As the district court recognized, the Kansas Constitution does not contain any "'textually demonstrable constitutional commitment'" of redistricting to the coordinate branches; rather, the "Kansas Constitution is silent as to congressional redistricting." J.A. VI, 175 (quoting *Kan. Bldg. Indus.*, 302 Kan. at 668). Redistricting is thus subject to ordinary judicial review, like "any other act of the legislature." *Harris*, 192 Kan. at 207.

Rather than discuss the Kansas Constitution, Defendants focus on the *federal* Constitution. Br. 24-25. As the district court explained, *see* J.A. VI, 176, this argument fails for two reasons. First, justiciability is a question of Kansas law, and this Court therefore "look[s] to the language of our own constitution for the possible existence of [a] 'textually demonstrable constitutional commitment of the issue.'" *Gannon*, 298 Kan. at 1119, 1140-41 (quoting *Baker*, 369 U.S. at 217). Defendants' reliance on the text of the *federal* Constitution is thus misplaced. Second, Defendants' argument merely repackages their Elections Clause argument, which, as discussed below, is meritless. *Infra* at Section III. As a result, this factor does not render partisan gerrymandering claims nonjusticiable.

**2. The district court applied judicially discoverable and manageable standards to adjudicate Plaintiffs' partisan gerrymandering claims.**

**a. Intent and effect is a manageable standard for adjudicating partisan gerrymandering claims.**

As the district court correctly explained, *see* J.A. VI, 166-73, Kansas courts have both the ability and the duty to develop manageable standards to enforce the Kansas

Constitution, *e.g.*, *Gannon*, 298 Kan. at 1149-56. "[C]ourts are frequently called upon, and adept at, defining and applying various, perhaps imprecise, constitutional standards." *Id.* at 1155; *see Harris*, 192 Kan. at 201-13. *Harris* exemplifies this principle. That case involved a challenge to redistricting on malapportionment grounds under since-amended sections of the Kansas Constitution that included no explicit standards. *See* 192 Kan. at 201-02. Despite the lack of specificity, *Harris* explained that Kansas courts have a "duty" to enforce the Constitution in the redistricting context, *id.* at 204-05, 207, and construed the equality guarantees of the Kansas Bill of Rights to require allocating legislative seats to achieve the greatest level of population equality possible, *see id.* at 204-05, 207-13. In particular, the Court determined that the method of equal proportions (the algorithm used to distribute U.S. House seats among the states) provided an appropriate method for achieving compliance with this constitutional requirement. *See id.* In other words, the *Harris* Court discerned a manageable standard to enforce constitutional protections in the redistricting context. The district court appropriately took the same approach in this case.

The district court also correctly noted, *see* J.A. 169-70, that Kansas courts routinely deviate from federal justiciability standards, *see, e.g.*, *VanSickle v. Shanahan*, 212 Kan. 426, 437-38, 511 P.2d 223 (1973) (holding Guarantee Clause claim justiciable), and that the need to enforce state constitutional protections is strongest where, as here, federal courts have retreated from protecting analogous rights, *e.g.*, *State v. McDaniel*, 228 Kan. 172, 184-85, 612 P.2d 1231 (1980).

As this Court has done in the past, the district court looked to the decisions of sister states for guidance. *See, e.g.*, *Gannon*, 298 Kan. at 1135, 1149-55. A raft of state courts

across the country have struck down partisan gerrymanders under their state constitutions. *See, e.g.*, *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *11 (N.Y. Apr. 27, 2022); *Harper v. Hall*, 868 S.E.2d 499, 559 (N.C. 2022), *stay denied sub nom. Moore v. Harper*, 142 S. Ct. 1089 (2022); *Adams v. DeWine*, Nos. 2021-1428 & 2021-1449, 2022 WL 129092, at *1-2 (Ohio Jan. 14, 2022); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 128, 178 A.3d 737 (2018); *Szeliga v. Lamone*, No. C-02-CV-21-001816, slip op. at 43, 88-94 (Md. Cir. Ct. Mar. 25, 2022).

In particular, the district court properly drew on case law from North Carolina and Pennsylvania, states whose constitutions share historical roots with the Kansas Constitution. J.A. VI, 171-73 & n.19. Both state supreme courts have declined to set bright-line tests to evaluate whether a challenged map constitutes a partisan gerrymander. *See Harper*, 868 S.E.2d at 547-49; *League of Women Voters of Pa.*, 645 Pa. at 122-23. Instead, both courts recognize that plaintiffs can, at minimum, prove a partisan gerrymandering claim by establishing, through expert and lay testimony, that map-drawers acted with partisan intent and effectively diluted the voting power of disfavored-party members. *See Harper*, 868 S.E.2d at 552, 559 (evaluating challenged map's dilution of disfavored-party votes); *League of Women Voters of Pa.*, 645 Pa. at 122 (examining whether challenged map subordinated traditional districting criteria to partisan considerations). As the district court explained, this approach provides a manageable standard to adjudicate partisan gerrymandering claims under the Kansas Constitution:

> [A]t minimum, a congressional plan constitutes a partisan gerrymander subject to strict scrutiny where the Court finds, as a factual matter, (1) that the Legislature acted with the purpose of achieving partisan gain by diluting

> the votes of disfavored-party members, and (2) that the challenged congressional plan will have the desired effect of substantially diluting disfavored-party members' votes.

J.A. VI, 173.

This intent-and-effect standard is easily applied to resolve this case, given Plaintiffs' overwhelming evidence of Ad Astra 2's partisan intent and effect. *See supra*, Section I.B. While constitutional standards are often "refined over time" through litigation, *Gannon*, 298 Kan. at 1155, Plaintiffs' evidence clearly satisfies any plausible standard.

**b. Defendants' objections to the intent-and-effect standard lack merit.**

Defendants offer a grab bag of arguments against applying an intent-and-effect standard to partisan gerrymandering claims. Br. 27-34. Most of these arguments go to the merits of the evidence, and none is persuasive. Moreover, Defendants fail to square their arguments that an intent-and-effect framework is proper in the context of racial discrimination, *id.* at 45, but unworkably policy-based elsewhere.

*First*, the fact that redistricting has political consequences does not make redistricting cases nonjusticiable. *Contra* Br. 26-27. On the contrary, "[i]t is axiomatic that an apportionment act, as any other act of the legislature, is subject to" judicial review, notwithstanding its political ramifications. *Harris*, 192 Kan. at 207. And the intent-and-effect framework involves run-of-the-mill judicial factfinding—the ordinary work of courts—not policymaking that might undermine the courts' perceived independence.

*Second*, Defendants contend that voting patterns are too unpredictable to allow for judicial resolution of partisan gerrymandering claims because voters may eventually

change their preferences. Br. 27-29. As numerous courts have recognized, this notion is incorrect: the same techniques that enable map-drawers to produce "extreme and durable partisan gerrymanders . . . make[] it possible to reliably evaluate the partisan [effects] of such plans." *Harper*, 868 S.E.2d at 509. Courts routinely rely on expert testimony about predicted future voting patterns to resolve claims involving gerrymandering and other electoral issues. *See, e.g.*, *id.* at 547-57; *Adams*, 2022 WL 129092, at *10-11. The district court considered the testimony of multiple experts who used standard, reliable methodologies that Ad Astra 2 would have durably pro-Republican effects. *E.g.*, J.A. VI, 42-64, 74-75, 83-92, 192-94. The fact that Defendants contested this testimony below with their own experts (whom the district court found unpersuasive), *e.g.*, *id.* at 134-35, confirms the effects of a gerrymander can be adjudicated through ordinary factfinding.[1]

*Third*, Defendants' argument that no provision of the Kansas Constitution prohibits partisan gerrymandering, Br. 29-33, is a merits argument addressed below. *Infra* at Section I.B. To the extent Defendants argue that the Constitution does not offer an explicit, bright-line rule for "how much politics . . . is too much," Br. 29, they ignore that "courts are frequently called upon, and adept at, defining and applying various, perhaps imprecise, constitutional standards," *Gannon*, 298 Kan. at 1155. Kansas judges routinely decide whether a given quantum of evidence provides police with probable cause or only

[1] It is undoubtedly true that voters may change preferences in the future, but that neither precludes legislatures from engaging in partisan gerrymandering employing *current* electoral information nor precludes courts from *remedying* that gerrymandering using the same information. Many things are mutable, yet still trigger legal rights and remedies; for example, people can and do convert to different religions, but retain the ability to enforce in court their First Amendment rights for their current religions.

reasonable suspicion and whether a particular school funding regime is adequate. *See id.* at 1155-56. Determinations of this kind are core judicial craft.

*Fourth*, the intent-and-effect framework does not require proportional representation, *contra* Br. 30-31, and neither the district court nor any of Plaintiffs' experts analyzed partisan intent or effect based on a comparison to a map that achieved proportional representation. The principal evidence from Plaintiffs' simulation expert, Dr. Jowei Chen, showed that nonpartisan Kansas maps respecting Kansas's political geography would generally result in Democrats winning one district, *see* J.A. VI, 52; proportionality would require two, *see id.* at 48.

*Fifth*, Defendants' objections to the framework's intent prong are also misplaced. *See* Br. 34. Judicial factfinding about legislative intent is routine, *see, e.g.*, *Harper*, 868 S.E.2d at 553-54—indeed, it is half of Defendants' proposed racial vote dilution standard, Br. 45. Moreover, the intent-and-effect framework does not render unlawful a map produced with *any* partisan intent, but only intent that map-drawers operationalize by substantially diluting disfavored-party voting power, such as by eliminating a seat that would have been Democratic under any nonpartisan map. Defendants' arguments regarding the testimony of particular legislators, meanwhile, present factual issues relevant to the merits, not to justiciability—and, in any event, the court found overwhelming evidence of partisan intent outside of that testimony. *E.g.*, J.A. VI, 63-64, 86, 193-94.

*Sixth*, Defendants' objections to the evidence the district court considered in finding that Ad Astra 2 effectively dilutes Democratic voting power also go to the merits, not

justiciability. Br. 36-39.[2] Courts routinely consider expert evidence in conducting factfinding in complex cases, including election cases. *See, e.g.*, *Harper*, 868 S.E.2d at 547-57; *Adams*, 2022 WL 129092, at *10-11. Debate over the weight due and persuasiveness of this evidence is a factual matter for the trial court, not a jurisdictional issue. *See, e.g.*, *City of Mission Hills v. Sexton*, 284 Kan. 414, 427, 160 P.3d 812 (2007).

Ultimately, Defendants' arguments contest the evidence used to satisfy the intent-and-effect test—not the workability of the test itself. Given the volume of evidence, the Court need not decide whether a particular metric that Plaintiffs relied upon is dispositive. More importantly, courts in gerrymandering cases can, through ordinary factfinding, weigh various pieces of probative expert and lay testimony to reach an overall factual conclusion. This is precisely how trial courts make *any* factual finding; there is no requirement that Plaintiffs provide a single bright-line measure that immediately resolves the case.

**3. Adjudicating partisan gerrymandering claims does not require policy determinations based on nonjudicial discretion.**

As the district court determined, the final factor cited by Defendants—"the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"—does not render partisan gerrymandering claims nonjusticiable.

[2] Defendants' objections to the metrics considered by the trial court are also unpersuasive on their merits. For example, Defendants criticize the efficiency gap on the grounds that the previous court-ordered plan has an efficiency gap of 15.6%. Br. 36. But this score was calculated using election data from 2012 to 2020, which the court could not have considered in drawing the map and which may reflect partisan shifts since its adoption. *See* J.A. VI, 88. In any event, the district court credited Dr. Warshaw's testimony that comparing this efficiency gap to Ad Astra 2's substantially higher 22.5% efficiency gap demonstrates Ad Astra 2's extremity. *Id.* at 90-92.

J.A. VI, 173-75 (quoting *Kan. Bldg. Indus.*, 302 Kan. at 668). This Court has explained that, while the Legislature has significant discretion in crafting redistricting plans, that discretion is not boundless: such plans remain "subject to the limitations contained in the Constitution," and where a map violates those limitations, "it is null and void and it is the duty of courts to so declare." *Harris*, 192 Kan. at 206-07. The district court's decision thus did not usurp legislative discretion, as Defendants suggest. Br. 39-40. Instead, it fulfilled the judiciary's nondiscretionary "duty" to ensure the Legislature acted constitutionally.

Moreover, contrary to Defendants' suggestion, *see* Br. 39, the intent-and-effect framework does not require a court to assess how much representation a party "deserves." In finding Ad Astra 2 unconstitutional, the district court did not make abstract policy judgments about how many seats Democrats deserve; rather, it conducted a rigorous factual inquiry examining evidence of the plan's intent and effects. *See* J.A. VI, 17-105, 133-145, 187-95; *see also, e.g.*, *Harper*, 868 S.E.2d at 553-56 (discussing factual findings regarding challenged map's partisan effects). This is ordinary judicial factfinding, not a policy decision, and does not preclude judicial review of Ad Astra 2.

**4. Defendants' appeals to history do not bear on justiciability.**

Defendants also incorrectly suggest that debate at Kansas's 1859 constitutional convention and a lack of decisions striking down past maps as gerrymanders somehow render partisan gerrymandering claims nonjusticiable. Br. 20-23. These are merits, not justiciability, arguments—and, in any event, they do not help Defendants' cause.

*First*, Kansas's constitutional history does not indicate gerrymandering is lawful. No convention delegate suggested that the Constitution endorsed partisan gerrymandering:

although Democratic delegates claimed that the state's initial apportionment favored Republicans, Republicans denied those allegations, arguing that the plan was necessary to achieve the "honest purpose" of equalizing district populations. *Wyandotte Convention Proceedings* 479 (1920). And this Court has not hesitated to enforce constitutional rights notwithstanding historical nonenforcement. *See, e.g.*, *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 659-60 (2019) (recognizing right to abortion despite gender-biased framing-era statutes criminalizing abortion); *Harris*, 192 Kan. at 205-07 (recognizing right against malapportionment).

*Second*, as the district court observed, J.A. VI, 174-75, the decisions of this Court cited by Defendants that discuss gerrymandering claims affirm their justiciability. In each case, the Court indicated that gerrymandering claims *are* cognizable before rejecting them *on the merits* for want of evidence. *See In re Stovall*, 273 Kan. 731, 735, 45 P.3d 855 (2002) (recognizing gerrymandering concerns but finding no violations); *In re Stovall*, 273 Kan. 715, 724-25, 45 P.3d 855 (2002) (same); *In re Stephan* ("*Stephan III*"), 251 Kan. 597, 608, 836 P.2d 574 (1992) (finding "[n]o evidence" of gerrymandering); *In re Senate Bill No. 220*, 225 Kan. 628, 637, 593 P.2d 1 (1979) (acknowledging gerrymandering could violate Constitution but finding "[n]o such showing ha[d] been made"); *In re House Bill No. 2620*, 225 Kan. 827, 835-40, 595 P.2d 334 (1979) (repeatedly affirming constitutional concerns raised by gerrymandering but finding *allegations at issue* too "speculative").[3] The fact that

[3] *In re Stephan*, 245 Kan. 118, 775 P.2d 663 (1989), also cited by Defendants, did not discuss gerrymandering, but rather a plan's treatment of incumbents. *See id.* at 128.

these past plaintiffs did not offer the necessary proof poses no obstacle to adjudicating this case, where the district court found "overwhelming" evidence. J.A. VI, 149.

In sum, partisan gerrymandering claims are justiciable, and nothing prevents this Court from carrying out its "duty" to review Ad Astra 2. *Harris*, 192 Kan. at 207.

### B. The partisan gerrymandering in Ad Astra 2 violates the Kansas Constitution.

#### 1. The district court correctly concluded that multiple provisions of the Kansas Constitution protect against partisan gerrymandering.

Partisan gerrymandering systematically denies equal electoral strength to disfavored classes of voters, diluting their votes and retaliating against them for their political views. This Court should affirm the district court's holding that partisan gerrymandering violates the fundamental rights of Kansans under Sections 1, 2, 3, and 11 of the Bill of Rights and Article 5, Section 1 of the Kansas Constitution. J.A. VI, 177-87. This legal determination is subject to de novo review, *Gannon*, 298 Kan. at 1136.

**Equal Protection.** Partisan gerrymandering violates Kansans' right to equal protection under Sections 1 and 2 of the Kansas Bill of Rights. In interpreting these provisions, this Court has recognized that "the Kansas Constitution affords separate, adequate, and greater rights than the federal Constitution." *Farley v. Engelken*, 241 Kan. 663, 671, 740 P.2d 1058 (1987).[4] Sections 1 and 2 guarantee political equality to all

[4] Defendants mischaracterize *Farley* by suggesting that it "involved the particular context of Section 18 of the Kansas Constitution's Bill of Rights." Br. 31. *Farley* did "not reach the issue of whether [the challenged statute] violate[d] Section 18 of the Kansas Bill of Rights," instead basing its holding on "the Equal Protection Clause of the Kansas Bill of Rights." 241 Kan. at 672, 678. And *Stephan III* did not even address Kansas's state equal protection provision; it simply applied the population deviation rule required by the Fourteenth Amendment. 251 Kan. at 606.

Kansans, and "equal power and influence in the making of laws which govern" them. *Harris*, 192 Kan. at 204. Like the malapportioned districts challenged in *Harris*, gerrymandered districts deprive disfavored voters of equal power. Indeed, partisan gerrymandering's "singular allure is that it locks in the controlling party's political power while locking out any other party or executive office from serving as a check and balance to power." *Adams*, 2022 WL 129092, at *1. It is directly contrary to the principles of representative democracy that Sections 1 and 2 guarantee.

Other courts have similarly concluded, like the district court, that partisan gerrymandering violates voters' equal protection rights. In North Carolina, for example, the state's supreme court concluded that partisan gerrymandering violates the state's equal protection clause. *Harper*, 868 S.E.2d at 543. The court based this ruling on the principle that the state's equal protection clause protects voters' right to "substantially equal voting power." *Id.* (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377 (2002)). The legislature infringes this right, the court held, when it "deprives voters in the disfavored party of the opportunity to aggregate their votes to elect such a governing majority" and diminishes their "representational influence." *Id.* at 544. As the district court in this case noted, the North Carolina Supreme Court's reasoning in *Harper* is especially persuasive because of the many commonalities between the Kansas and North Carolina constitutions.

Accordingly, Sections 1 and 2 of the Kansas Bill of Rights prohibit the Legislature from depriving groups of disfavored voters of equal power and influence by drawing district lines that dilute their ability to elect representatives of their choice. Such gerrymandering violates the rule that "every citizen and qualified elector is entitled to a

vote and representation equal or substantially equal to every other citizen and qualified elector in the state." *Harris*, 192 Kan.183, Syl. ¶ 11.

**Right to Vote.** As the district court explained, *see* J.A. VI, 182-83, partisan gerrymandering violates Kansans' right to vote. *See* Kan. Const. Bill of Rights §§ 1-2; Kan. Const. art. 5, § 1. The right to vote is "fundamental" and must be "exercised in a free and unimpaired manner," *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506 (1971), and the Kansas Constitution bars legislation that will, "directly or indirectly, deny or abridge . . . or unnecessarily impede the exercise of th[is] right," *State v. Beggs*, 126 Kan. 811, 271 P. 400, 402 (1928) (citation omitted). Intentionally drawing district lines to impede the franchise of disfavored voters violates the right to vote.

Defendants wrongly contend that partisan gerrymandering "do[es] not alter voting power" because "[p]eople remain free to vote for their chosen candidates." Br. 32. As the district court observed, and as this Court has held in the past, the Kansas Constitution protects not just the right to cast a ballot, but the right to vote on "equal or substantially equal" terms with other Kansans. *Harris*, 192 Kan. at 183, Syl. ¶ 11; *see* J.A. 182-83; *Harper*, 868 S.E.2d at 544. By "strategically exaggerat[ing] the power of voters who tend to support the favored party while diminishing the power of [disfavored-party] voters," *Adams*, 2022 WL 129092, at *1, partisan gerrymandering "abridge[s]" this right to vote on equal terms, *Beggs*, 271 P. at 402.

**Free Speech and Assembly.** Lastly, partisan gerrymandering violates Kansans' rights to free speech and assembly. *See* Kan. Const. Bill of Rights §§ 3, 11. These provisions guarantee that "all persons may freely speak" and that "[t]he people have the

right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government, or any department thereof, for the redress of grievances." *Id.* As the district court properly recognized, this text describes protections broader than the First Amendment and articulates a protection that is at its height in matters of political speech and public concern. J.A. VI, 183, 185.

Partisan gerrymandering violates these rights in at least three ways. First, it is viewpoint discrimination that targets members of the disfavored party and is therefore "presumptively unconstitutional." *Roeder v. Kan. Dep't of Corr.*, No. 113,239, 2016 WL 556281, at *3 (Kan. Ct. App. 2016) (per curiam) (unpublished opinion); *see also Harper*, 868 S.E.2d at 546; *State v. Smith*, 57 Kan. App. 2d 312, 318, 452 P.3d 382 (2019). Second, partisan gerrymandering severely burdens freedom of association. The Kansas Constitution's guarantee that its citizens retain the right to "instruct" their representatives indicates a special solicitude for associational freedom not found in the First Amendment. Kan. Const. Bill of Rights, § 3; *see also Harper*, 868 S.E.2d, at 544-46 (North Carolina Constitution's right to instruct prohibited partisan gerrymandering); James A. Gardner, *Devolution and the Paradox of Democratic Unresponsiveness*, 40 S. Tex. L. Rev. 759, 767-68 (1999) (state constitutions including "instruct" provision "enhance the responsiveness of state government"). Partisan gerrymandering burdens that right by disincentivizing "voter mobilization, voter registration, voter turnout, fundraising, all of the activities that build a political base because the election would not be competitive." J.A. VI, 100-01 (quoting J.A. XIII, 32). Third, partisan gerrymandering retaliates against protected activity by diluting the votes of disfavored-party members—and moving them

into different districts—because of their history of political speech. *See, e.g., Grammer v. Kan. Dep't of Corr.*, 57 Kan. App. 2d 533, 538, 455 P.3d 819 (2019); *League of Women Voters of Pa.*, 645 Pa. at 65; *cf. Rebarchek v. Farmers Coop. Elevator & Mercantile Ass'n*, 272 Kan. 546, 553, 35 P.3d 892 (2001).

Defendants do not dispute the district court's retaliation analysis and respond only briefly to its viewpoint discrimination and associational burden determinations. Defendants claim that some "level of partisan motivation" in districting is permissible, and thus this Court's viewpoint discrimination ban must not apply. Br. 30, 33. There is no redistricting exception to viewpoint discrimination doctrine, however, and the cases upon which Defendants rely do not suggest otherwise: incumbency protection is not a form of viewpoint discrimination when it is not a proxy for partisan favoritism. *Contra* Br. 30 (citing *In re Stovall*, 273 Kan. at 734; *In re Stovall*, 273 Kan. at 722). Further, the district court's partisan gerrymandering test is satisfied only when a plan "has the effect of substantially diluting disfavored-party members' votes." J.A. VI, 173. That limiting principle permits "[s]ome political consideration in redistricting." Br. 30.

As for the court's associational analysis, Defendants offer the cold comfort that "Kansans remain free to speak, to assemble, to consult, and to instruct or petition their government" notwithstanding the severe burdens a partisan gerrymander inflicts on those protected activities. Br. 33. But Kansas courts routinely enforce associational rights against laws that allow expressive activity but make that activity more difficult or burdensome, or less effective without a compelling justification. *See, e.g.*, *Grammer*, 57 Kan. App. 2d at 537-38 (describing elements of retaliation claim). And here, as the district court

recognized, although "citizens living in gerrymandered districts may nonetheless vote for candidates of their choice or coordinate across siloed jurisdictions, . . . the cracking of Democratic communities across districts creates a significant associational burden." J.A. VI, 185. That is because partisan gerrymandering "has the effect of 'debilitat[ing]' the disfavored party and 'weaken[ing] its ability to carry out its core functions and purposes.'" *Id.* (quoting *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *122 (N.C. Super. Ct. Sept. 3, 2019)). That Plaintiffs remain free to speak "into a void" is no answer.[5] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

**2. Ad Astra 2 is an unconstitutional partisan gerrymander because it was intentionally designed to favor Republicans and has the effect of substantially diluting Democratic votes.**

Ad Astra 2 violates each of the provisions described above by intentionally and effectively diluting Democratic votes. The district court articulated a clear and manageable standard to apply to partisan gerrymandering claims:

> [A] congressional plan constitutes a partisan gerrymander subject to strict scrutiny where the Court finds, as a factual matter, (1) that the Legislature acted with the purpose of achieving partisan gain by diluting the votes of disfavored-party members, and (2) that the challenged congressional plan will have the desired effect of substantially diluting disfavored-party members' votes.

J.A. VI, 173. As the district court found, "overwhelming evidence" established Ad Astra 2's impermissible intent and effect. *Id.* at 149. Those factual findings are reviewed for

[5] Contrary to Defendants' suggestion, *see* Br. 33, Plaintiffs do not demand guaranteed electoral success. Striking down a partisan gerrymander as unconstitutional no more guarantees a particular plaintiff electoral success than does striking down a campaign finance restriction. Plaintiffs ask the Court only to enforce their right to compete on constitutional terms.

"substantial evidence," and this Court does not "weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact." *Manhattan Mall Co. v. Shult*, 254 Kan. 253, 257, 864 P.2d 1136 (1993).

First, as the district court found, overwhelming evidence demonstrated that the Legislature intentionally designed Ad Astra 2 to maximize Republican advantage, and to entrench Republicans in power, by diluting the voting power of Democratic voters. In particular, the mathematical and statistical evidence provided by Plaintiffs' experts provides irrefutable (and unrefuted) support for a finding of intentional discrimination. As described in more detail above, Dr. Chen created 1,000 simulated, neutral maps that respected Kansas's natural political geography and traditional redistricting criteria, including criteria supposedly relied on by the Legislature. J.A. VI, 34. By comparing Ad Astra 2 to those 1,000 computer-generated maps, Dr. Chen demonstrated that Ad Astra 2 is an extreme partisan outlier and that its partisan consequences were extremely statistically unlikely to happen by chance. *Id.* at 53. Congressional District 3 cracks more Democrats than 99.6% of Dr. Chen's simulated plans. *Id.* at 45. Dr. Rodden concluded that Ad Astra 2 creates "districts that are noncompact and irregularly shaped, includes numerous unnecessary political subdivisions splits, breaks up geographically compact communities of interests, and fails to preserve the cores of former districts," and the consequence is to "place[] Kansans across northeast Kansas—and especially in Wyandotte County, Johnson County, and Lawrence—in districts that are far more Republican than can be explained by any neutral map-drawing considerations." *Id.* at 74. Dr. Warshaw concluded that Ad Astra 2 exhibits more extreme partisan bias, as measured by the efficiency gap, than 95% of

historical congressional plans with four or more seats, and is more Republican-favoring than 98% of historical plans. *Id.* at 88. The court correctly found that this high level of partisan bias is "persuasive evidence that Ad Astra 2 is an intentional, effective partisan gerrymander." *Id.* at 92.

As the district court ultimately concluded, this and other expert evidence establishes Ad Astra 2's partisan intent, *id.* at 31, and that finding is supported by substantial expert evidence. It is further supported by the irregularities that led to the map's enactment, including that public testimony was limited and often ignored by legislators, *id.* at 17-30, and that Republican lawmakers rushed Ad Astra 2 through the legislative process at an unprecedented pace, J.A. X, 221-22. The district court's finding is also supported by the substantial evidence that, as the court found, "Ad Astra 2 runs roughshod over communities of interest for the purpose of securing maximum Republican advantage." J.A. VI, 101.

Second, the district court correctly found that Ad Astra 2 accomplishes its intended effect of diluting Democratic voting power and entrenching Republican dominance in the state's congressional delegation. "Dr. Chen's simulations demonstrated that Ad Astra 2's least Republican district, CD 3, is more heavily Republican than the least Republican district in 99.6% of Dr. Chen's 1,000 simulated plans." *Id.* at 192. In other words, Ad Astra 2 exhibits extreme and successful cracking that makes CD 3 as invulnerable as possible for Republicans. *Id.* at 51. As described above, expert testimony proved that Ad Astra 2 likely results in four Republican seats across a wide range of elections, where nonpartisan maps would overwhelmingly result in only three. *Id.* at 192. "None of the other plans submitted to the Legislature during the latest round of redistricting—nor, for that matter, the state's

previous congressional plan—exhibits this level of Republican bias." *Id.* Ad Astra 2 deviates from neutral redistricting criteria, affords a clear advantage to Republicans that cannot be explained by the state's political geography, registers an efficiency gap that exceeds every other plan the Legislature considered (as well as a host of historical and simulated plans), and has a stronger Republican lean than almost every comparator plan, both actual and simulated. *See id.* at 189-95. The district court had "no difficulty finding, as a factual matter, that Ad Astra 2 is an intentional, effective pro-Republican gerrymander that systemically dilutes the votes of Democratic Kansans." *Id.* at 194.

**3. Defendants' factual arguments fail.**

The district court's conclusion that Ad Astra 2 is a durable, extreme partisan gerrymander because it intentionally and effectively dilutes the political voices of Democratic Kansans is therefore supported by substantial evidence. Defendants' arguments otherwise are unsupported by the record and unpersuasive.

Defendants argue that CD 3 leans slightly Democratic, citing analyses by the website PlanScore and the Princeton Gerrymandering Project referenced by one of Defendants' experts. Br. 40-41. But as the district court found, that same expert testified at trial that Plaintiffs' experts "used a more reliable election composite" to measure CD 3's partisanship than PlanScore and the Princeton Gerrymandering Project, which ignored many recent Kansas elections. J.A. VI, 134. Moreover, PlanScore ultimately concludes that Ad Astra 2 is "an extreme historical outlier [that] is more skewed than the vast, vast

majority of plans in history." *Id*. at 89 (quoting J.A. XI, 208).[6] And the district court credited each of Plaintiffs' experts who testified that CD 3 is a pro-Republican district. *Id.* at 65, 74, 83, 101, 124. In any event, the point is not that Democrats could *never* win CD 3 under Ad Astra 2 no matter what happens in the election. Dr. Warshaw, for example, determined that the district has a Democratic vote share of around 47% using a composite of recent Kansas elections, allowing a Democrat to win in rare "wave" years. *Id.* at 83. Even still, CD 3 is an extreme partisan outlier that the Legislature made as "invulnerable as possible" for Republicans. *Id.* at 51. Defendants presented no testimony disputing that Ad Astra 2 has a lower percentage of Democrats in CD 3 (the most Democratic district in the enacted plan) than 99.6% of random, nonpartisan plans. *Id.* at 45. The fact that there is an off chance for a Democratic candidate to win does not negate the durable, extreme partisan nature of the plan.

Defendants also argue that Ad Astra 2 "honors communities of interest across Kansas." Br. 42. But the district court correctly found that it does just the opposite. J.A. VI, 190-91. As discussed, Ad Astra 2 splits the Kansas City metro area in two, extracts Lawrence from the rest of Douglas County, and haphazardly pairs urban and rural areas from far-flung regions of the state without apparent justification. J.A. XX, 34. As for the specific communities Defendants claim Ad Astra 2 *does* protect, there is negligible record support that those "communities" wanted to be preserved in a single district. For example,

[6] Campaign Legal Center has not "deleted," Br. 41 n.13, the page Defendants cite. Defendants appear to have typed in an erroneous URL. *See* https://planscore.campaignlegal.org/plan.html?20220209T161325.318102023Z (last accessed May 9, 2022).

Defendants cite Ad Astra 2's pairing of the University of Kansas and Kansas State University in a single district, the largely agrarian CD 1; there is no evidence that anyone asked for such an outcome during the 2020 redistricting cycle, whether during the listening tour sessions or during the legislative hearings. In fact, the Kansas Board of Regents expressly stated that they had *no position* on redistricting. J.A. VI, 142.

Defendants also argue that the Legislature was required to split either Johnson or Wyandotte County, and simply chose to split Wyandotte County. Br. 42-43. But they ignore the unrefuted testimony from Dr. Chen, which the district court credited, establishing that a hypothetical goal of keeping Johnson County whole could not explain the partisan bias in the map. J.A. VI, 60-64. Over half—514—of Dr. Chen's neutral, nonpartisan plans kept Johnson County whole, and CD 3 in Ad Astra 2 is more favorable to Republicans than *every single one* of its comparator districts in those 514 plans. *Id.* at 62. Overall, 98.8% of those plans would elect a Democrat using Dr. Chen's election composite, while Ad Astra 2's CD 3 would elect a Republican. *Id.* at 63. Thus, as the district court found, "a desire to keep Johnson County whole cannot explain Ad Astra 2's partisan bias." *Id.* at 63-64. Given this and other evidence, the district court further found that Defendants' focus on Johnson County was a "post hoc rationalization." *Id.* As Senator Corson testified, the overwhelming majority of public testimony received by the Legislature during listening tour sessions asked to preserve the *Kansas City metro area*—which consists of Wyandotte County and the *northern* part of Johnson County. *Id.* at 20. Moreover, lay and expert testimony presented at trial confirmed that the Kansas City metro

area constitutes a significant community of interest. *See, e.g.*, J.A. X, 225-26; J.A. XX, 39-40.

Moreover, the preservation of Johnson County alone cannot justify Ad Astra 2's treatment of the Kansas City metro area. Rather than preserve as much of the prior CD 3 as possible by keeping Johnson whole and including as much of Wyandotte as possible, Ad Astra 2 instead added 2.5 new and overwhelmingly rural counties to the district, splitting off far more of Wyandotte County than was necessary and significantly expanding the geographical size of CD 3. *E.g.*, J.A. X, 227-28; J.A. VI, 103-04, 140.

Finally, Defendants note that Ad Astra 2 does not pair incumbents, achieves population equality, splits only 4 counties, and keeps 86% of Kansas in their current districts. Br. 41-42. But none of these facts explain or justify the map's *partisan bias* or provide an alternate explanation for that bias; to the contrary, as the district court found, it is easy to draw a map that splits only 3 counties and preserves the cores of Kansas's old districts to an even greater degree than Ad Astra 2 does. Ad Astra 2 splits more counties than any of Dr. Chen's simulations or any comparator maps Dr. Rodden considered. J.A. XX, 51, 117. Moreover, Ad Astra 2 also splits more than a dozen more voting districts than any other plan submitted to the Legislature, and five additional cities and towns. J.A. VI, 67. Ad Astra 2 has a lower plan-wide compactness score than *all 1,000* of Dr. Chen's simulations. *Id.* at 39-40. Dr. Rodden was able to keep 97% of residents in the same district in one of his comparator maps, *see* J.A. XX, 47—in comparison to 86% in the enacted plan. And Dr. Chen's maps, which were drawn without any goal of preserving the cores of prior districts, largely did better than the enacted plan that, according to Defendants, had

core preservation as one of its main objectives. J.A. VI, 41. In other words, as the district court found and substantial evidence shows, Ad Astra 2's poor performance on nonpartisan metrics confirms that it was enacted with partisan intent, not to advance any neutral goal.

## II. The District Court Correctly Invalidated Ad Astra 2 as Unconstitutional Racial Vote Dilution Under the Kansas Constitution.

The district court correctly found that Ad Astra 2 intentionally and effectively dilutes minority voting power in violation of Sections 1 and 2 of the Kansas Bill of Rights. Those equal protection provisions "afford[] separate, adequate, and greater rights than the federal Constitution." *Farley*, 241 Kan. at 671; *see also Hodes & Nauser*, 309 Kan. at 638. Indeed, the Kansas Constitution's robust equal protection guarantee likely obviates the need to prove discriminatory intent. But this Court need not resolve that question of first impression because the district court found racially discriminatory intent here, and that finding is supported by "substantial competent evidence." *Gannon*, 298 Kan. at 1175-76.

When a constitutional claim presents "mixed questions of fact and law," this Court reviews the lower court's factual findings for "substantial competent evidence" and its legal conclusions de novo. *Id.*

On appeal, Defendants do not claim Plaintiffs' racial vote dilution claim is nonjusticiable; their justiciability arguments are limited only to the partisan gerrymandering claims. *See* Br. 44-45. Nor do Defendants contest that a redistricting plan that intentionally and effectively discriminates on the basis of race violates the Kansas Constitution. Br. 45. And Defendants agree that the intent element is satisfied if race was *a* factor motivating the plan—it need not be the only factor or the predominant factor. Br.

45 (noting intentional racial discrimination occurs if race "at least in part" motivated plan). Defendants further acknowledge that discriminatory intent may be proved by either direct evidence or indirect circumstantial evidence, and that evidence of racial animus is not necessary. Br. 44-48; *see* J.A. VI, 196; *Jones v. Kan. State Univ.*, 279 Kan. 128, 145, 106 P.3d 10 (2005) (courts look to circumstantial evidence to determine legislative intent).

Given this broad agreement, the narrow question before this Court is limited to whether the district court's factual findings of racially discriminatory intent and effect are supported by substantial competent evidence. *See State v. Pham*, 281 Kan. 1227, 1237, 136 P.3d 919 (2006) (district court's finding of intentional discrimination is a "factual" one). That inquiry asks whether the district court's findings were reasonable, *Gannon*, 298 Kan. at 1175, with this Court giving "great deference to the factual findings of the district court." *Talkington*, 301 Kan. at 461. The district court's findings of intentional and successful racial discrimination easily satisfy this highly deferential standard of review.

### A. Ad Astra 2 intentionally dilutes minority voting power.

#### 1. The district court correctly found racially discriminatory intent.

The district court's intent analysis considered "the totality of the circumstances," with a focus on five "particularly relevant" factors. J.A. VI, 196-97. Those factors "all point to the conclusion that . . . Ad Astra 2 was motivated at least in part by an intent to dilute minority voting strength." *Id.* at 206.

First and foremost, intent to dilute minority voting strength is evident from the face of Ad Astra 2 itself. As the district court repeatedly stressed, the plan "surgically targets the most heavily minority areas," *id.* at 205, excising the census blocks with heaviest

concentrations of minority voters from CD 3 to CD 2 with "surgical precision," *id.* at 122, 118-19. Dr. Collingwood's "heat" map showing who was removed from CD 3 and who stayed in provides a vivid visual illustration. *Id.* at 119. To replace these minority voters, CD 3 adds counties to the southwest of Johnson County that are 90.3% white. *Id.* at 120. Dr. Collingwood testified that this was among the starkest cuts along racial lines he had "ever seen." *Id.* This extreme racial divide did not happen "by mistake." *Id.* at 205.

The district court considered and rejected alternative explanations for the plan's racial division. The court found that the dilution of minority votes cannot be explained by an attempt to target Democrats, because the plan "treats minority Democrats much less favorably than it treats white Democrats." *Id.* at 123. The court further found that "attempts to justify the stark racial divide in Ad Astra 2 based upon neutral explanations," including the location of I-70, "are pretext." *Id.* at 204. "[T]he racial divide along the highway is widely known in Kansas, and would have been an obvious implication to those developing and enacting the plan"—and "[a]ny number of highways—or other natural or manmade features—that do not so closely divide Kansas on the basis of race could have formed a barrier along which to divide a county." *Id.* at 204-05.

Extensive additional evidence supports the district court's finding of discriminatory intent. Ad Astra 2 was enacted through "an unprecedented departure from ordinary legislative process" in both speed and opacity. *Id.* at 17; *see id.* at 17-22, 25-30. The Legislature gave white communities more time to testify about the plan than those in the predominantly minority Wyandotte County. *Id.* at 18-19, 201-02. The plan divides the Kansas City metropolitan area and its heavily minority population for only the second time

in the last hundred years, and the first time in the last forty years. *Id.* at 202-03. And proponents of Ad Astra 2 in the Legislature extensively discussed—and acknowledged—the plan's adverse effects on minority voters. *Id.* at 206.

Expert analysis also supports the finding of discriminatory intent. Dr. Collingwood found racially polarized voting in CD 2 and CD 3, and illustrated the plan's surgical cracking of minority voters in Wyandotte County to dilute their votes, *id.* at 111-15, 118-21. Dr. Chen showed that Ad Astra 2 is an extreme statistical outlier in exporting minority voters from the district in which they had the best chance of electing their preferred candidate—94.9% of his race-blind simulated plans had higher minority populations in their most Democratic district. *Id.* at 126. And Dr. Rodden demonstrated that the plan moves minority voters between districts at a much higher rate than white voters. *Id.* at 106. Defendants' brief does not even address this expert evidence. Br. 45-48.

**2. Defendants fail to refute the finding of racially discriminatory intent.**

Defendants' attacks on the district court's finding of discriminatory intent fall flat, particularly in light of the great deference owed to those findings.

First, Defendants are wrong that the district court improperly "collaps[ed]" the intent and effect elements by considering the plan's racially discriminatory effects as evidence of racially discriminatory intent. Br. 47. It is well settled in the law of racial discrimination and elsewhere that people generally intend the outcomes they achieve, so evidence of effects is regularly relied upon as circumstantial evidence of intent. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 266 (1977). Indeed, the "impact of the official action" is "an important starting point" in evaluating

discriminatory intent. *Id.* And contrary to Defendants' suggestion, *see* Br. 47, evidence of an action's effects can circumstantially support a finding of intent with or without "a consistent pattern of official racial discrimination." *Vill. of Arlington Heights,* 429 U.S. at 266 n.14.

Second, Defendants mischaracterize the district court's finding regarding legislators' knowledge of the plan's racially discriminatory effects. Br. 47. The court did not find—and Plaintiffs did not argue—that legislators' awareness of discriminatory effects was *conclusive* evidence of discriminatory intent. To the contrary, the court considered a multitude of factors in reaching its conclusion, all of which "*together*" supported its finding of discriminatory intent. J.A. VI, 206 (emphasis added). Considering awareness of effects as one factor in an evaluation of discriminatory intent is entirely proper, as the case Defendants cite makes clear: "the inevitability or foreseeability of consequences" supports "a strong inference that the adverse effects were desired." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 n.25 (1979). That is precisely what the district court found. J.A. VI, 121-22, 196.

Third, the district court's extensive factual findings refute Defendants' contention that Ad Astra 2 "was enacted according to the usual procedures." Br. 47. Over nearly fifteen pages, the district court detailed the "unprecedented departure from ordinary legislative process" that led to enactment of Ad Astra 2. J.A. VI, 17-31. Citing *Stephan III*, Defendants assert that a redistricting process held with emergency speed that provides no "opportunity for comment" is not procedurally irregular. Br. 48. That is wrong. *Stephan III* stands only for the unremarkable proposition that a redistricting plan enacted in compliance with

"legislative rules and constitutional and statutory law" is not invalid *solely* on the basis that "there was no opportunity for public comment." 251 Kan. at 601, 603. The plan in *Stephan III* took three months to pass, and "there [was] no evidence that legislative meetings or action were conducted in secret." *Id.* at 603. In sharp contrast, the Legislature created Ad Astra 2 "in secret," J.A. VI, 17, and passed it in just over one week, *see id.* at 25, 28.

Fourth, the district court's consideration of the "historical evidence of discrimination" in I-70's location, Br. 48, was plainly relevant to its finding of discriminatory intent given the way Ad Astra 2 split Wyandotte County along the I-70 line. The court did not find that this history was sufficient on its own to prove intent. Rather, "the motivations behind the location and construction of I-70" were a relevant factor for consideration because "the racial divide along [I-70] is widely known in Kansas, and would have been an obvious implication to those developing and enacting the plan." J.A. VI, 204.

Finally, Defendants argue that the district court failed to adequately consider that "district lines drawn for political reasons can easily resemble a district line drawn for racial reasons," Br. at 46, given racially polarized voting patterns in Kansas. That too is wrong. The court carefully explained that, although minority voters in the relevant districts favor Democratic candidates, "Ad Astra 2 treats minority Democrats even less favorably than it treats white Democrats." J.A. VI, 197. Indeed, the line splitting Wyandotte County indisputably follows a racial, not partisan, divide. While both sides of the line are heavily Democratic, only one side is heavily minority, blatantly separating minority voters from white voters. *Compare id.* at 85 (showing heavily Democratic areas on both sides of the line), *with id.* at 119 (showing heavily minority areas on only one side of the line). Even if

partisanship was a major motivating factor for the plan, the presence of even *some* intent to reduce minority voting strength constitutes intentional racial vote dilution in violation of the Kansas Constitution.

**B. Ad Astra 2 has the effect of diluting minority voting power.**

The district court's finding that Ad Astra 2 effectively dilutes minority votes is also supported by substantial competent evidence. As the court explained, the prior plan enabled minority voters to elect their preferred candidates in CD 3, but Ad Astra 2 will not perform for minority voters in either CD 2 or CD 3. J.A. VI, 198. To accomplish this result, Ad Astra 2 moves over 45,000 minority voters from CD 3 to CD 2, diluting the minority vote share "in *both* CD 2 and CD 3." *Id.* In CD 3, the 120,000 minority voters who remain are now significantly less likely to elect their candidate of choice. *Id.* In CD 2, the 45,000 minority voters moved from CD 3 can no longer elect their preferred candidate in "*any* of the elections in which RPV is present." *Id.* These are discriminatory effects.

In challenging the district court's finding of discriminatory effects, Defendants primarily argue that under federal law (which no one invoked), the Legislature is not required to create new minority crossover districts (which no one has asked it to do). For instance, Defendants argue that "the Kansas Constitution does not require that minority voters have 'the most potential, or the best potential, to elect a candidate by attracting crossover [white] voters.'" Br. 49-50 (quoting *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (Kennedy, J.) (lead opinion)). But that is not what the district court held. Instead, it determined that the Kansas Constitution prohibits the State from intentionally destroying a performing crossover district, namely CD 3 under the prior plan. J.A. VI, 120-21, 195-97.

Even the U.S. Supreme Court decision cited by Defendants recognizes that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious" equal protection concerns. *Bartlett*, 556 U.S. at 24. The district court found precisely such an intent here.

Defendants are also wrong that "[m]inority voting power is not diluted when minority voters are moved from one district where they comprise a one-third sub-majority to another district where they also comprise a one-third sub-majority." Br. 49. When minority voters can join with white crossover voters to elect their preferred candidates in the former district but not in the latter, the map necessarily has an adverse effect on the displaced minority voters. That the Legislature enacted a Sudoku-like plan that preserves minority vote shares between twenty and thirty percent in each district only underscores the precision with which it rearranged minority voters to create a façade of minimal changes while in fact ensuring that minority voting strength would be eliminated.

Contrary to Defendants' assertion, retaining CD 3 as a performing crossover district is not "in tension with basic equal protection principles." Br. 50. The Legislature purposefully destroyed an existing performing crossover district in order to prevent Wyandotte County's minority voters from electing their preferred candidates. Defendants' contention that it would somehow violate equal protection for courts to *remedy* the *Legislature's* intentional and effective dilution of minority voting strength makes no sense. Remedying an equal protection violation by undoing it does not create an equal protection problem—it solves one. Moreover, the finding of Plaintiffs' expert Dr. Chen was that plans

drawn at random, *without considering race* and just respecting political geography, would overwhelmingly retain a CD 3 with a large minority share. J.A. VI, 124-26.

In sum, the record resoundingly supports the district court's findings of racially discriminatory intent and effect, and Defendants' arguments fall well short of overcoming the deferential standard of review those findings merit. The court's conclusion that Ad Astra 2 unconstitutionally dilutes minority votes should be affirmed.

## III. The U.S. Constitution's Elections Clause Does Not Bar Kansas Courts from Reviewing the Validity of Ad Astra 2 Under the Kansas Constitution.

Defendants argue that the U.S. Constitution's Elections Clause bars state courts from reviewing the validity of congressional redistricting legislation under the state's own constitution. Br. 9-10. Under this theory, the Elections Clause gives the Kansas Legislature free reign, when drawing congressional districts, to intentionally discriminate against Kansas voters based on political affiliation and race, in defiance of the Kansas Constitution as construed by Kansas courts. The district court correctly rejected this radical theory as "inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015," and "also repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts." J.A. VI, 154 (quoting *Harper*, 868 S.E.2d at 551). Although this legal determination is subject to de novo review, *Gannon*, 298 Kan. at 1136, this Court should affirm the district court's decision.

### A. The text and history of the Elections Clause refute Defendants' theory.

As the district court explained, Defendants' interpretation of the Elections Clause contradicts constitutional text and history. J.A. VI, 153-54. Defendants offer no response.

The Elections Clause provides that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4. At the Founding, "the public meaning of state 'legislature' was clear and well accepted": it referred to "an entity created and constrained by the state's constitution." Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent-State- Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. (forthcoming) (manuscript at 24) (emphasis omitted). State constitutions adopted at the time reflected this understanding by expressly constraining state legislatures' authority—particularly their authority over federal elections. *Id.* at 27-30. Indeed, among the states that held constitutional conventions in the decade after ratification of the U.S. Constitution, all but one "adopted constitutional provisions that regulated federal elections, either explicitly (Delaware) or by virtue of 'all elections' provisions (the rest)." Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. 101, 149 (forthcoming 2022).

What is more, the specific individuals responsible for inclusion of the word "Legislature" in the federal Elections (and Electors) Clause subsequently supported the adoption of provisions in their own states' constitutions regulating federal elections. *See id.* at 140-43. And "[s]ince the Founding, state constitutions have regulated nearly every aspect of federal elections, from voter registration and balloting to congressional redistricting and election administration." Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 Harvard J.L. & Pub. Pol'y (forthcoming 2023)

(manuscript at 3). This history and tradition alone dispel the notion that the Elections Clause somehow licenses state legislatures to violate state constitutions in conducting congressional redistricting and otherwise regulating federal elections.

**B. Numerous U.S. Supreme Court decisions refute Defendants' theory.**

Defendants' Elections Clause theory also contradicts extensive U.S. Supreme Court precedent holding that a state legislature's congressional redistricting legislation is subject to state court judicial review under the state constitution. J.A. VI, 154-58.

Just three years ago, *Rucho* recognized that "[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply" in adjudicating partisan gerrymandering challenges to legislatively enacted congressional plans. 139 S. Ct. at 2507 (emphases added). This was not mere "dicta," Br. 16, but essential to *Rucho*'s holding: as the district court explained, "it enabled the Supreme Court to foreclose *federal* partisan gerrymandering claims while promising that 'complaints about districting' would not 'echo into a void.'" J.A. VI, 155 (quoting *Rucho,* 139 S. Ct. at 2507). Defendants' response that only "express" state constitutional provisions can constrain state legislatures in congressional redistricting, while "general" provisions cannot, is incoherent. Br. 17. There are no second-class provisions of the Kansas Constitution. And this Court has the final word in construing that Constitution. *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). If this Court declares that a congressional plan violates a provision of the Kansas Constitution, it makes no difference whether the provision is "express" or "general." And, in any event, Defendants cannot seriously dispute that Kansas's equal protection provisions "expressly" prohibits intentional race discrimination, as the district court found here.

*Rucho* is the latest in "a long line of decisions by the Supreme Court of the United States confirm[ing] the view that state courts may review state laws governing federal elections to determine whether they comply with the state constitution." *Harper*, 868 S.E.2d at 552 (citing cases); *see* J.A. VI, 155-58. In *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), the Court held that the Elections Clause does not authorize state legislatures to enact laws that are invalid "under the Constitution and laws of the state." *Id.* at 568. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court similarly concluded that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided," or eliminate "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power." *Id.* at 368-69; *see also Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *Carroll v. Becker*, 285 U.S. 380, 381-82 (1932). The Court likewise recently held that "[n]othing in [the Elections] Clause instructs, nor has [the Supreme] Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature*, 576 U.S at 817-18. Indeed, the Court has emphasized that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Growe v. Emison*, 507 U.S. 25, 33 (1993) (internal quotation marks omitted)). In attempting to distinguish these decisions, *see* Br. 17-18, Defendants ignore the Supreme Court's repeated and unqualified holdings that in exercising their Elections Clause authority to regulate federal elections, state legislatures

remain subject to "provisions of the State's constitution." *Ariz. State Legislature.*, 576 U.S. at 818.

Contrary to Defendants' assertion, Br. 13, 18-19, *McPherson v. Blacker*, 146 U.S. 1 (1892), did not hold that state legislatures may violate state constitutions in regulating federal elections. Although Defendants' brief carefully avoids mentioning it, the entire passage Defendants rely upon from *McPherson* concerning the power "conferred upon" state legislatures by the federal Electors Clause was part of a lengthy block quote from a Senate report. 146 U.S. at 35 (quoting S. Rep. No. 395, 43 Cong., 1st Sess. (1874)). Nothing in *McPherson* indicates that the Court was endorsing that line in the Senate report, and it is contrary to a century of precedent holding that the Elections Clause does not allow state legislatures to violate state constitutions in enacting congressional plans.

**C. The Reduction Clause refutes Defendants' theory.**

As the district court explained, "the Fourteenth Amendment's Reduction Clause confirms that the U.S. Constitution not only permits but *requires* states' congressional districting plans to comply with state constitutional provisions protecting voting rights." J.A. VI, 160-61. The Reduction Clause dictates that "when the right to vote at any election for . . . Representatives in Congress" is "denied . . . or in any way abridged," the state's representation in Congress "shall be reduced" proportionally. U.S. Const. amend. XIV, § 2. *McPherson* held that "[t]he right to vote intended to be protected refers to the right to vote *as established by the laws and constitution of the state*." 146 U.S. at 39 (emphasis added). Thus, under *McPherson*, "the right to vote" in federal elections *defined by the Kansas Constitution* "cannot be denied or abridged without invoking the penalty" of a proportional

reduction in the state's congressional representation. *Id.* Defendants assert that the Reduction Clause "mentions neither redistricting nor state courts," Br. 18, but it does mention "the right to vote," and *McPherson* held that this means the right to vote under state constitutions. If this Court holds that Ad Astra 2 abridges voting rights protected by the Kansas Constitution, "it cannot be that the federal Elections Clause requires Kansas to conduct its congressional elections in a manner that would trigger a reduction in the state's representation in Congress under the Reduction Clause." J.A. VI, 161.

### D. Federal statutes authorize state courts to review and remedy congressional plans under the state's own constitution.

The district court also correctly recognized that "[r]egardless of the meaning of 'Legislature'" in the Elections Clause, the Clause authorizes "Congress 'at any time' to make its own regulations related to congressional redistricting," and "Congress has mandated that states' congressional redistricting plans comply with substantive state constitutional provisions." *Id.* at 158-60 (quoting U.S. Const. art. I, § 4). Specifically, 2 U.S.C. § 2a(c) provides that states must redistrict "in the manner provided by the law thereof." As Justice Scalia's plurality opinion in *Branch v. Smith*, 538 U.S. 254 (2003), explained, this phrase includes *substantive* state constitutional provisions: "[T]he word 'manner' refers to the State's substantive 'policies and preferences' for redistricting, as expressed in a State's statutes, constitution, proposed reapportionment plans, or a State's 'traditional districting principles.'" *Id.* at 277-78 (citations omitted). The *Branch* plurality expressly rejected the argument—identical to Defendants' argument here—that § 2a(c) "refer[s] to *process* or *procedures*, rather than *substantive requirements.*" *Id.* at 277.

Another federal statute ignored by Defendants empowers state courts to adopt remedial congressional redistricting plans. A majority of the *Branch* Court held that 2 U.S.C. § 2c authorizes "action by *state and federal courts*" to "remedy[] a failure" by the state legislature "to redistrict constitutionally." 538 U.S. at 270, 272 (emphasis added). And § 2a(c) reaffirms state courts' authority to establish congressional plans: "[W]hen a court, *state or federal*, redistricts pursuant to § 2c, it necessarily does so 'in the manner provided by [state] law'" for purposes of § 2a(c). *Id.* at 274 (plurality opinion) (emphasis added).

Accordingly, as the district court recognized, "even if there were doubt whether the Elections Clause [itself] permits state courts to review and remedy congressional districting laws under state constitutions," Congress has exercised its Elections Clause power to "declare[] that state courts can do so." J.A. VI, 160.

**E. Defendants' remaining arguments lack merit.**

Defendants cite a hodgepodge of decisions from courts of other states, *see* Br. 14, but none supports their interpretation of the Elections Clause. As the district court explained, "[e]very lower court to have considered the issue since *Smiley* has concluded that the Elections Clause does not bar state courts from invalidating a congressional map under the state's constitution." J.A. VI, 163-64. Most recently, the North Carolina Supreme Court rejected the Elections Clause theory advanced by Defendants here. *See Harper*, 868 S.E.2d at 551-52. This Court's decision in *Parsons v. Ryan*, 144 Kan. 370, 60 P.2d 910 (1936), is not to the contrary. *Parsons* involved neither the Elections Clause nor congressional elections; rather, the decision simply upheld a run-of-the-mill state-law deadline for presidential-elector nominations. *See id.* at 912.

Defendants also note that Article 10, Section 1, of the Kansas Constitution provides for this Court's automatic review of state legislative redistricting plans, but not congressional plans. Br. 14. But that does not mean that this Court cannot review the validity of congressional plans. First, as the district court recognized, "[t]he Constitution's treatment of the courts' role in each type of redistricting . . . parallels its treatment of the Legislature's role: the document explicitly describes the Legislature's authority in state legislative reapportionment, Kan. Const. art. 10, § 1, but is silent as to congressional redistricting." J.A. VI, 175. And long before the introduction of the automatic-review provision in the 1980s, this Court recognized its "duty" to review redistricting plans, "as any other act of the legislature," under the Kansas Constitution even without an explicit judicial review provision. *Harris*, 192 Kan. at 207. Regardless, Article 10, Section 1 certainly has no bearing on whether the *federal* Constitution prohibits state court judicial review of congressional plans under other provisions of the state constitution.

Defendants contend that there is no need for state courts to review the validity of congressional plans because Congress and federal courts can play a role. Br. 15. But as Defendants themselves emphasize, *Rucho* shut the federal courthouse doors to partisan gerrymandering claims, stating that any remedy must lie with state courts applying state constitutions. And as explained above, Congress has already mandated that congressional plans comply with state constitutions and authorized state courts to adopt remedial plans when the state legislature fails to enact a lawful plan. Nor is any amendment to the Kansas Constitution needed, as Defendants contend. Br. 15-16. For all the reasons set forth above,

the Kansas Constitution already safeguards each citizen's right to "equal power and influence in the making of laws which govern him." *Harris*, 192 Kan. at 204.

Lastly, the district court's invitation to the Legislature to enact a remedial plan "as expeditiously as possible," J.A. VI, 208, does not support Defendants' Elections Clause theory. This was not an "aggrandizing command" to the Legislature, Br. 19, but rather a standard practice of courts in redistricting litigation to give the state legislature a chance to take timely remedial action when an existing plan has been invalidated, *see, e.g.*, *League of Women Voters of Pa.*, 645 Pa. at 128-30. So understood, the district court's order was an attempt to give the Legislature another chance, rather than assuming responsibility for drawing a remedial map in the first instance.

Defendants' Elections Clause theory is therefore without merit.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on May 9, 2022, a true and correct copy of this Notice using the Court's electronic filing system which will serve all parties. On the same day a copy was electronically mailed to:

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# APPENDIX OF UNPUBLISHED OPINIONS

2022 WL 1236822

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

In the Matter of Tim HARKENRIDER, et al., Respondents-Appellants,

v.

Kathy HOCHUL, &c., et al., Appellants-Respondents, et al., Respondents.

No. 60

|

Decided April 27, 2022

**Synopsis**

**Background:** Voters initiated special proceeding against Governor, Senate Majority Leader, Speaker of Assembly, and New York State Board of Elections, challenging constitutionality of congressional and senate maps redrawn by majority party in both senate and assembly. Following trial, the Supreme Court, Steuben County, Patrick F. McAllister, J., declared congressional, state senate, and state assembly maps void as violative of New York Constitution. Respondents appealed. The Supreme Court, Appellate Division, 2022 WL 1193180, modified Supreme Court's order by vacating declaration that senate and assembly maps and legislation were unconstitutional, but otherwise affirmed and remitted. Voters and respondents filed cross-appeals.

**Holdings:** The Court of Appeals, DiFiore, C.J., held that:

voters had standing to challenge state legislature's redistricting maps;

as matter of first impression, legislature violated constitutional procedural mandate by unilaterally redrawing district maps;

evidence supported trial court's finding that congressional map unilaterally redrawn by controlling party in state legislature violated constitutional prohibition against partisan gerrymandering; and

remission of case to Supreme Court for purposes of ordering redrawing of congressional and senate maps in accordance with procedural mandates of Constitution, with assistance of special master, was appropriate remedy.

Judgment of Appellate Division affirmed as modified; remitted to Supreme Court.

Troutman, J., filed opinion dissenting in part in which Wilson, J., concurred in part.

Wilson, J., filed dissenting opinion in which Rivera, J., concurs in part.

Rivera, J., filed dissenting opinion in which Wilson, J., concurred.

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Campaign Legal Center et al.; League of Women Voters; Thomas F. O'Mara, et al.; Jamaal Bowman, et al., amici curiae.

**OPINION**

DiFIORE, Chief Judge:

***1** In 2014, the People of the State of New York amended the State Constitution to adopt historic reforms of the redistricting process by requiring, in a carefully structured process, the creation of electoral maps by an Independent Redistricting Commission (IRC) and by declaring unconstitutional certain undemocratic practices such as partisan and racial gerrymandering. No one disputes that this year, during the first redistricting cycle to follow adoption of the 2014 amendments, the IRC and the legislature failed to follow the procedure commanded by the State Constitution. A stalemate within the IRC resulted in a breakdown in the mandatory process for submission of electoral maps to the legislature. The legislature responded

  

by creating and enacting maps in a nontransparent manner controlled exclusively by the dominant political party — doing exactly what they would have done had the 2014 constitutional reforms never been passed. On these appeals, the primary questions before us are whether this failure to follow the prescribed constitutional procedure warrants invalidation of the legislature's congressional and state senate maps and whether there is record support for the determination of both courts below that the district lines for congressional races were drawn with an unconstitutional partisan intent. We answer both questions in the affirmative and therefore declare the congressional and senate maps void. As a result, judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election.

I.

Every ten years, following the federal census, reapportionment of the state senate, assembly, and congressional districts in New York must be undertaken to account for population shifts and potential changes in the state's allocated number of congressional representatives (*see* NY Const, art III, § 4). Redistricting — which is "primarily the duty and responsibility of the State" (*Perry v. Perez*, 565 U.S. 388, 392, 132 S.Ct. 934, 181 L.Ed.2d 900 [2012] [internal quotation marks and citation omitted]; *see Growe v. Emison*, 507 U.S. 25, 34, 113 S.Ct. 1075, 122 L.Ed.2d 388 [1993]) — is a complex and contentious process that, historically, has been "within the legislative power ... subject to constitutional regulation and limitation" (*Matter of Orans*, 15 N.Y.2d 339, 352, 258 N.Y.S.2d 825, 206 N.E.2d 854 [1965]). In New York, prior to 2012, the process of drawing district lines was entirely within the purview of the legislature,[1] subject to state and federal constitutional restraint and federal voting laws, as well as judicial review.

Particularly with respect to congressional maps, exclusive legislative control has repeatedly resulted in stalemates, with opposing political parties unable to reach consensus on district lines — often necessitating federal court involvement in the development of New York's congressional maps (*see e.g. Favors v. Cuomo*, 2012 WL 928223 *2, 2012 US Dist LEXIS 36910 [E.D. N.Y., Mar. 19, 2012, No. 11-CV-5632, Raggi, Lynch, and Irizarry, JJ.]; *Rodriguez v. Pataki*, 2002 WL 1058054, *7, 2002 US Dist LEXIS, [S.D. N.Y. 2002, May 24, 2002, No. 02 Civ. 618, Walker, Ch. J., Koeltl, and Berman, JJ.]; *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 684 [E.D. N.Y. 1992]). Among other concerns, the redistricting process has been plagued with allegations of partisan gerrymandering — that is, one political party manipulating district lines in order to disproportionately increase its advantage in the upcoming elections, disenfranchising voters of the opposing party (*see generally Rucho v. Common Cause*, 588 U.S. ——, 139 S. Ct. 2484, 2494, 204 L.Ed.2d 931 [2019]).

***2** By adopting the 2014 constitutional amendments, the People significantly altered both substantive standards governing the determination of district lines and the redistricting process established to achieve those standards. Given the history of legislative stalemates and persistent allegations of partisan gerrymandering, the constitutional reforms were intended to introduce a new era of bipartisanship and transparency through the creation of an independent redistricting commission and the adoption of additional limitations on legislative discretion in redistricting, including explicit prohibitions on partisan and racial gerrymandering (*see* Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526 Sponsor Memo, S2107). The Constitution now requires that the IRC — a bipartisan commission working under a constitutionally mandated timeline — is charged with the obligation of drawing a set of redistricting maps that, with appropriate implementing legislation, must be submitted to the legislature for a vote, without amendment (*see* NY Const, art III, § 4 [b]; § 5-b [a]).[2] If this first set of maps is rejected, the IRC is required to prepare a second set that, again, would be subject to an up or down vote by the legislature, without amendment (*see* NY Const, art III, § 4 [b]). Under that constitutional framework, only upon rejection of a second set of IRC maps is the legislature free to offer amendments to the maps created by the IRC (*see* NY Const, art III, § 4 [b]) and, even then, a statutory restriction enacted as a companion to the constitutional reforms precluded legislative alterations that would affect more than two percent of the population in any district (*see* L 2012, ch 17, § 3).

II.

Following receipt of the results of the 2020 federal census, the redistricting process began in New York — the first opportunity for district lines to be drawn under the new IRC procedures established by the 2014 constitutional amendments. Due to shifts in New York's

population, the state lost a congressional seat and other districts were malapportioned, undisputedly rendering the 2012 congressional apportionment — developed by a federal court following a legislative impasse (*see Favors*, 2012 WL 928223, *2, 2012 US Dist LEXIS 36910) — unconstitutional and necessitating the drawing of new district lines. Throughout 2021, the IRC held the requisite public hearings, gathering input from stakeholders and voters across the state to inform their composition of redistricting maps. In December 2021 and January 2022, however, negotiations between the IRC members deteriorated and the IRC, split along party lines, was unable to agree upon consensus maps. According to the IRC members appointed by the minority party, after agreement had been reached on many of the district lines, the majority party delegation of the IRC declined to continue negotiations on a consensus map, insisting they would proceed with discussions only if further negotiations were based on their preferred redistricting maps.

As a result of their disagreements, the IRC submitted, as a first set of maps, two proposed redistricting plans to the legislature — maps from each party delegation — as is constitutionally permitted if a single consensus map fails to garner sufficient votes (*see* NY Const, art III, § 5-b [g]). The legislature voted on this first set of plans without amendment as required by the Constitution and rejected both plans. The legislature notified the IRC of that rejection, triggering the IRC's obligation to compose — within 15 days — a second redistricting plan for the legislature's review (*see* NY Const, art III § 4 [b]). On January 24, 2022 — the day before the 15-day deadline but more than one month before the February 28, 2022 deadline— the IRC announced that it was deadlocked and, as a result, would not present a second plan to the legislature. Within a week, the Democrats in the legislature — in control of both the senate and assembly — composed and enacted new congressional, senate, and assembly redistricting maps (*see* 2022 NY Assembly Bill A9167, 2022 NY Senate Bill S8196, 2022 NY Assembly Bill A9039-A, 2022 NY Senate Bill S8172-A, 2022 NY Assembly Bill A9168, 2022 NY Senate Bill S8197, 2022 NY Senate Bill S8185-A, 2022 NY Assembly Bill A9040-A), undisputedly without any consultation or participation by the minority Republican Party.[3] On February 3rd, the Governor signed into law this new redistricting legislation, which also superseded the two percent limitation imposed in 2012 on the legislature's authority to amend IRC plans (Senate Introducer's Mem in Support, Bill Jacket, L 2012, ch 17, at 11).

***3** That same day, petitioners — New York voters residing in several different congressional districts — commenced this special proceeding under Article III, § 5 of the State Constitution and Unconsolidated Laws § 4221 against various State respondents, including the Governor,[4] Senate Majority Leader, Speaker of the Assembly, and the New York State Board of Elections, challenging the congressional and senate maps. Petitioners alleged that the process by which the 2022 maps were enacted was constitutionally defective because the IRC failed to submit a second redistricting plan as required under the 2014 constitutional amendments and, as such, the legislature lacked authority to compose and enact its own plan. Petitioners also asserted that the congressional map is unconstitutionally gerrymandered in favor of the majority party because it both "packed" minority-party voters into a select few districts and "cracked" other pockets of those voters across multiple districts, thereby diluting the competitiveness of those districts. Petitioners asked Supreme Court to enjoin any elections from proceeding on the 2022 congressional map and to either adopt its own map or direct the legislature to cure the infirmities. Petitioners subsequently sought to amend their petition to include similar challenges to the state senate map. The State respondents answered that petitioners lacked standing to challenge most of the districts they claimed were gerrymandered, that the IRC's failure to perform its duty did not strip the legislature of its enduring authority to enact redistricting plans, and that petitioners could not meet their burden of proving that the maps were unconstitutionally partisan.

A trial ensued, at which petitioners and the State respondents presented expert testimony regarding the maps. Petitioners' expert, Sean P. Trende — a doctoral candidate who has a juris doctorate, a master's degree in political science, and a master's degree in applied statistics, and who has participated as an expert in several redistricting proceedings in other states — was qualified as an expert in election analysis with particular knowledge in redistricting, with no objection from the State respondents or any request for a *Frye* hearing to challenge the efficacy of his methodology or the basis of his opinion. Trende testified that a comparison of the enacted congressional map to ensembles of 5,000 or 10,000 maps created by computer simulation revealed that the enacted map was an "extreme outlier" that likely reduced the number of Republican congressional seats from eight to four by "packing" Republican voters into four discrete districts and "cracking" Republican voter blocks across the remaining districts in such manner as to dilute the strength of their vote and render such districts noncompetitive.

  

Opposing experts called by the State respondents challenged Trende's methodology and asserted that the enacted congressional map actually resulted in more Republican districts than the simulated maps, although several conceded that they did not analyze the level of competitiveness of the new districts. Further, the State's experts defended various choices made by the legislature as justifiable based on constitutionally required considerations, contending that the enacted maps were not reflective of partisan intent.

After determining petitioners had standing to challenge the statewide maps, Supreme Court declared the congressional, state senate, and state assembly maps "void" under the State Constitution, reasoning that the legislature's enactment of redistricting maps absent submission of a second redistricting plan by the IRC was unconstitutional and that 2021 legislation purporting to authorize the enactment ("the 2021 legislation") was also unconstitutional. Further, crediting Trende's testimony, Supreme Court found that petitioners had proven that the congressional map violated the constitutional prohibition on partisan gerrymandering by packing republican voters into four districts while ensuring there were "virtually zero competitive districts." Supreme Court declared all three maps void, enjoined the State respondents from using the maps in the impending 2022 election, and directed the legislature to submit new "bipartisanly-supported" maps that meet constitutional requirements for the court's review by a particular date.

***4** The State respondents appealed, and a Justice of the Appellate Division stayed much of Supreme Court's order pending that appeal, including the deadline for submission of new redistricting maps by the legislature. However, the stay order did not prohibit Supreme Court from retaining a neutral expert to prepare a proposed new congressional map, which would have no force and effect until certain contingencies occurred, including the legislature's failure to proffer its own new congressional maps by April 30th — 30 days after the date of Supreme Court's order.[5] Thereafter, in a divided decision, the Appellate Division modified Supreme Court's order by denying the petition, in part, vacating the declaration that the senate and assembly maps and the 2021 legislation were unconstitutional, but otherwise affirmed and remitted, with three Justices agreeing with Supreme Court that petitioners had met their burden of proving that the constitutional prohibition against partisan gerrymandering had been violated with respect to the 2022 congressional map, rendering that map void and unenforceable (—— A.D.3d ——, —— N.Y.S.3d ——, 2022 N.Y. Slip Op. 02648 [4th Dept. 2022]).[6] In reaching that conclusion, the Appellate Division relied on "evidence of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende" (*id.* at *3). However, the Court rejected petitioners' argument that both the congressional and senate maps were void due to the failure to adhere to the constitutional procedure, with one Justice dissenting on that point. The parties now cross appeal as of right (*see* CPLR 5601 [b] [1]), challenging certain aspects of the Appellate Division order.

III.

As a threshold matter, relying on common law standing principles, the State respondents assert that petitioners lack standing to challenge many of the districts that they claim reflect unconstitutional partisan gerrymandering because none of the individual petitioners reside in those districts. Even absent the procedural challenge applicable to all districts, this contention is unavailing because standing is expressly conferred by constitution and statute. Article III, § 5 of the New York Constitution provides that "[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, *at the suit of any citizen*, under such reasonable regulations as the legislature may prescribe" (NY Const art III, § 5 [emphasis added]; *see* 3 Rev Rec, 1894 NY Constitutional Convention at 987; *see Matter of Dowling*, 219 N.Y. 44, 50, 113 N.E. 545 [1916]; *Schieffelin v. Komfort*, 212 N.Y. 520, 529, 106 N.E. 675 [1914]). Moreover, statutes may identify the class of persons entitled to challenge particular governmental action, relieving courts of the need to resolve the question under common law principles (*see Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 n. 2, 98 N.Y.S.3d 504, 122 N.E.3d 21 [2019]; *Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769, 570 N.Y.S.2d 778, 573 N.E.2d 1034 [1991]; *Wein v. Comptroller of State of N.Y.*, 46 N.Y.2d 394, 399, 413 N.Y.S.2d 633, 386 N.E.2d 242 [1979]; *see e.g.* State Finance Law § 123) and, here, Unconsolidated Laws § 4221 likewise authorizes "any citizen" of the state to seek judicial review of a legislative act establishing electoral districts. We therefore turn to consideration of the merits of petitioners' challenges to the 2022 redistricting maps.

Petitioners first assert that, in light of the lack of compliance by the IRC and the legislature with the procedures set

  

forth in the Constitution, the legislature's enactment of the 2022 redistricting maps contravened the Constitution. To conclude otherwise, petitioners contend, would be to render the 2014 amendments — touted as an important reform of the redistricting process — functionally meaningless. We agree.

Legislative enactments, including those implementing redistricting plans, are entitled to a "strong presumption of constitutionality" and redistricting legislation will be declared unconstitutional by the courts " 'only when it can be shown beyond reasonable doubt that it conflicts' " with the Constitution after " 'every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " (*Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78, 587 N.Y.S.2d 560, 600 N.E.2d 191 [1992], quoting *Matter of Fay*, 291 N.Y. 198, 207, 52 N.E.2d 97 [1943] [internal quotation marks omitted]; *see Cohen v. Cuomo*, 19 N.Y.3d 196, 201-202, 946 N.Y.S.2d 536, 969 N.E.2d 754 [2012]). Nevertheless, invalidation of a legislative enactment is required when such act amounts to " 'a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein' " (*Cohen*, 19 N.Y.3d at 202, 946 N.Y.S.2d 536, 969 N.E.2d 754, quoting *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 198, 81 N.E. 124 [1907]).

***5** To determine whether the legislature's 2022 enactment of redistricting legislation comports with the Constitution, our starting point must be the text thereof. "In construing the language of the Constitution as in construing the language of a statute, ... [we] look for the intention of the People and give to the language used its ordinary meaning" (*Matter of Sherrill*, 188 N.Y. at 207, 81 N.E. 124; *see White v. Cuomo*, —— N.Y.3d ——, ——, —— N.Y.S.3d ——, —— N.E.3d ——, 2022 N.Y. Slip Op. 01954, * 5 [2022]; *Burton v. New York State Dept. of Taxation & Fin.*, 25 N.Y.3d 732, 739, 16 N.Y.S.3d 215, 37 N.E.3d 718 [2015]; *Matter of Carey v. Morton*, 297 N.Y. 361, 366, 79 N.E.2d 442 [1948]). Upon careful review of the plain language of the Constitution and the history pertaining to the adoption of the 2014 reforms, it is evident that the legislature and the IRC deviated from the constitutionally mandated procedure.

From a procedural standpoint, the Constitution — as amended in 2014 — requires that, every ten years commencing in 2020, an "independent redistricting commission" comprising 10 members — eight of whom are appointed by the majority and minority leaders of the senate and assembly and the remaining two by those eight appointees — shall be established (*see* NY Const, art III, § 5-b [a]). The members must be a diverse group of registered voters and cannot be (or recently have been) members of the state or federal legislature, statewide elected officials, state officers or legislative employees, registered lobbyists, or political party chairmen, or the spouses of state or federal elected officials (*see* NY Const, art III, § 5-b [b], [c]).

Under the Constitution, the IRC must make its draft redistricting plans available to the public and hold no less than 12 public hearings throughout the state regarding proposals for redistricting, ensuring transparency and giving New Yorkers a voice in the redistricting process (*see* NY Const, art III, § 4 [c]). After considering public comments and working together across party lines to compose new redistricting lines, the IRC must submit its approved plan and implementing legislation to the legislature no later than January 15th in a redistricting year (*see* NY Const, art III, § 4 [b]), with the caveat that, if the IRC is unable to muster the requisite number of votes for a single plan, it must provide the legislature with each plan that "garnered the highest number of votes in support of its approval by the [IRC]" (NY Const, art III, § 5-b [g]). If the legislature rejects the IRC's first plan, the Constitution requires the IRC to go back to the drawing board, work to reach consensus, and "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation" to the legislature within 15 days and in no case later than February 28th (NY Const, art III, § 4 [b]). "If" the legislature fails to approve the second plan without amendment, the Constitution then directs that "each house shall introduce such implementing legislation" — a clear reference to the IRC's second plan — with any amendments each house of the legislature deems necessary (NY Const, art III § 4 [b]). As a further safeguard against one party dominating redistricting, the Constitution dictates that the number of votes required for the IRC and legislature to approve a plan differs depending on whether the legislature is controlled by one political party or control of the houses are split between the parties (*see* NY Const, art III, §§ 4 [b] [1] – [3]; 5-b [f] [1], [2]).

The Redistricting Reform Act of 2012, legislation enacted in conjunction with the 2012 constitutional resolution, further provides as a matter of statutory law that "[a]ny amendments by the senate or assembly to a redistricting plan submitted by the [IRC] shall not affect more than two percent of the population of any district contained in such plan" (L 2012, ch 17, § 3). As the sponsor of the legislation explained,

  

"[i]f the [IRC's] second plan [was] also rejected ..., each house may then amend *that plan* prior to approval except that such amendments ... cannot affect more than two percent of the population of any district *in the commission's plan*," a limitation designed to "provide reasonable restrictions on the legislature's changes to the commission's plans" (Senate Introducer's Mem in Support, Bill Jacket, L 2012, ch 17, at 15 [emphasis added]).

***6** The plain language of Article III, § 4 dictates that the IRC "*shall* prepare" and "*shall* submit" to the legislature a redistricting plan with implementing legislation, that IRC plan "*shall* be voted upon, without amendment" by the legislature, and — in the event the first plan is rejected — the IRC "*shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation," which again "*shall* be voted upon, without amendment" (NY Const, art III, § 4 [b] [emphasis added]). "*If*" and only "if" that second plan is rejected, does the Constitution permit the legislature to introduce its own implementing legislation, "with any amendments" to the IRC plans deemed necessary that otherwise comply with constitutional directives (NY Const, art III, § 4 [b] [emphasis added]).

"In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect" and "[i]t must be presumed that its framers understood the force of the language used and, as well, the people who adopted it" (*People v. Rathbone*, 145 N.Y. 434, 438, 40 N.E. 395 [1895]). Our Constitution is "an instrument framed deliberately and with care, and adopted by the people as the organic law of the State" and, when interpreting it, we may "not allow for interstitial and interpretative gloss ... by the other [b]ranches [of the government] that substantially alters the specified law-making regimen" set forth in the Constitution (*Matter of King v. Cuomo*, 81 N.Y.2d 247, 253, 597 N.Y.S.2d 918, 613 N.E.2d 950 [1993]).

Article III, § 4 is permeated with language that, when given its full effect, permits the legislature to undertake the drawing of district lines *only* after two redistricting plans composed by the IRC have been duly considered and rejected.[7] Moreover, the text of section 4 contemplates that any redistricting act ultimately adopted must be founded upon a plan submitted by the IRC; in the event the IRC plan is rejected, the Constitution authorizes "amendments" to such plan, not the wholesale drawing of entirely new maps (NY Const, art III, § 4 [b]; *see* NY Assembly Debate on Assembly Bill A9557 Mar. 15, 2012 at 39 ["The Constitutional amendment allows the (l)egislature to *amend* the plan submitted by the independent redistricting commission *if* the (l)egislature has twice rejected submitted plans" (emphasis added)]).[8]

Despite clear constitutional language, the State respondents posit that it is wrong to interpret the 2014 constitutional amendments as requiring two separate IRC plans as a precondition to the legislature's exercise of its longstanding and historically unbridled authority to enact redistricting legislation.[9] They further rely on the 2021 legislation authorizing the legislature to move forward on redistricting even if the IRC fails to submit maps as permissibly filling a purported gap in the constitutional design. However, in addition to being contrary to the text of the Constitution as we have explained, the State respondents' arguments are also belied by the purpose of the 2014 amendments and the relevant legislative history — including the legislature's own statements regarding the intent and effect of the 2014 constitutional reform effort.

***7** Indeed, the State respondents studiously ignore events that gave rise to the 2014 amendments. During the previous redistricting cycle in 2012, the New York legislature was unable to reach agreement on legislation setting the congressional district lines and, as a result, a federal court ordered the adoption of a judicially-drafted congressional redistricting plan (*see Favors*, 2012 WL 928223, *2, 2012 US Dist LEXIS 36910). While the 2012 legislature did agree on state senate and assembly maps, the proposed maps were widely criticized as a product of partisan gerrymandering, prompting the then-Governor to threaten to veto the plans absent a concrete legislative commitment to redistricting reform (*see* Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation*, 47 U Rich L Rev 771, 829 [2013]; Thomas Kaplan, *An Update on New York Redistricting*, NY Times, March 7, 2012; Thomas Kaplan, *An Update on New York Redistricting*, NY Times, March 9, 2012). Thus, as we have discussed, in conjunction with enactment of the 2012 redistricting acts (*see* L 2012, ch 16), the legislature affirmed its commitment to redistricting reform by passing the Redistricting Reform Act of 2012 (*see* L 2012, ch 17) and the first of the two concurrent resolutions proposing the constitutional amendments creating the IRC process (*see* 2012 NY Assembly Bill A9526 [Mar. 11, 2012]). Characterizing the legislature's 2012 senate and assembly district lines as "significantly flawed," the Governor nevertheless approved

the redistricting legislation that year in light of the legislature's demonstrated agreement to "permanent[ly]" and "meaningful[ly]" reform the redistricting process for future years and "provide transparency to a process [otherwise] cloaked in secrecy and largely immune from legal challenges to partisan gerrymandering" (Governor's Approval Mem, Bill Jacket, L 2012, ch 17 at 5; 2012 NY Legis Ann at 12-13).

As the surrounding context and history of the 2014 amendments illustrate, the constitutional amendments adopted by the two consecutive legislatures and the voters — from the provisions detailing the composition of the IRC to those setting forth the voting metrics — were carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines. The procedural amendments — along with a novel *substantive* amendment of the State Constitution expressly prohibiting partisan gerrymandering, discussed further below — were enacted in response to criticism of the scourge of hyper-partisanship, which the United States Supreme Court has recognized as "incompatible with democratic principles" (*Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. at 791, 135 S.Ct. 2652 [internal quotation marks, punctuation and citation omitted]).

As reflected in the legislative record, the IRC's fulfillment of its constitutional obligations was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting. The legislative record shows that the 2012 legislature — the drafters of the constitutional amendments — intended to "comprehensively" reform and "implement historic changes to achieve a fair and readily transparent process" to "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body" — rather than entirely by the legislature itself (Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Sponsor's Mem, 2013 NY Senate Bill S2107). As the sponsors explained, the reforms were designed to "substantively and fundamentally" alter the redistricting process, allowing "[f]or the first time, both the majority and minority parties in the legislature [to] have an equal role in the process of drawing lines," with these "far-reaching" constitutional reforms touted as a template "for independent redistricting throughout the United States" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086).

The Senate debate indicates that the constitutional provision allowing the legislature to amend the second redistricting plan submitted by the IRC only after twice voting on and rejecting IRC plans was intended to encourage bipartisan participation by the legislature in the redistricting process. The Senate sponsor explained that "[o]n the third enactment, there could be amendments under this provision. But again, it would be the third time – not first time, not the second time, but the third time in order to get ultimately a product produced" (NY Senate Debate on AB2086, January 23, 2013 at 222). In other words, "[i]f there cannot be agreement, if the Governor vetoes the provision twice, ... that third time the Legislature would be acting. But not until that time" (*id.* at 224) because "the intent of th[e] resolution [wa]s to have the Legislature act and vote on ... a [second] plan" before undertaking any amendments of its own (*id.* at 226). Answering a charge that the IRC would essentially be only "an advisory commission" since the legislature could ultimately reject both sets of IRC maps, the Senate sponsor explained that the IRC process was intended, in part, to impose consequences on the legislature for rejecting plans developed through a bipartisan process by forcing it to take a public position refusing to adopt district lines that were developed with an "enormous amount of citizen input" and effort (*id.* at 228).

***8** It is no surprise, then, that the Constitution dictates that the IRC-based process for redistricting established therein "*shall* govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law" (NY Const art III, § 4 [e] [emphasis added]). Contrary to the State respondents' contentions, the detailed amendments leave no room for legislative discretion regarding the particulars of implementation; this is not a scenario where the Constitution fails to provide "specific guidance" or is "silen[t] on the issue" (*Cohen*, 19 N.Y.3d at 200, 202, 946 N.Y.S.2d 536, 969 N.E.2d 754). Under the 2014 amendments, compliance with the IRC process enshrined in the Constitution is the *exclusive* method of redistricting, absent court intervention following a violation of the law, incentivizing the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process.[10]

That the IRC process was intended to operate as a limitation on the legislature's power to compose district lines is further underscored by the Redistricting Reform Act of 2012 (*see* L 2012, ch 17). That legislation, adopted simultaneously with the 2012 constitutional resolution, instituted the two percent

limitation on the legislature's authority (*see* L 2012, ch 17, § 3). In describing this particular reform, the Sponsor of the bill explained that "[i]f the legislature fails to pass" the IRC's second plan "it may then amend such plans and vote upon them as amended. However, any such amendments shall be limited ... to affect no more than two percent of the population of any district in such plan" (Senate Introducer's Mem in Support, Bill Jacket, L 2012, ch 17, at 11). Thus, although the legislature retains the ultimate authority to enact districting maps upon completion of the IRC process, the constitutional reforms were clearly intended to promote fairness, transparency, and bipartisanship by requiring, as a precondition to redistricting legislation, that the IRC fulfill a substantial and constitutionally required role in the map drawing process.[11]

***9** Indeed, recent events suggest that the legislature itself recognized that the Constitution did not permit it to proceed with redistricting absent compliance with the bipartisan IRC process. Apparently forecasting that the IRC would not comply with its constitutional obligations, in the summer of 2021 — before the IRC had even been given a chance to fulfill its constitutional role — the legislature attempted to amend the constitution to add language authorizing it to introduce redistricting legislation "[i]f ... the redistricting commission fails to vote on a redistricting plan and implementing legislation by the required deadline" for any reason (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). After New York voters rejected this constitutional amendment (among others) — and with the first redistricting cycle since the 2014 amendments on the horizon — the legislature attempted to fill a purported "gap" in constitutional language by *statutorily* amending the IRC procedure in the same manner (*see* L 2021, ch 633). In this Court, the State respondents attempt to rely on the 2021 legislation to justify the deviation from constitutional requirements. Needless to say, the bipartisan process was placed in the State Constitution specifically to insulate it from capricious legislative action and to ensure permanent redistricting reform absent further amendment to the constitution, which has not occurred. The 2021 legislation is unconstitutional to the extent that it permits the legislature to avoid a central requirement of the reform amendments (*see Matter of King*, 81 N.Y.2d at 252, 597 N.Y.S.2d 918, 613 N.E.2d 950 ["The (l)egislature must be guided and governed in this particular function by the Constitution, not by a self-generated additive"]).

In sum, there can be no question that the drafters of the 2014 constitutional amendments and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature's enactment of redistricting legislation. In urging this Court to adopt their view that the IRC may abandon its constitutional mandate with no impact on the ultimate result and by contending that the legislature may seize upon such inaction to bypass the IRC process and compose its own redistricting maps with impunity, the State respondents ask us to effectively nullify the 2014 amendments. This we will not do. Indeed, such an approach would encourage partisans involved in the IRC process to avoid consensus, thereby permitting the legislature to step in and create new maps merely by engineering a stalemate at any stage of the IRC process, or even by failing to appoint members or withholding funding from the IRC. Through the 2014 amendments, the People of this state adopted substantial redistricting reforms aimed at ensuring that the starting point for redistricting legislation would be district lines proffered by a bipartisan commission following significant public participation, thereby ensuring each political party and all interested persons a voice in the composition of those lines. We decline to render the constitutional IRC process inconsequential in the manner requested by the State respondents, a result that would "violat[e] ... the plain intent of the Constitution and ... disregard [the] spirit and the purpose" of the 2014 constitutional amendments (*Cohen*, 19 N.Y.3d at 202, 946 N.Y.S.2d 536, 969 N.E.2d 754 [internal quotation marks and citation omitted]).

IV.

Having addressed the procedural violation, we turn to the substantive partisan gerrymandering claim. As a threshold matter, despite our invalidation of the maps on procedural grounds, we nevertheless must determine on the State respondents' cross appeal whether the courts below properly declared that the congressional map was also substantively unconstitutional.[12]

***10** In addition to the procedural amendments, in 2014, the People also amended the New York State Constitution to include certain substantive limitations on redistricting, including an express prohibition on partisan gerrymandering, commanding that "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]).[13] This amendment was made in recognition that the practice of partisan

gerrymandering "jeopardizes [t]he ordered working of our Republic, and of the democratic process" and, "[a]t its most extreme, the practice amounts to 'rigging elections,' " which violates "the most fundamental of all democratic principles — that 'the voters should choose their representatives, not the other way around' " (*Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1940, 201 L.Ed.2d 313 [2018], quoting *Arizona State Legislature*, 576 U.S. at 824, 135 S.Ct. 2652).

In this case, petitioners asserted that, along with being procedurally flawed, the 2022 congressional map enacted by the legislature violates the constitutional provision prohibiting partisan gerrymandering. To prevail on such claim, petitioners bore the burden of proving beyond a reasonable doubt that the congressional districts were drawn with a particular impermissible intent or motive — that is, to "discourage competition" or to "favor[ ] or disfavor[ ] incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]). Such invidious intent could be demonstrated directly or circumstantially through proof of a partisan process excluding participation by the minority party and evidence of discriminatory results (i.e., lines that impactfully and unduly favor or disfavor a political party or reduce competition).

Here, at the conclusion of the non-jury trial, Supreme Court — based on the partisan process, the map enacted by the legislature itself, and the expert testimony proffered by petitioners — found by "clear evidence and beyond a reasonable doubt that the congressional map was unconstitutionally drawn with political bias" to "significantly reduce[ ]" the number of competitive districts. The Appellate Division affirmed, similarly drawing an inference of invidious partisan purpose based on "evidence of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende," finding that "the 2022 congressional map was drawn to discourage competition and favor democrats" (—— A.D.3d at ——, —— N.Y.S.3d ——, 2022 N.Y. Slip Op., * 4).

***11** We reject respondents' assertion that the evidence was legally insufficient to establish an unconstitutional partisan purpose. Viewing the evidence in the light most favorable to petitioners and drawing every inference in their favor, there is a "valid line of reasoning and permissible inferences" which could possibly lead [a] rational [factfinder] to the conclusion reached by the [factfinder] on the basis of the evidence presented at trial" (*Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 382 N.E.2d 1145 [1978]). Moreover, where, as here, this Court is presented with affirmed findings of fact in a civil case, our review is limited to whether there is record support for those findings (*see Matter of Rittersporn v. Sadowski*, 48 N.Y.2d 618, 421 N.Y.S.2d 49, 396 N.E.2d 197 [1979]). There is record support in the undisputed facts and evidence presented by petitioners for the affirmed finding that the 2022 congressional map was drawn to discourage competition. Indeed, several of the State respondents' experts, who urged the court to draw the contrary inference, concededly did not take into account the reduction in competitive districts. Thus, we find no basis to disturb the determination of the courts below (*see Matter of Rittersporn*, 48 N.Y.2d at 619, 421 N.Y.S.2d 49, 396 N.E.2d 197).[14]

V.

Based on the foregoing, the enactment of the congressional and senate maps by the legislature was procedurally unconstitutional, and the congressional map is also substantively unconstitutional as drawn with impermissible partisan purpose, leaving the state without constitutional district lines for use in the 2022 primary and general elections.[15] The parties dispute the proper remedy for these constitutional violations, with the State respondents arguing no remedy should be ordered for the 2022 election cycle because the election process for this year is already underway. In other words, the State respondents urge that the 2022 congressional and senate elections be conducted using the unconstitutional maps, deferring any remedy for a future election.[16] We reject this invitation to subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment.

***12** "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by [the United States Supreme] Court but appropriate action by the States in such cases has been specifically encouraged" (*Scott v. Germano*, 381 U.S. 407, 409, 85 S.Ct. 1525, 14 L.Ed.2d 477 [1965]; *see Growe*, 507 U.S. at 33, 113 S.Ct. 1075).[17] Indeed, our State Constitution both requires expedited judicial review of redistricting challenges (*see* NY Const, art III, § 5) — as occurred here — and authorizes the judiciary to "order the adoption of, or changes to, a redistricting plan" in the absence

of a constitutionally-viable legislative plan (NY Const, art III, § 4 [e]). Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps had been enacted. Prompt judicial intervention is both necessary and appropriate to guarantee the People's right to a free and fair election.

We are cognizant of the logistical difficulties involved in preparing for and executing an election — and appreciate that rescheduling a primary election impacts administrative officials, candidates for public office, and the voters themselves. Like the courts below, however, we are not convinced that we have no choice but to allow the 2022 primary election to proceed on unconstitutionally enacted and gerrymandered maps. With judicial supervision and the support of a neutral expert designated a special master, there is sufficient time for the adoption of new district lines.[18] Although it will likely be necessary to move the congressional and senate primary elections to August, New York routinely held a bifurcated primary until recently, with some primaries occurring as late as September. We are confident that, in consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and compliance with federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act (*see* 52 USC § 20302).

Finally, the State respondents' protest that the legislature must be provided a "full and reasonable opportunity to correct ... legal infirmities" in redistricting legislation (NY Const, art III, § 5). The procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.[19] Although the State respondents assert that, even following a constitutional violation, the legislature possesses exclusive jurisdiction and unrestricted power over redistricting, the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality — a function familiar to the courts given their obligation to safeguard the constitutional rights of the People under our tripartite form of government. Thus, we endorse the procedure directed by Supreme Court to "order the adoption of ... a redistricting plan" (NY Const, art III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions from the parties, the legislature, and any interested stakeholders who wish to be heard.[20]

***13** Nearly a century and a half ago, we wrote that "[t]he Constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded" (*Matter of New York El. R.R. Co.*, 70 N.Y. 327, 342 [1877]). Thirty years later, we relied on that fundamental principle to conclude that "[a] legislative apportionment act cannot stand as a valid exercise of discretionary power by the legislature when it is manifest that the constitutional provisions have been disregarded ... [because] [a]ny other determination by the courts might result in the constitutional standards being broken down and wholly disregarded" (*Matter of Sherrill v. O'Brien*, 188 N.Y. at 198, 81 N.E. 124). Today, we again uphold those constitutional standards by adhering to the will of the People of this State and giving meaningful effect to the 2014 constitutional amendments.

We therefore remit the matter to Supreme Court which, with the assistance of the special master and any other relevant submissions (including any submissions any party wishes to promptly offer), shall adopt constitutional maps with all due haste. Accordingly, the Appellate Division order should be modified, with costs to petitioners, in accordance with this opinion and, as so modified affirmed.

TROUTMAN, J. (dissenting in part):
I agree with the majority that petitioners have standing, and I further agree with the majority's holding that the 2022 congressional and state senate redistricting plans (2022 plans) were not enacted by the legislature in compliance with the constitutional process. However, I dissent as to the majority's advisory opinion on the substantive issue of whether the plans constitute political gerrymandering and as to the remedy.

The majority correctly concludes that sections 4, 5, and 5-b of article III of the State Constitution, as ratified by the citizens of the State, provide the exclusive process for redistricting (*see* NY Const, art III, § 4 [e]). This process requires, among other things, that any redistricting plan to be voted on by the legislature must be initiated by the Independent Redistricting Committee (IRC) (*see* § 4 [b]). Once this Court holds that the 2022 plans were unconstitutionally enacted and must be stricken on that threshold basis, it should not then step out of its judicial role to further opine on the purely academic issue of whether the 2022 congressional map failed to comply with the substantive requirements of section 4 (c)

(5). The 2022 plans, which the majority concludes are void ab initio, are no longer substantively at issue, nor can the majority seriously claim them to be so. Furthermore, although the majority purports to provide "necessary guidance to inform the development of a new congressional map on remittal" (majority op at 24 n 12), the majority's opinion provides no such guidance. Its conclusion, based on affirmed findings of fact that the congressional map was drawn with partisan intent, is not illuminating in the least because the majority does not engage in the kind of careful district-specific analysis that might provide any practical guidance to an actual mapmaker, nor could it on this record (*cf.* Wilson dissenting op at 12-25). By opining on this academic issue, the majority renders "an inappropriate advisory opinion" by "prospectively declar[ing] the [redistricting] invalid on additional ... constitutional grounds" (*T.D. v. New York State Off. of Mental Health*, 91 N.Y.2d 860, 862, 668 N.Y.S.2d 153, 690 N.E.2d 1259 [1997]; *see Self-Insurer's Assn. v. State Indus. Commn.*, 224 N.Y. 13, 16, 119 N.E. 1027 [1918] [Cardozo, J.] ["The function of the courts is to determine controversies between litigants ... They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function"]).

Given the procedural violation flowing from the breakdown in the constitutional process, we must fashion a remedy that matches the error.[1] The Constitution contemplates that a court may be "required to order the adoption of ... a redistricting plan as a remedy for a violation of law" (NY Const, art III, § 4 [e]). In so ordering, where a court finds that redistricting legislation violates article III, "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities" (§ 5). Consistent with these provisions, this Court should order the legislature to adopt either of the two plans that the IRC has already approved pursuant to section 5-b (g). Those plans show significant areas of bipartisan consensus among the IRC commissioners. The boundaries of the districts of Upstate New York, in particular, are nearly identical between the two plans and similar to those in the procedurally infirm plan enacted by the legislature (*see Matter of Harkenrider v. Hochul*, —— A.D.3d ——, —— N.Y.S.3d ——, 2022 NY Slip Op 02648, *7 [4th Dept. April 21, 2022] [Whalen, P.J. & Winslow, J., dissenting in part]). Given the existence of these IRC-approved plans, there is no need for a redistricting plan to be crafted out of whole cloth and adopted by a court. Rather, the legislature should be ordered to adopt one of the IRC-approved plans on a strict timetable, with limited opportunity to make amendments thereto. As part of our judicially crafted remedy, we could order that any amendments to either plan "shall not affect more than [2%] of the population of any district contained in such plan" (Legislative Law former § 94). In other words, the legislature would be bound by its own self-imposed restrictions, which were in effect at the time these plans were first presented for legislative approval.

***14** Such a remedy not only adheres more closely to the constitutional redistricting process, but it discourages political gamesmanship. Throughout this proceeding, respondents have asserted that the legislature has near-plenary authority to adopt a redistricting plan, whereas petitioners have sought to take the process out of the hands of the legislature and to place it into the hands of the judiciary. It is of course disputed why the constitutional process broke down, but it is readily apparent that the IRC's bipartisan commissioners failed to fulfill their constitutional duty. None of the parties is entitled to the resolution that he or she seeks.

In addition, this remedy allows the legislature to enact a plan that minimizes the impact on the reliance interests of both the voters and candidates. Petitions have been circulated, citizens have contributed monetary donations to the candidates of their choice, and eligible voters have had the opportunity to educate themselves on the candidates who are campaigning for their votes, all in reliance on the procedurally infirm redistricting plan enacted by the legislature. Of course, entrenched candidates have the party apparatus to support them in the event that further redistricting causes excessive upset to the current plan. In such a circumstance, outside candidates, upstart candidates, and independent candidates, who lack the resources of the well-heeled, will be disadvantaged most, leaving the voters who support them without suitable options. The legislature, duly elected by the citizens of this State, is in the best position to take these considerations into account.

Yet, the remedy ordered by the majority takes the ultimate decision-making authority out of the hands of the legislature and entrusts it to a single trial court judge. Moreover, it may ultimately subject the citizens of this State, for the next 10 years, to an electoral map created by an unelected individual, with no apparent ties to this State, whom our citizens never envisioned having such a profound effect on their democracy. That is simply not what the people voted for when they enacted the constitutional provision at issue. Although the IRC process is not perfect, it is preferable to a process that removes the people's representatives entirely from the process. The majority states that it "decline[s] to

  

render the constitutional IRC process inconsequential in the manner requested by the State respondents" (majority op at 23); however, the majority does just that by crafting a remedy that cuts the legislature out of the process. The citizens of the State are entitled to a resolution that adheres as closely to the constitutional process as possible. By ordering the legislature to enact redistricting legislation duly initiated by the IRC, this Court could afford the legislature its "full and reasonable" opportunity while honoring the constitutional process ratified by the people.

WILSON, J. (dissenting):

I agree with Judge Troutman that Article III, Section 5 of the Constitution means that the majority's referral of this matter to a special referee is not allowable, and I further agree that her proposed solution of requiring the Legislature to act on the Independent Redistricting Commission ("IRC") maps that have been submitted, though novel, would be acceptable in the unusual circumstances presented here. I also fully concur in Judge Rivera's dissenting opinion, and I do not view Judge Rivera's opinion as necessarily inconsistent with Judge Troutman's proposed remedy. Therefore, I address the merits of the claim that the 2022 redistricting itself violates the Constitution. It does not.

***15** The burden a plaintiff must meet to overturn legislative action as violative of the New York Constitution is extraordinarily high. We have often (though not always) described that burden as proving unconstitutionality "beyond a reasonable doubt" (*Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78, 587 N.Y.S.2d 560, 600 N.E.2d 191 [1992]; *but see Matter of City of Utica*, 91 N.Y.2d 964, 672 N.Y.S.2d 844, 695 N.E.2d 713 [1998] [upholding a state statute's constitutionality without reference to the beyond a reasonable doubt standard]; *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 198, 81 N.E. 124 [1907] ["A legislative apportionment act cannot stand as a valid exercise of discretionary power by the legislature when it is manifest that the constitutional provisions have been disregarded"]; *Matter of Whitney*, 142 N.Y. 531, 533, 37 N.E. 621 [1894] [upholding the apportionment of Kings County into assembly districts because, although flawed, "the division has seemed to us a reasonable approach to equality, and under all the circumstances of the case a substantial obedience to the writ"]). Both Supreme Court and the Appellate Division described the test that way. Thus, to prevail, the petitioners need to have proved beyond a reasonable doubt that the Legislature's 2022 Congressional and State Senatorial districts were "drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]). It is important to pay close attention to the wording of the Constitution. It does not prohibit the creation (or maintenance) of districts that are highly partisan in one direction or the other. Indeed, both in New York and around the rest of the nation, voters tend to cluster in geographic areas that reflect party affiliation. As a simple example, rural areas in New York and in the United States generally tend to have much higher concentrations of Republican voters than do urban areas. What the Constitution prevents is purposefully drawing districts to discourage competition or favor particular parties or candidates.

After a review of the record, I am certain that the petitioners failed to satisfy the "beyond a reasonable doubt" standard. By that, I do not mean to say that I know the Legislature did not draw some districts in a way that violated our State Constitution; rather, the evidence here does not prove that to be the case at the level of certainty required to invalidate the 2022 redistricting as unconstitutional. Perhaps with a different record, petitioners could make such a showing, but they have failed to do so here.

The question before us, then, is whether the petitioners introduced sufficient evidence to discharge their very high burden of proving that the Legislature adopted gerrymandered district lines in violation of the Constitution. That is unequivocally a question of law, and thus within the heartland of our Court's power of review (*see Glenbriar Co. v. Lipsman*, 5 N.Y.3d 388, 392, 804 N.Y.S.2d 719, 838 N.E.2d 635 [2005]; *see also People v. Jin Cheng Lin*, 26 N.Y.3d 701, 719, 27 N.Y.S.3d 439, 47 N.E.3d 718 [2016] [noting that whether "the proof (does not meet) the reasonable doubt standard" is "a matter of law" (alterations in original)]; *People v. Tarsia*, 50 N.Y.2d 1, 13, 427 N.Y.S.2d 944, 405 N.E.2d 188 [1980] [evaluating "the total evidence" as to whether "the proof was insufficient as a matter of law to support the affirmed findings that defendant's inculpatory statements ... were voluntary"]; *People v. Anderson*, 42 N.Y.2d 35, 39, 396 N.Y.S.2d 625, 364 N.E.2d 1318 [1977] ["(W)hether the proof met the reasonable doubt standard at all is a matter of law"]; *People v. Leonti*, 18 N.Y.2d 384, 389, 275 N.Y.S.2d 825, 222 N.E.2d 591 [1966] ["(W)hether the evidence adduced meets the standard required is one of law for our review"]). The majority incorrectly treats this as an unreviewable question of fact, characterizing Supreme Court's finding that the 2022 congressional map was drawn to discourage competition

  

as a factual "determination" that has "record support" and thus should not be "disturb[ed]" (majority op at 26-27)—a distinct, and here inapt, standard (*see Stiles v. Batavia Atomic Horseshoes, Inc.*, 81 N.Y.2d 950, 951, 597 N.Y.S.2d 666, 613 N.E.2d 572 [1993]).

Indeed, it is remarkably inaccurate to suggest that our Court is without power to review the Appellate Division's ruling on the partisan gerrymander claim. This case is before us as an appeal as of right based on CPLR 5601 (b). This case satisfies the conditions for an appeal as of right because the question presented—whether a congressional map, *i.e.*, a legislative enactment, is constitutionally invalid—is a question of law that is reviewable by this court (*see Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 635, 904 N.Y.S.2d 312, 930 N.E.2d 233 [2010] ["(A) query concerning the scope and interpretation of a statute or a challenge to its constitutional validity" is a "pure question of law"]).

Petitioners' evidence falls into three basic categories. First, petitioners primarily rely on the testimony of Sean P. Trende, an elections analyst and doctoral candidate at Ohio State University. At best, Mr. Trende's results are incomplete and inconclusive, but they are also legally insufficient to meet the above standard. Second, petitioners rely on the projected loss of four Republican Congressional seats (out of eight that currently exist). The difficulty with that proof is that it assumes that factors unrelated to how the districts were drawn have not caused the result. Third, petitioners contend that the 2022 redistricting was accomplished through the complete exclusion of Republican members of the Legislature from the process and a failed attempt by Democrats to further amend the Constitution, followed by the enactment of a statute. I view that as their best argument in support of their gerrymander claim but one that, without more, does not meet the high bar for invalidating the Legislature's 2022 redistricting plan.

I

***16** The petitioners, Supreme Court, and the Appellate Division plurality each relied heavily on the testimony of Mr. Trende. Mr. Trende's testimony is based on simulations in which a computer algorithm uses demographic data, takes parameters set by the user, and draws districting maps for the region (in this case, New York State) specified by the user. This is the first time Mr. Trende has testified in a case in which he prepared redistricting simulations of any kind. Instead of using the Markov Chain Monte Carlo simulation algorithm, which has been regularly used in redistricting cases, Mr. Trende used a new simulation algorithm developed by Dr. Kosuke Imai, a Harvard professor, along with publicly available political and demographic data at the census block and precinct levels. Dr. Imai's new algorithm appeared in an unpublished paper that had yet to be peer-reviewed. In that paper, Dr. Imai reported that he had tested the reliability of his new model by applying it to a 50-precinct map and running 10,000 simulations. By comparison, New York State has more than 140,000 precincts; uncontroverted evidence (including from Mr. Trende) establishes that the complexity of producing a working algorithm increases as the number of precincts increases.

In brief, Dr. Imai's algorithm draws possible maps, starting from a blank page, but taking into account parameters the user sets. For example, a user can specify to avoid splitting a county (or city) into different districts, though sometimes splitting is inevitable and may be accomplished in myriad ways. By running thousands of simulations and comparing them to what the Legislature has done, the model allows for measurement of the difference in party breakdown between the collection of simulated maps and the legislatively drawn map. The model can produce summary statistics showing, for example, that, when compared to the legislative map, the simulated maps distribute voters of one party or another (here, Republicans) in a way that concentrates a lot of them into some districts where Republicans would likely have won elections anyway, thus removing them from districts where Democrats might have faced a close election. In simple terms, Mr. Trende concluded that the legislative map consolidated Republican voters into a few Republican-leaning districts and spread Democratic voters in an efficient fashion. Of course, the model cannot tell you *why* the Legislature drew the districts that way, but, provided that a scientific method is proven to be reliable, the data entered is of good quality, the parameters chosen are correct, and the results are robust (*i.e.*, not susceptible to material swings in output when parameters are varied within reasonable ranges for those parameters), the law allows intent to be inferred from results in a variety of areas (*e.g.*, *People v. Guzman*, 60 N.Y.2d 403, 412, 469 N.Y.S.2d 916, 457 N.E.2d 1143 [1983] [discriminatory intent inferred from underrepresentation in Grand Jury selection]; *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 695, 416 N.Y.S.2d 219, 389 N.E.2d 815 [1979] [discriminatory intent inferred from "a convincing showing of a grossly disproportionate incidence of nonenforcement against others

  

similarly situated in all relevant respects save for that which furnishes the basis of the claimed discrimination"]).

Again, Article III, Section 4 of the Constitution states that "[d]istricts shall not be drawn *to* discourage competition or *for the purpose of* favoring or disfavoring incumbents or other political candidates or other political parties" (emphasis added). The prohibition, then, is against drawing maps *with the intention to* discourage competition or favor or disfavor incumbents, political candidates, or political parties. In other words, if a given map ends up discouraging competition or favoring a political party, that map does not necessarily run afoul of the Constitution's prohibition. Instead, an *intent* to discourage competition or to favor that political party must be shown for the map to violate the Constitution.

Staten Island provides a good example to keep in mind, one to which I will return later. Staten Island is traditionally Republican. It does not have quite enough people in it to constitute an entire congressional district, but it forms the vast portion of Congressional District 11, both in the 2010 districting and the Legislature's 2022 districting, with the added voters coming from Brooklyn. No one suggests that, by keeping Staten Island intact within a single congressional district instead of splitting it across two districts with more Brooklynites, the Legislature in 2010 or 2022 did so with the intent to advantage Republicans. If you split Staten Island into two different congressional districts and added enough Brooklynites to fill out those districts, each of the districts would have more Brooklynites than Staten Islanders, and the strength of the Republican voting of Staten Island would be diluted. The two new districts might be more competitive —*i.e.*, closer to 50/50 than District 11 is or has been—but it is sufficient, to reject a claim of intent to advantage Republicans by keeping Staten Island whole within a single district, to say that it is an island and people there live in communities that are distinct from those in Brooklyn. Again, the *why* is important, not the *what.*

***17** Mr. Trende's testimony and analysis were legally insufficient to bear on the question of intent for three reasons. First, the New York Constitution *requires* the consideration of several specifically identified factors when creating congressional districts, with some additional factors required for State Senatorial districts. Thus, Mr. Trende's results at most show that if we amended the New York Constitution to strike out those factors, he could conclude the Legislature acted with intent to disfavor Republicans or reduce competition. Second, close examination of districts in the real world, as compared to those hidden in thousands of hypothetical unseen maps, further exposes the unreliability of Mr. Trende's conclusions. Finally, the novelty of Dr. Imai's algorithm and the opacity of Mr. Trende's implementation of it create very substantial doubt as to his conclusions. The method is novel and not peer reviewed. Mr. Trende did not attempt the established Markov Chain Monte Carlo simulation to compare it to his results, nor did he provide the model, inputs, data sets, or output maps that formed the basis for his analysis. Indeed, neither he nor anyone has seen the algorithm-produced maps underlying his analysis. We are being asked to determine unconstitutionality based on shadows.

New York's Constitution requires that the following factors be considered when drawing congressional districts:

1. Compliance with "the federal constitution and statutes" (NY Const, art III, § 4 [c]);

2. "whether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to or have the purpose of, nor shall they result in, the denial or abridgement of such rights" (*id.* § 4 [c] [1]);

3. "Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice" (*id.*);

4. "Each district shall consist of contiguous territory" (*id.* § 4 [c] [3]);

5. "Each district shall be as compact in form as practicable" (*id.* § 4 [c] [4]);

6. "Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (*id.* § 4 [c] [5]);

7. Consideration of "the maintenance of cores of existing districts" (*id.*); and

8. Consideration of the maintenance of "pre-existing political subdivisions, including counties, cities and towns, and of communities of interest" (*id.*).

For senatorial districts, the Constitution adds requirements that "senate districts not divide counties or towns, as well as

  

the 'block-on-border' and 'town on border' rules" (*id.* § 4 [c] [6]).

Mr. Trende admittedly did not attempt to have his simulations account for several of the constitutionally required factors listed above. For that reason alone, his simulations do not provide evidence of the Legislature's intent to disfavor Republicans or reduce competition. Putting aside all other methodological and implementation problems, a proper comparison would ask: what would an unbiased mapmaker (the algorithm) do if given the same constitutional requirements as the Legislature has? Instead, Mr. Trende has attempted to answer a different question: what would an unbiased mapmaker do if it lacked some of the constitutional requirements the Legislature is required to follow?

This is not merely a conceptual problem, which is readily seen by identifying the constitutional factors Mr. Trende omitted. First, under the Equal Protection Clause and the federal Voting Rights Act ("VRA"), the composition of congressional districts must not discriminate on the basis of race or color (52 USC § 10301; US const, amend XIV, § 1). New York's Constitutional requirements, listed as items 2 and 3 above, represent similar protections not just on the basis of race, but language as well. Mr. Trende gave no instruction to his algorithm to take any consideration of those constitutional requirements for drawing districts. Mr. Trende noted that his "simulated maps are not drawn with any racial data available to the simulation"—that is, the simulation could not even take race into account in drawing districts if Mr. Trende had specified that as a parameter. Likewise, nothing in the record suggests that Mr. Trende's simulation used any data concerning the language of inhabitants, and he made no claim to have done so.

***18** Faced with criticism that he had omitted consideration of factors 1 through 3 above, Mr. Trende responded generally that, "every one of Respondent's experts could readily demonstrate that ... fixing the purported omissions might lead this Court to arrive at different conclusions," which, as explained below, attempts to shift the burden of proof onto respondents. He then explained his omission on the ground that "there is no evidence proffered by any party of racially polarized voting in New York City or in particularized boroughs, nor is there any evidence that any single minority group can form a reasonably compact majority in a district." Besides lacking any evidentiary support, his assertion is patently and commonly understood to be wrong. Looking just to last year's New York City mayoral election, Curtis Sliwa, the Republican nominee, "scored 44% of the vote in precincts where more than half of residents are Asian — surpassing his 40% of votes in white enclaves, 20% in majority-Hispanic districts and 6% in majority-Black districts" (Rong Xiaoqing et al., Chinese Voters Came Out in Force for the GOP in NYC, Shaking Up Politics, The City [Nov 11, 2021], https://www.thecity.nyc/politics/2021/11/11/22777346/chinese-new-yorkers-voted-for-sliwa-gop-republicans). In the same election, now-Mayor Eric Adams "dominated" the "Black Bloc," a "63 percent non-Hispanic Black and 23 percent college-educated swath of Brooklyn and Queens," where Adams grew up and where he won "63 percent of first-place votes" (Nathaniel Rakich, How Eric Adams Won The New York City Mayoral Primary, FiveThirtyEight [Aug 25, 2021], https://fivethirtyeight.com/features/how-eric-adams-won-the-new-york-city-mayoral-primary/).

Mr. Trende attempted to make some account of the omission of the federal and state protections for racial minority voting rights by "freezing" certain census blocks in nine districts to remove them from his analysis, explaining that those districts are "plausible candidates for protection under the VRA or the State Constitution." Even assuming that his choice of districts is sound, his results demonstrate the importance of his omission of constitutionally required factors: his "frozen" simulations produced results that "ma[ke] Petitioner's case more difficult." Specifically, those "plausible" protections for minority voters produced results that "accept[ ] the Legislature's decision to pair Yorktown with Yonkers in the Sixteenth District, and to crack Republican-leaning areas in Midwood and Sheepshead Bay between the Ninth and Eighth districts." In other words, by including even a rough proxy for protection of minorities, he admits that some of what he described as gerrymandering is explainable instead by protection of minority voting rights. Mr. Trende's utter lack of consideration of the constitutional requirement to consider protection of non-English language groups inherently means his simulations do not show what an unbiased mapmaker would do if that constitutional command mattered.

Likewise, Mr. Trende completely neglected considering keeping "communities of interest" together (item 8 above), as the Constitution requires. Keeping in mind that differences in party affiliation within a district do not matter unless they were created with the *intent* to disadvantage a party or candidate or to reduce competition, Mr. Trende ignored that the IRC—composed in equal parts of persons appointed by Democrats and Republicans—reached agreement on keeping

together many communities of interest. For example, both sets of IRC maps (one produced by the Democratic faction and the other by the Republican faction) agreed that the Southern Tier of New York should be unified in a district. The Southern Tier is a strip of eight counties along upstate New York's southern edge, the part of the state that shares a border with Pennsylvania.[1] Those counties are grouped as a region in New York State's materials on economic development (*see* New York State, Empire State Development: Southern Tier, https://esd.ny.gov/regions/southern-tier [last accessed Apr 26, 2022]). Indeed, the region has a storied history of being a manufacturing powerhouse, though the region also faced struggles within the past decade due to a decline in manufacturing and uncertain economic development (Susanne Craig, New York's Southern Tier, Once a Home for Big Business, Is Struggling, NY Times [Sept 29, 2015], https://www.nytimes.com/2015/09/30/nyregion/new-yorks-southern-tier-once-a-home-for-big-business-is-struggling.html). Those counties are more Republican than Democratic; in a show of how culturally distinct the region is, hundreds of residents in the Southern Tier in 2015 rallied in support of seceding from the state of New York (*id.*). One Republican lawmaker even applauded the fact that the maps proposed by the Democratic and Republican commissioners to the IRC both kept the Southern Tier intact (Rick Miller, Southern Tier Congressional District Essentially Maintained in NY Redistricting Maps, Olean Times Herald [Jan 4, 2022], https://www.oleantimesherald.com/news/southern-tier-congressional-district-essentially-maintained-in-ny-redistricting-maps/article_56c5d543-6c8a-55d3-a3de-e662bdb0f6dd.html). For upstate New York, the Democratic Commissioners and the Republican Commissioners agreed that there should be three Republican-leaning districts: one uniting the Southern Tier, one uniting the North Country, and one by Lake Ontario. The Commissioners from the two parties also agreed that there should be Democratic-leaning districts in the four urban areas in upstate New York: in and around Albany, Syracuse, Rochester, and Buffalo. The result of those bipartisan decisions by the IRC demonstrates that those districts (broadly, all of upstate New York, about which the IRC had no substantial disagreements) should have been excluded from Mr. Trende's simulations. But even though the Southern Tier and the other upstate counties and cities were bipartisanly districted as "communities of interest," Mr. Trende made no effort to keep the Southern Tier, or other communities of interest, intact in his model. Indeed, Mr. Trende "didn't pay any attention to what any of those [IRC] commissioners [had] done in their proposals," had not read any of the testimony before the IRC, and did not know whether there was any testimony before the IRC about communities of interest.

***19** Instead, he told Supreme Court that such communities are too difficult to code, even though he also acknowledged that in a redistricting exercise he undertook for Virginia, he and his co-researcher accounted for communities of interest. Mr. Trende did not do any sort of proxy analysis as he did for race, and because neither he nor anyone else ever looked at the 10,000 maps his simulation drew, he has no idea what his algorithm did to the Southern Tier or any other upstate areas. But Dr. Imai's own data provides some insight.

Mr. Trende used Dr. Imai's model and data. The record includes four sample maps from a set of 5,000 simulations for New York prepared by Dr. Imai himself. Two of the sample maps from Dr. Imai's simulations broke up the North Country. All three of the sample maps broke up the Southern Tier. None of Dr. Imai's sample maps maintained Democratic-leaning districts around all of Albany, Syracuse, Rochester, and Buffalo. Those samples strongly suggest that Mr. Trende's conclusions about intentional gerrymandering depend on comparison to maps that would have broken up congressional districts arrived at by bipartisan consensus. Of course, had Mr. Trende looked at his own maps, or even turned them over for respondents to examine, we would be able to know how many of his "less gerrymandered" simulations were incompatible with districting actually arrived at bipartisanly, with regard for the constitution's directions.[2] Instead, it is clear that, just as with the racial and language protections in the constitution, Mr. Trende's exclusion of communities of interest has made his analysis legally irrelevant: at most, it answers what an unbiased mapmaker would do if that mapmaker was told to disregard protection of racial minorities, language minorities and communities of interest.

One final example from Dr. Imai's work illustrates the unsoundness of Mr. Trend's conclusions. His conclusions are based on comparing the algorithm-drawn simulated districts, which purportedly are "less gerrymandered," against the Legislature's redistricting plan. Because neither we nor Mr. Trende knows what his "less gerrymandered" maps look like, we cannot know whether they are sensible maps that should be included in such a comparison. But because Dr. Imai, using the same data and same model, displayed some sample maps, we can observe the kind of maps Mr. Trende has relied on for his conclusions. Sample Plan 1 from Dr. Imai's simulation placed Schuyler County and Franklin County into the same congressional district. Schuyler County is near

  

upstate New York's southern border with Pennsylvania, and Franklin County is one of the northernmost counties in New York, on the border with Canada—that is, those two counties are on opposite sides of upstate New York. Their county seats are 262 miles away via highway (Google, Google Maps Driving Directions for Driving from Watkins Glen, New York to Malone, New York, https://perma.cc/L3KH-DN5B [last accessed Apr 26, 2022]). In essence, what Mr. Trende is showing is that the partisan imbalance of some congressional districts could be reduced by radically rejiggering them in a way that no human mapmaker (or resident of either of those counties) would think remotely sensible. Interesting though it may be, it is legally irrelevant.

***20** Apart from the omitted constitutional requirements, the creation of districts requires balancing among the different constitutional requirements. Some are relatively inflexible—such as districts of equal population (*see Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 [1962]), compliance with the VRA or, for senatorial districts, the "block-on-block" rule; others, such as compactness or protection of communities of interest, allow for an exercise of judgment in how to balance them. Mr. Trende made no explicit decision in how to balance the factors he did include, was uninformative about what balance was implied, and did not vary the relative weights of his parameters to determine the robustness of his conclusions. For instance, Mr. Trende included a parameter for the compactness of districts, which the constitution instructs should be considered. When asked how he valued compactness, he testified to selecting a value of "1" in Dr. Imai's model because he knew that "the other choices don't work well." He agreed that the compactness parameter could be set at less than 1, or more than 1, but provided no explanation for what the settings meant, how much priority a change in setting gave to compactness versus any other factor, or even what was meant by other values not working well—which may simply mean that when he tested for robustness of the parameter, he found that changing the relative weight given to compactness resulted in statistics that did not support his conclusions or that the model ceased to function, neither of which should give us confidence sufficient to hold the redistricting unconstitutional.

Similarly, Mr. Trende said that Dr. Imai's model allowed an "on" or "off" switch on whether to split counties. He put that switch "on," even though New York map drawers must balance county preservation with other considerations—effectively meaning he gave county integrity a superpriority over other constitutional factors. Nothing in the Constitution requires the Legislature to prefer county integrity over any other factor, or even to give the same priority to county integrity for every county. Rather, the Constitution gives the Legislature flexibility in weighting many of the required considerations differently in different circumstances, but Mr. Trende implicitly assigned fixed and universal relative weights to every one of those that he included. Faced with the potential for differently weighting parameters, responsible modelers alter the parameters within reasonable bounds to see whether the alterations make a difference. When the difference is not great, models are robust; when they are great, models are lacking in probative value (*see, e.g.,* Amariah Becker et al., Computational Redistricting and the Voting Rights Act, 20 Election L J 407, 430 & n 31 [2021]). When nobody tests for robustness, invalidating districts as unconstitutional beyond a reasonable doubt is sheer guesswork.

Respondents pointed out the many deficiencies in Mr. Trende's model. In addition to the examples explained in detail above, Mr. Trende repeatedly and improperly answered in a way that attempted to shift the burden of proof from petitioners onto respondents. For instance, in response to respondents' assertion that his failure to consider all the relevant constitutional considerations undermined the validity of his methodology, Mr. Trende asserted that "[e]very one of Respondents' experts is more than capable of either re-running the relevant simulation algorithm that I employed or executing a competing algorithm" and "[i]f there are indeed important communities of interest to be protected, however, any of Respondents' experts could program a simulation that respected those communities of interest and potentially harm Petitioners' case." On cross-examination, he reiterated that "if there is something that [the respondents'] experts believe ... is missing that makes a difference -- they think makes a difference, they can do it."

The lower courts erroneously acceded to Mr. Trende's burden shifting, which itself is a legal error requiring reversal (*Harkenrider v. Hochul*, —— A.D.3d ——, —— N.Y.S.3d ——, 2022 N.Y. Slip Op. 02648, *7 [4th Dept. 2022] [Whalen, P.J., dissenting]).[3] Proof beyond a reasonable doubt is an exacting standard: a party bearing that burden must remove all reasonable doubt, which is not met by saying that the opponent has the ability to disprove an assertion. Faulting the respondents for the petitioners' failure to account for constitutionally required redistricting criteria improperly reverses the burden of proof; it is the *petitioner*'s burden to

prove unconstitutional partisan intent beyond a reasonable doubt.

***21** In short, the factors set out in the Constitution must be considered during redistricting with flexibility in the relative weighting on a case-by-case basis. Maintaining the Southern Tier as a community of interest may be powerfully important; maintaining the Upper West Side as one may not be. Mr. Trende acknowledged that his algorithm cannot undertake that balancing, and to his credit explained that "the more that you adequately control all of the variables that the actual mapmakers actually used, the more you can infer intent, and the less you adequately control for those variables, the less you can infer intent" to gerrymander. Because Mr. Trende's analysis omitted constitutionally required factors and fixed implicit weights for others without allowing for flexibility, all his analysis demonstrates, at best, is that if our Constitution read very differently, he could find an intent to gerrymander. That conclusion is orthogonal to the issue here.[4]

II

Apart from Mr. Trende's opinion, the Appellate Division plurality concluded that the " 'application of simple common sense' from the enacted map itself and its likely effects on particular districts" supports petitioners' argument that the legislative districts were intentionally created to disfavor a party or candidate or render certain districts less competitive (2022 N.Y. Slip Op. 02648, *5 [citations omitted]). There are three significant problems with that conclusion. First, as noted above, for the great majority of congressional (and senatorial) districts, the Republican and Democratic factions of the IRC substantially agreed as to the district boundaries, and the legislative plan does not deviate materially in the case of those districts. Of course, that does not resolve the question for districts on which the IRC factions disagreed or for which the Legislature's plan was materially different, but it should remove most districts from the dispute.

Second, the Appellate Division relied on the following observation: "under the 2012 congressional map there were 19 elected democrats and 8 elected republicans and under the 2022 congressional map there were 22 democrat-majority and 4 republican-majority districts" (2022 N.Y. Slip Op. 02648, *3). The majority acknowledged that, standing alone or even in conjunction with the lack of Republican input into, or vote for, the 2022 map, the evidence would not be strong enough to surmount the high standard for invalidating the 2022 redistricting as unconstitutional. However, the mere change in the number of majority Democratic and Republican districts says nothing about *why* those changes occurred or about intent. The inference that the change is nefarious ignores important undisputed data.

The 2012 districts are obsolete and not a relevant source of comparison. Population and registration shifts demonstrate that New York's voting populace has changed in the Democrats' favor. In the past ten years, Democratic voter registration has outstripped Republican voter registration ten-to-one: Democratic voter registration increased by more than one million people statewide between April 2012 and February 2021, whereas Republican voter registration increased by less than 100,000 people during the same period. Similarly, over the decade, Democrat-leaning counties have increased in population, whereas Republican-leaning counties have decreased in population. It is unsurprising that such drastic shifts would occur in just a ten-year time horizon; that's why the Constitution requires decennial redistricting (NY Const, art III, § 4 [a]).

***22** The characterization of the outgoing 2012 map as having 19 Democrat-leaning and eight Republican-leaning districts—in comparison to the four Republican-leaning districts in the 2022 map—is misleading because it disregards the changes of the last decade. To start, it is undisputed that one Republican seat under the 2012 map, former District 22, was eliminated due to substantial population shifts and New York's loss of a congressional seat. But more importantly, it is undisputed that, based on the 2020 census data, the 2012 map would also produce only four Republican-leaning districts.

Third, and most importantly, it is undisputed that the 2022 legislative redistricting was slightly *more* favorable for Republicans than the array of simulated "unbiased" maps produced by Mr. Trende's simulation. The Appellate Division contended that, by "boldly asserting" that the Democratically created 2022 plan tended to favor Republicans more than Mr. Trende's supposedly neutral maps, "respondents have created a further inference that they acted with a partisan purpose favoring democrats" (2022 N.Y. Slip Op. 02648, *4). That claim confuses intent with effect. I return to Staten Island to illustrate the point.

Staten Island has historically been treated as a community of interest and not split into different congressional districts. If Staten Island is to be kept that way (wholly within District 11), it needs to include voters from somewhere else because

  

Staten Island does not have enough people to make up a full congressional district. Because of contiguity requirements, that must be Brooklyn. The 2012 map of District 11 included all of Bay Ridge (which is just north of the Verrazano Bridge) and Bath Beach, a few blocks of Bensonhurst, and Gravesend (all south of the bridge). The Legislature's 2022 redistricting keeps Bay Ridge to the north (itself a community of interest) with Staten Island, but instead of then going south, it drops out Bath Beach, the bit of Bensonhurst and Gravesend, and goes north and incorporates Sunset Park and a small bit of Park Slope.

Among the thousands of comments sent to the IRC after it publicly released its draft report for comments, looking just at the Richmond and Kings County submissions (https://nyirc.gov/storage/archive/Kings_Richmond_Redacted.pdf), numerous letters asked the IRC to keep various groups together. Among those is a letter from OCA-NY (formerly known as the Organization of Chinese Americans), a "non-profit, non-partisan organization dedicated to protecting the rights of Asian Americans in New York City." That letter urged the IRC that, with regard to District 11, which contained Staten Island, "Bensonhurst and Bath Beach should NOT be with Staten Island. ... Staten Island does not share a similar concentration of Asians, nor the culture of Asian businesses as Bath Beach/Bensonhurst, nor do residents in Bath Beach/Bensonhurst travel on a regular basis to Staten Island and vice versa." Justin Wood, a Staten Islander, asked the IRC to "counter decades of artificial gerrymandering" by "extend[ing] NY11 northward into Bay Ridge and Sunset Park to unify linguistic and ethnic communities with shared interests." Karen Zhou, the past president of Homecrest Community Services, wrote the IRC noting that "Sunset Park, Bensonhurst, Homecrest, Sheepshead Bay, Dyker Heights, Bath Beach and Gravesend ... [have] an interconnection bounded by common culture, language and socioeconomic factors," further requesting that Bensonhurst and Homecrest be "together in one Congressional district ... [to] ensur[e] communities of interest are not ignored or neglected."

***23** District 11 has been made less Republican by paying attention to unifying Asian American communities (which relates to the racial, language and community of interest requirements in the Constitution), for which the comments to the IRC were uniformly supportive. Because of contiguity requirements, there was nowhere to go but further north. The Appellate Division's observation that the reduction in Republican-leaning districts (or in the strength of the Republican lean) demonstrates an *intent* to gerrymander rather than an attempt to pay attention to the Constitution is unsupportable. Data tells you effect only. But the record before the IRC shows that various members of the Asian American community—and one Staten Islander—urged the IRC to go north instead of south specifically to serve the ends of the VRA and the constitutional provision requiring weight be given to communities of interest. The algorithmic comparators on which the lower courts relied, by omitting considerations required by the Constitution, gave zero weight to those considerations, effectively saying that the Asian American community does not matter. That, in turn, leads to an unfounded inference that the 2022 redistricting was *intended* to disadvantage Republicans, when, in the case of Staten Island, it was intended to protect Asian American voting rights and community interests, as the Constitution requires.

III

The remaining evidence on which petitioners rely to demonstrate that the 2022 redistricting was done with intent to disfavor Republicans or make certain districts less competitive relates to procedural issues concerning the 2021 legislation, a failed 2021 constitutional amendment, and the creation of the 2022 districts in a three-day period after the IRC failed to deliver a revised report. Unlike the prior two factors, these are not legally irrelevant. As the Appellate Division concluded, however, as to petitioners' arguments on the process pursued to enact the 2022 map and its projected loss of Republican seats: without more and even with every reasonable inference taken in petitioner's favor, they do not meet the standard to declare the 2022 redistricting plan unconstitutional (2022 N.Y. Slip Op. 02648, *3).

First, petitioners claimed that Democrats unilaterally drafted the 2022 redistricting map without any input or involvement from Republicans. The Appellate Division plurality further pointed to the "largely one-party process used to enact the 2022 congressional map" as partial support for its conclusion that petitioners met their burden of proving an inferred intent to favor the Democratic party (2022 N.Y. Slip Op. 02648, *3). That the process was dominated by one party, however, is a result of the current political reality of the Legislature. Put another way, the Legislature reflects the current choice of the people as to who will best represent their interests. Indeed, even had the IRC not shirked its duty, the Democratic supermajority in both houses could have rejected all IRC

  

plans and then, consistent with the Constitution, adopted a plan without any Republican support. That result would be "partisan" in a sense, but not in the sense that would be necessary to show an intent to violate the Constitution. That the vote was along party lines could just as well suggest that the Republicans wanted to prevent a redistricting map that corrected past gerrymandering favoring Republicans (or an electoral shift that diminished their chances) as it could that Democrats sought to exclude Republicans for their party's benefit.

Next, petitioners contend that the (Democratically controlled) Legislature, in June 2021, passed legislation providing for the possibility that the IRC might not vote on any redistricting plans, which the Governor signed in November 2021, and that the statute provides evidence of partisan intent to gerrymander because it provides that the Legislature will conduct the redistricting in that eventuality. As with the above claim, the statute's adoption is not particularly probative as to intent. It is equally possible that the Legislature, seeing the possibility of electoral chaos in the event that the IRC failed to act as required, clarified that the outcome would be the same as if the IRC produced plans that the Legislature rejected. The fact that the statute was passed without Republican support might suggest a future intent by Democrats to gerrymander. It might suggest an intent by Republicans to oppose any measures that would correct existing imbalances. Or it might suggest that legislators simply sought to provide for something not contemplated by the Constitution.

***24** Finally, petitioners point to a failed attempt by Democrats to further amend the Constitution as supporting an inference that the Democrats intended to favor a political party through the 2022 map. In November 2021, the Legislature proposed a constitutional amendment to the voters. Under that proposed constitutional amendment—if the IRC failed to vote on any redistricting plan or plans by the date required—the Commission would submit to the Legislature all plans in its possession, completed and in draft form, and the data upon which those plans were based (2021 SB 515 § 5-b [g-1]). If the IRC so failed in voting and had to submit its plans to the Legislature, that failure would require the Legislature to create its own redistricting plan, to be enacted by the Governor (*id.* § 4-b). The proposed constitutional amendment also included other changes, including increasing the number of state senators (*id.* § 2), establishing a timeline for 2022 redistricting (*id.* § 4 [b]), and requiring that incarcerated people be re-numerated to their last place of residence for the purpose of drawing redistricting lines (*id.* § 4 [c] [6]). On one hand, the petitioners argue that the voters' rejection of the amendment shows that the voters would also have disapproved of the statute, and that both the failed amendment and statute were part of a plan by Democrats to bypass the IRC. On the other hand, as with the statute, it is perfectly feasible that Democrats worried that the IRC process would break down and wanted to clarify what should occur in that instance for the sake of election efficiency and integrity.

Taking all of this together, and taking every inference in favor of petitioners, one could colorably believe that the Legislature was attempting to position itself to be able to draw legislative districts unfettered by the IRC if the IRC deadlocked. As the Appellate Division concluded, however, that evidence, standing alone, does not prove intent to gerrymander beyond a reasonable doubt (2022 N.Y. Slip Op. 02648, *3).

IV

I agree with the principles underlying the majority's opinion. Election districts should not be created for the purpose of disadvantaging political opponents. Nor should they be created to disadvantage racial or ethnic minorities, or constructed in ways that minimize the responsiveness of elected officials to their constituents by, for example, splitting cities or communities of interest apart. I also do not rule out that, with a sound analysis, these plaintiffs or others could prove that the 2022 legislative plan violated the Constitution, at least in some districts. My disagreements are threefold:

- I read the constitutional provision as Judge Rivera does—leaving the redistricting authority ultimately in the hands of the Legislature;

- I am convinced these petitioners have not adduced legally sufficient evidence to demonstrate gerrymandering; and

- given my first two disagreements, I believe the majority's remedy inappropriately strips from the Legislature the right clearly provided in Article III, Section 5: "In any judicial proceeding relating to redistricting ... [i]n the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." This case is such a proceeding. As the majority says, "[t]he Constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded" (majority op at 32, quoting *Matter of New York El. R.R. Co.*, 70 N.Y. 327, 342 [1877]).

  

> Why, then, does the majority not heed the Constitution's command that the Legislature must be given a "full and fair opportunity" to address the legal infirmities identified in this judicial proceeding?

RIVERA, J. (dissenting):

I would reverse the Appellate Division judgment because petitioners failed to establish that the legislature violated the state's redistricting procedures or constitutional mandates. The legislature acted within its authority by adopting the redistricting legislation challenged here after the Independent Redistricting Commission (IRC) chose not to submit a redistricting plan by the second constitutional deadline. Thus, there is no procedural error rendering the redistricting legislation *void ab initio.* Petitioners' claim of a substantive violation based on gerrymandering is also without merit as their evidence fell far short of proving that the legislature's congressional map was unconstitutional beyond a reasonable doubt.

I.

In interpreting a constitutional provision, the primary role of this Court is to give effect to its unambiguous text and the intent of the People in adopting the provision (*see White v. Cuomo*, —— N.Y.3d ——, ——, —— N.Y.S.3d ——, —— N.E.3d ——, 2022 N.Y. Slip Op. 01954, *5 [2022]). This appeal requires that we interpret Article III, §§ 4 and 5 of the New York Constitution. Under section 4, the IRC shall prepare decennially a redistricting plan to establish State Assembly and Senate and federal congressional districts and submit such plan and implementing legislation to the legislature for its consideration, without amendment (*see* NY Const, art III, § 4 [b]). If the legislature fails to approve the proposed legislation, the IRC shall prepare and submit a second redistricting plan and necessary implementing legislation for consideration (*see id.*). If the legislature fails to approve the second plan, the legislature shall approve its own implementing legislation (*see id.*). Section 4 (e) acknowledges that the redistricting procedure may not be followed where "a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." Section 5 further provides that upon a judicial finding that a redistricting law violates Article III, such law shall be "invalid in whole or in part," and that "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." Here, the IRC initially submitted two redistricting plans by the first deadline. The legislature failed to approve either. When the IRC chose not to make another submission by the second deadline, the legislature drafted and approved redistricting implementing legislation which the Governor signed.[1]

***25** Petitioners, residents of several New York districts, claim that the legislature avoided the exclusive redistricting process set forth in sections 4 and 5 by enacting redistricting legislation in the absence of an IRC submission by the second deadline, because a second IRC submission is a constitutional requirement that triggers the legislature's authority to act. Petitioners further claim that the redistricting legislation is the product of intentional gerrymandering by the democratic members of the State legislature, in violation of section 4 (c) (5) of article III of the Constitution. As I discuss, petitioners are wrong as a matter of law on their procedural challenge and have failed to prove their gerrymandering allegation.

II.

There is no procedural error of constitutional magnitude warranting invalidation of the legislature's redistricting implementing legislation. That conclusion is supported by either of two analytic paths.

A.

By one view, the process followed by the legislature here does not violate the text or purpose of article III because the IRC in fact submitted two plans, albeit all at once, in furtherance of the purpose of section 4, and, in any case, the legislature is not bound to approve an IRC plan as drafted.[2] Under that view, the legislature acted appropriately on the unique facts of this case. First, the Constitution does not mandate legislative adoption of any IRC-proposed implementing legislation; the legislature may opt to reject the IRC submissions and proceed to draft implementing legislation, which would then be submitted to the Governor for action (*see* NY Const, art III, § 4 [b]).[3] That is exactly what happened here. Second, the Constitution requires that in the event that more than one draft plan receives an equal number of IRC member votes for approval, above the votes garnered for any other plan, the IRC must submit all of those plans to the legislature in accordance with section 4 (b) of article III of the Constitution (*see id.* § 5-b [g]). Thus, if the

  

IRC fails to garner a majority vote, the IRC is empowered to submit more than one redistricting plan and implementing legislation for the legislature's consideration. That is also what happened here. Third, nothing in the Constitution expressly prohibits the legislature from acting if the IRC chooses not to submit yet another plan after the legislature has considered and failed to approve all the plans with the highest number of IRC votes. The Constitution is simply silent on how to address the IRC's choice to forego submission of a redistricting plan and implementing legislation before the second deadline. Nor does the constitutional framework command that the legislature remain idle in the face of an IRC decision not to submit a plan despite section 4 (b)'s mandatory language setting forth deadlines for submission. The Constitution requires the legislature approve redistricting legislation, upon consideration of one IRC plan and, if necessary, a second plan. The legislature did exactly that, reviewing two IRC plans and determining not to approve either, but instead adopting legislation which it maintains wholly comports with the Constitution.[4] The majority's decision leaves the legislature hostage to the IRC, and thus incentivizes political gamesmanship by the IRC members—the exact scenario the majority claims it avoids by interpreting the second IRC submission as a mandatory predicate to legislative action (*see* majority op at 20).

***26** The majority claims that upholding the legislative action here would undermine the redistricting process adopted by the 2014 constitutional amendment and thwart the purpose of the amendment (*see id.* at 23). That is only true if we ignore the salutary aspects of the entire redistricting process and how it informs the legislature's decisions. Under the Constitution, the IRC is tasked with drafting proposed districts that are contiguous, compact, and equipopulous, while considering the maintenance of cores of existing districts and political subdivisions, and avoiding line-drawing that denies or abridges the rights of communities of interest, including racial and minority language groups, or the formation of districts that favor or disfavor political candidates or parties (*see* NY Const, art III, § 4 [c]). The goal of fair, non-gerrymandered line drawing is furthered, in part, by a robust public hearing and comment process that allows the IRC to consider diverse viewpoints when preparing its redistricting plan (*see id.*). In turn, the legislature benefits from this same process when it considers the IRC's draft plan. Here, in accordance with the Constitution, the legislature considered both of the plans submitted by the IRC, fully aware of the public process that preceded the approval of both plans by a concededly split IRC membership. Unfortunately, like the IRC, the legislature could not agree on only one of those plans. When the IRC chose not to make a submission by the second deadline—of a plan that would be subject to legislative amendment, unlike the two plans submitted by the first deadline—nothing in the Constitution prohibited the legislature from drafting and approving redistricting legislation that it determined was in compliance with the constitutional mandates set forth in article III.

The majority also concludes that the legislature may only may "amend[ ]" redistricting plans submitted by the IRC (*see* majority op at 14, quoting NY Const, art III, § 4 [b]). The extent of the legislature's authority to redraw the IRC's proposed maps, however, is not before us since that did not occur here. Moreover, the majority's interpretation ignores that legislative plans may include "*any* amendments" that are "deem[ed] necessary" (NY Const, art III, § 4 [b]), giving the legislature significant discretion to reject the IRC's proposals. Likewise, the two percent rule—which the majority seems to interpret as a constitutional requirement (*see* majority op at 21 n 11)—is also not properly before us, and in any case, that statutory rule applies only when the IRC submits a plan by the second deadline, which concededly it did not do. In sum, the majority is incorrect that the legislature's authority to approve redistricting legislation is subject to the two percent rule after it decides not to approve the first IRC plan as drafted because that legislative authority can only be triggered after the IRC submits a plan pursuant to the second deadline.

Even assuming the majority is correct that the Constitution provides the legislature with express and exclusive choices—either approve, as drafted, the IRC implementing legislation submitted by the first or the second constitutional deadlines, or don't approve either and amend and approve bicamerally the second submission which is then presented to the governor for action—the majority correctly concedes that the legislature is not required to adopt, without change, the IRC recommendations (*see* majority op at 13-14). Instead, the legislature must exercise its constitutional duty to ensure that New York's district lines comply with the constitutional factors set forth in Article III and do not otherwise violate federal or state law (*see* NY Const, art III, § 4 [c]; Voting Rights Act of 1965, 52 USC § 10101 *et seq.*, as added by Pub L 89-110, 79 US Stat 437). As this Court has made clear, redistricting is a complex and intricate task, involving a "[b]alancing" of "myriad requirements imposed by both the State and the Federal Constitution," which is ultimately "entrusted to the legislature" (*Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79, 587 N.Y.S.2d 560, 600 N.E.2d

191 [1992]; *see Matter of Schneider v. Rockefeller*, 31 N.Y.2d 420, 431, 340 N.Y.S.2d 889, 293 N.E.2d 67 [1972] ["The gerrymandering is ... rather deep in the 'political thicket' "]). Thus, and contrary to the majority's conclusion (*see* majority op at 18-19), the legislature was not required to ignore its constitutional duty because the IRC "abandon[ed] its constitutional mandate" (*id.* at 23). And, despite the majority rhetoric about redistricting reform—that the IRC process was designed to "incentiviz[e] the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process" (*id.* at 20)—it is the majority's interpretation of the Constitution that effectively places the redistricting process at the mercy of the IRC, which cannot be what the People of the State of New York intended when they approved the amendment and even though the Constitution does not mandate legislative approval of any IRC plan. Indeed, recognition that the legislature retains the ultimate authority to enact a redistricting plan does not, as the majority posits, "render the 2014 amendments ... functionally meaningless" (*id.* at 11); it merely confirms that the legislature must step in when the IRC fails in its task.

B.

***27** Even if the plain text of the Constitution did not support the legislative action taken here, there is an alternative analytic basis for rejecting the petitioners' procedural argument. The constitution is silent as to how to respond when the IRC does not submit a plan in accordance with Article III, as in this case where the IRC chooses not to make a second deadline submission. Notably, petitioners did not sue the IRC to secure compliance with what they and the majority maintain is the "*exclusive* method of redistricting" (majority op at 20). Nor have petitioners requested the courts to adopt either of the IRC plans even though petitioners, like the majority, claim that the IRC's submissions are a constitutional predicate to legislative action (*see id.* at 21).

However, the legislature anticipated just such a failure in the IRC process by passage of an amendment to the Redistricting Reform Act of 2012 (L 2012, ch 17), which provides that "if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan and the commission submitted to the legislature ... all plans in its possession, both completed and in draft form, and the data upon which such plans are based, each house shall introduce such implementing legislation with any amendments each house deems necessary"(*see* Redistricting Reform Act § 3 [c], as amended by L 2021, ch 633, § 1).[5] That statute, having been properly enacted, controls and provided the legislature with the authority to act as it did here.[6]

III.

Turning to petitioners second claim, that the legislative plan is an unlawful gerrymander, we review this challenge, like other constitutional attacks on redistricting plans, de novo and not, as the majority suggests, under a deferential standard of review (*see Matter of Wolpoff*, 80 N.Y.2d at 78, 587 N.Y.S.2d 560, 600 N.E.2d 191 ["(W)e examine the balance struck by the (l)egislature in its effort to harmonize competing Federal and State requirements"]; *Matter of Schneider*, 31 N.Y.2d at 427, 340 N.Y.S.2d 889, 293 N.E.2d 67 ["Our duty is ... to determine whether the legislative plan substantially complies with the Federal and State Constitutions"]). Thus, petitioners are held to the highest burden in our law—one generally enshrined in criminal law—proof beyond a reasonable doubt:

> "A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " (*Matter of Wolpoff*, 80 N.Y.2d at 78, 587 N.Y.S.2d 560, 600 N.E.2d 191, quoting *Matter of Fay*, 291 N.Y. 198, 207, 52 N.E.2d 97 [1943]; *accord Cohen v. Cuomo*, 19 N.Y.3d 196, 201-202, 946 N.Y.S.2d 536, 969 N.E.2d 754 [2012]).

***28** Upon review of the record before us, I conclude that petitioners failed to meet their heavy burden. As three justices concluded below, and as Judge Wilson explains, other than the petitioners' expert analysis alleging gerrymandering, the petitioners' other evidence cannot satisfy their burden of proof (*see Matter of Harkenrider*, —— A.D.3d at ——, —— N.Y.S.3d ——, 2022 N.Y. Slip Op. 02648, *4 [plurality]; Wilson dissenting op at 25-28).[7] I have already discussed why there was no constitutional procedural violation, but even if there had been, the legislature's approval of a redistricting plan in the absence of a second IRC submission does not establish intentional gerrymandering. This case does not rest on "the credibility issue routinely seen in battle-of-the-experts cases," but rather turns on petitioners' expert evidence and its "probative force ... regardless of respondents' opposition" (*id.*

at ——, 2022 N.Y. Slip Op. 02648, *8 [Whalen, P.J., and Winslow, J., dissenting in part]). For reasons discussed at length in Judge Wilson's thorough and compelling analysis of petitioner's evidence and gerrymandering claim, which I fully join, petitioners failed to carry their burden. In sum, petitioners relied on an expert who failed to account for several constitutional requirements and who used an untested, unverified algorithm (*see* Wilson dissenting op at 5-6; *cf. People v. Wakefield*, —— N.Y.3d ——, ——, —— N.Y.S.3d ——, —— N.E.3d ——, 2022 N.Y. Slip Op. 02771, *15-19 [2022, Rivera, J., concurring in result]). No district line drawer could do so and still comply with the Constitution.

I dissent.

Judges Garcia, Singas and Cannataro concur. Judge Troutman dissents in part in an opinion, in which Judge Wilson concurs in part in a dissenting opinion, in which Judge Rivera concurs in part. Judge Rivera dissents in a separate dissenting opinion, in which Judge Wilson concurs.

Order modified, with costs to petitioners, in accordance with the opinion herein and, as so modified, affirmed.

**All Citations**

--- N.E.3d ----, 2022 WL 1236822, 2022 N.Y. Slip Op. 02833

Footnotes

1 A legislative advisory task force on apportionment — created by statute and comprising lawmakers and staff selected by legislative leaders — conducted studies and proffered recommendations and proposed maps for the legislature's consideration (*see* Legislative Law § 83-m; L 1978, ch 45, § 1).

2 Many other states have also turned to independent redistricting commissions to curtail partisan gerrymandering (*see e.g.* Ariz Const, art IV, pt. 2, § 1; Cal Const, art XXI, § 2; Colo Const, art V, §§ 44 44-48.4; Conn Const, art III, § 6; Haw Const, art IV, § 2; Idaho Const, art III, § 2; Me Const, art IV, part 3, § 1-A; Mich Const, art 4, § 6; Mont Const, art V, § 14; NJ Const, art II, § 2; Ohio Const, arts XI, XIX; Va Const, art II, § 6-A; Wash Const, art II, § 43). In upholding a state constitutional delegation of redistricting authority to an IRC, the United States Supreme Court has recognized that IRCs "generally draw their maps in a timely fashion and create districts both more competitive and more likely to survive legal challenge" and "have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]" (*Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 798, 821, 135 S.Ct. 2652, 192 L.Ed.2d 704 [2015] [internal quotation marks and citation omitted]).

3 As one house of the legislature explained during this litigation, in their view "there [was no] reason for the Democratic super-majorities in both houses of the [l]egislature to seek 'input or involvement' from the Republican minorities" regarding the development of these legislative maps, characterizing such communications as inviting "time-wasting political theater" (App Div reply brief for respondent-appellant Senate Majority Leader, at 13).

4 Notwithstanding respondent Governor's contentions to the contrary, any petition challenging redistricting legislation must be served upon the Attorney-General, President of the Senate, Speaker of the Assembly and the Governor, who are proper parties to this proceeding (*see* Uncons Laws § 4221).

5 Supreme Court also analyzed whether the state senate map was an unconstitutional partisan gerrymander after granting petitioners' request to amend the petition to challenge the senate map but concluded petitioners did not meet their burden of proof on such claim. Petitioners have not sought review of that determination.

6 Supreme Court, as permitted by the stay, has procured the services of a neutral redistricting expert "to serve as special master to prepare and draw a new neutral, non-partisan [c]ongressional map" and has established a schedule by which the parties and other interested persons may submit commentary and proposed redistricting plans for consideration prior to a planned hearing. Petitioners and several interested parties have already proffered submissions to that court.

7 Indeed, the description on the 2014 ballot informed voters considering whether to support the constitutional amendments that "the legislature may only amend the redistricting plan ... if the commission's plan is rejected twice by the legislature."

  

8 Judge Rivera's contention that the IRC process was not violated because two sets of maps were simultaneously submitted by the IRC in the first round — one by the Democratic delegation and one by the Republican delegation — is remarkable. Under her view, this was the functional equivalent of the successive presentations required by the Constitution. Aside from being directly contrary to the text of the constitution, the intent of the People who adopted the 2014 reforms, and the relevant legislative history, such contention has not been advanced by any party before this Court, a reflection of its total lack of merit.

9 In a reply brief submitted in the Appellate Division, one of the State respondents candidly acknowledged that the constitutional process was not followed here, asserting that "[e]veryone agrees" that the Constitution requires two rounds of IRC recommendations "and that the [l]egislature vote up or down on each Commission proposal without amendment before exercising its authority to make any amendments"; and "that nobody suggests that 'the process' is optional" (App Div reply brief for respondent-appellant Senate Majority Leader, at 2-3). Despite acknowledging the constitutional violation, however, they essentially view it as irrelevant because the legislature could ultimately have adopted its own maps through the amendment process following a properly completed IRC procedure. This view ignores the fact that procedural requirements matter and are imposed precisely because, as here, they safeguard substantive rights.

10 The State respondents and Judge Rivera assert that giving force to the constitutional language risks gamesmanship by minority members of the IRC, claiming such members could potentially derail the redistricting process by refusing to participate. In giving effect to the constitutional reforms endorsed by the People of this state, our decision does not leave the legislature hostage to that body as Judge Rivera contends. Legislative leaders appoint a majority of the IRC members and, in the event those members fail either to appear at IRC meetings or to otherwise perform their constitutional duties, judicial intervention in the form of a mandamus proceeding, political pressure, more meaningful attempts at compromise, and possibly even replacement of members who fail to faithfully perform their duties, are among the many courses of action available to ensure the IRC process is completed as constitutionally intended. The IRC may not be a panacea, but to accept the crabbed description of that body proffered by the State respondents and Judge Rivera would be to render the body nothing more than "window dressing" masquerading as meaningful reform.

11 In 2022 — the very first time that the legislature had occasion to implement the IRC procedure and the two percent rule (L 2012, ch 17, § 3) — that provision was disregarded. The legislature wholly superseded the two percent rule by prefacing the 2022 redistricting legislation with language indicating that such districts were enacted as provided therein "notwithstanding any other provision of law to the contrary" and providing that the new legislation "shall supersede any inconsistent provision of law including but not limited to" the two percent rule (L 2022, chs 13, 14, 15, 16). Despite this attempted end run, however, the 2012 redistricting reform legislation provides relevant evidence of the drafters' intent.

12 While we agree with Judge Troutman that this Court should not issue advisory opinions, her suggestion that no actual case or controversy is presented by the State respondents' appeal — here as of right on the substantial constitutional question of whether the Appellate Division erred in invalidating the congressional map on the ground of partisan gerrymandering — is quite extraordinary. Even if the State respondents were not otherwise entitled to review of the declaration that the apportionment legislation was infected by such invidious intent, there are substantial arguments before this Court concerning the proper remedy in the event of a constitutional violation — arguments that turn, in part, on whether the violation involved procedural or substantive constitutional provisions. The question of whether the congressional map amounts to a partisan gerrymander is also relevant to the issue of whether the primary election should be permitted to proceed on the maps drawn by the legislature, despite the determination of procedural unconstitutionality. Moreover, given our conclusion that new maps must be drawn in light of the procedural violation — a conclusion with which Judge Troutman agrees — resolution of the issue is critical to provide necessary guidance to inform the development of a new congressional map on remittal.

13 The 2014 constitutional amendments also forbid racial gerrymandering, in a provision that similarly prohibits an invidious intent or motive, requiring that district lines "shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of" the voting rights of racial or minority language groups (NY Const, art III, § 4 [c] [1]). Other requirements added that year directed certain results, namely, that redistricting, to the extent possible, maintain cores of existing districts, pre-existing political subdivisions — such as counties, cities, and towns — and communities of interest (*see* NY Const, art III, § 4 [c] [5]). These requirements supplement the longstanding constitutional constraints on redistricting

  

embodied in the State Constitution requiring, to the extent practical, that districts "contain as nearly as may be an equal number of inhabitants," "consist of contiguous territory," and be "as compact in form as practicable" (NY Const, art III, § 4 [c] [2] – [4]), and those required by federal law — such as conformity with the "one person, one vote" principle (*Abrams v. Johnson*, 521 U.S. 74, 98, 117 S.Ct. 1925, 138 L.Ed.2d 285 [1997]; *see Wesberry v. Sanders*, 376 U.S. 1, 8, 84 S.Ct. 526, 11 L.Ed.2d 481 [1964]) and with the federal Voting Rights Act (*see generally* 52 USC § 10301).

14 Although purporting to treat the question as an issue of law, Judge Wilson impermissibly performs a weight of the evidence analysis, largely parroting the points in the State respondents' briefs. Tellingly, however, Judge Wilson repeatedly acknowledges that an inference of intent could rationally be drawn from proof in the record. Determining whether to draw such an inference when multiple inferences are possible is a quintessential function of a finder of fact and, here, the courts below — which, unlike this Court, possessed fact-finding authority — credited Trende's testimony. Contrary to Judge Wilson's contention, the burden of proof was not impermissibly shifted to the State respondents. As noted, respondents did not seek exclusion of Trende's testimony on the basis that his methodology or the computer algorithm on which he relied — drafted by a recognized expert and, according to Trende, a "state of the art" program repeatedly accepted by other courts — was insufficiently reliable. Although Trende did observe that the State respondents completely failed to refute any of his simulations with simulations of their own, he also responded substantively to the criticisms of his methodology. Trende explained that his map ensemble "perform[ed] comparably to the enacted plan in terms of compactness," "minority-majority districts," and county lines. He ran additional simulations, freezing municipalities kept intact by the enacted plan, freezing district cores, freezing every "ability-to-elect district," and even conceding the split in southeast Brooklyn to respondents. Trende testified that even when the simulations were run in a manner "incredibly generous" to the State respondents by "ced[ing] to [respondents] ... a third of the districts drawn in New York," the simulations produced "the same basic output," showing the same cracking and packing patterns in the enacted maps. As even a short rendition of just some of the proof presented by petitioners demonstrates, Judge Wilson refuses to apply the proper standard of review, which — even in cases where the legal standard is proof beyond a reasonable doubt — requires that the evidence be viewed in the light most favorable to petitioners, the prevailing party at trial.

15 Inasmuch as petitioners neither sought invalidation of the 2022 state assembly redistricting legislation in their pleadings nor challenge in this Court the Appellate Division's vacatur of the relief granted by Supreme Court with respect to that map, we may not invalidate the assembly map despite its procedural infirmity.

16 The State respondents' reliance on the federal *Purcell* principle is misplaced (*see Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 [2006]). The *Purcell* doctrine cautions *federal* courts against interfering with state election laws when an election is imminent (*see Republican National Committee v. Democratic National Committee*, 589 U.S. ——, ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 [2020]) and does not limit state judicial authority where, as here, a *state* court must intervene to remedy violations of the State Constitution. Indeed, most recently the principle was cited to justify the United States Supreme Court's decision not to disturb a state court order requiring alteration of North Carolina's existing congressional maps for the upcoming 2022 primary (*Moore v. Harper*, 595 U.S. ——, 142 S. Ct. 1089, 1089, —— L.Ed.2d —— [2022, Kavanaugh, J., concurring in denial of application for stay]).

17 A number of other state courts have been called upon to intervene in redistricting just this year (*see League of Women Voters of Ohio v. Ohio Redistricting Commn.*, —— Ohio St.3d ——, 2022-Ohio-789, —— N.E.3d —— [2022]; *Harper v. Hall*, 2022-NCSC-17, ¶ 6, 868 S.E.2d 499, 510 [2022]; *Johnson v. Wisconsin Elections Commn.*, 2022 WI 19, ¶ 3, 972 N.W.2d 559; *Carter v. Chapman*, —— Pa. ——, 270 A.3d 444, 450 [2022]).

18 Delaying a remedy until the next election would substantially undermine the People's efforts to temper partisan gerrymandering. Here, the legislature enacted maps within one week of the IRC's abdication—which itself came more than a month before the Constitution's outer end date for the IRC process—and petitioners commenced this proceeding on the same day. If there is insufficient time to order a remedy for the 2022 primary election under these circumstances, it is unlikely there would ever be sufficient time to challenge a redistricting plan and obtain relief before an upcoming primary election. Such a conclusion would be contrary to the Constitution, which contemplates that the IRC process may not be completed until February 28th (to be followed by legislative action) but nevertheless expressly authorizes expedited judicial review and modification or adoption of redistricting plans by the courts. Delaying a remedy in this election cycle —

  

permitting an election to go forward on unconstitutional maps — would set a troubling precedent for future cases raising similar partisan gerrymandering claims, as well as other types of challenges, such as racial gerrymandering claims.

19 To the extent the 2022 redistricting legislation, which we invalidate here, purported to render any court order "tentative" for a period of 30 days (L 2022, ch 13, § 3, [5] [i]) such a limitation on judicial authority appears inconsistent with (among other things) the constitutional provision authorizing judicial review without limitation and requiring "disposition" of the claim by Supreme Court within 60 days. The Constitution does not contemplate an advisory order. In any event, here, due to the procedural constitutional violations and the expiration of the outer February 28th constitutional deadline for IRC action, the legislature is incapable of unilaterally correcting the infirmity.

20 While accusing this Court of "step[ping] out of its judicial role" (Troutman, J. dissenting in part op, at 2), Judge Troutman crafts a remedy that is neither consistent with the constitutional text nor requested by any of the parties to this proceeding. She proposes that the legislature should be directed to adopt one of the two plans submitted by the IRC and already rejected by the legislature (although she does not specify which one). Judge Troutman's position is incongruous; she agrees that the legislature lacked authority to enact redistricting legislation absent a second submission from the IRC but, paradoxically, she suggests that we should now order the legislature to enact redistricting legislation despite their inability to cure the procedural violation. Moreover, although Judge Troutman posits that the People would not approve of a court-ordered redistricting map that is, in fact, exactly what the People have approved in the State Constitution as a remedy by declaring that the IRC "process ... shall govern ... except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law" (NY Const, art. III, § 4 [e]). Just as puzzling, Judge Wilson begins his dissent with a nonsensical advisory opinion, indicating that although he concludes no violation of the constitution occurred, he nonetheless agrees with Judge Troutman's proposed remedy – a solution to a problem that, in his view, does not exist.

1 The majority seems unwilling to grasp this concept (majority op at 31-32 n 20).

1 The Southern Tier has long been recognized as a cohesive political unit (*see* Warren Moscow, GOP Held Strong in Southern Tier, NY Times [Oct 16, 1946], https://timesmachine.nytimes.com/timesmachine/1946/10/16/107146657.html?pageNumber=31).

2 Mr. Trende's decision not to examine his own maps and not to permit anyone else to see them poses a separate reliability issue. Dr. Imai's algorithm generates huge numbers of redundant maps, which should be weeded out before analysis is conducted. Mr. Trende himself did so when working on a redistricting map for Maryland. There, he completed three sets of 250,000 simulations. He then eliminated the duplicates, which ranged from 220,000 to 160,000 for each of his sets—that is, 64% to 88% of the maps produced were duplicates that he discarded (*Szeliga v Lamone*, Nos. C-02-CV-21-00173, Slip Op at 99, 102-104). Furthermore, New York State is significantly larger than Maryland; whereas Maryland only has 8 congressional districts, New York has 26 congressional districts. Mr. Trende acknowledged that that the more precincts are involved, the more complicated it becomes to accurately use redistricting simulations to draw conclusions. Yet, in spite of acknowledging that using simulations for New York would be more difficult than for Maryland, Mr. Trende inexplicably generated only 10,000 simulations for New York and subsequently failed to check even that small set for duplicates.

3 For example, Supreme Court noted that Mr. Trende "did not include every constitutional consideration"—which should render his evidence legally insufficient. Supreme Court explained away that deficiency by saying that "[n]one of Respondents' experts attempted to draw computer generated maps using all the constitutionally required considerations," a clear example of improper burden shifting.

4 The error in the majority's sole, footnoted response, contending that I have performed a weight of the evidence analysis (majority op at 27 n 14), can be illustrated as follows: Mr. Trende uses a Ouija board to determine that the districts have been gerrymandered, and, when communicating with the spirits in the netherworld, directs them to the provisions in North Carolina's constitution instead of New York's. The lower courts rely on that evidence to hold that the New York Legislature has engaged in gerrymandering. According to the majority, the New York Court of Appeals could not conclude an error of law has been made. The majority is right about one thing: I disagree that my job is so limited.

1 Contrary to the majority's view, the IRC was not required to submit a different set of second plans. Indeed, the lead Republican IRC Commissioner noted that the Republican members of the IRC had considered agreeing to submit

  

the same plans during the second round, but he concluded that "he would prefer for the Legislature to begin its process then postpone it one week with presumably voting down maps that he claims have not changed" (Joshua Solomon, *Independent Redistricting Commission Comes to a Likely Final Impasse*, Times Union [Jan. 24, 2022], https://www.timesunion.com/state/article/Independent-Redistricting-Commission-comes-to-a-16800357.php).

2 The majority incorrectly asserts that the legislature's alleged violation of the constitutional procedure is undisputed (*see* majority op at 2). In fact, respondents have maintained that the IRC, not the legislature, is at fault here.

3 Several of the states cited by the majority (*see* majority op at 4 n 2) have adopted redistricting commissions which are not subject to legislative approval (*see e.g.* Cal Const, art XXI, § 2; Colo Const, art V, § 48; Mich Const, art 4, § 6; *see generally* Loyola Law School, *All About Redistricting: National Summary*, https://redistricting.lls.edu/national-overview/?colorby=Institution & level=Congress & cycle=2020 [last visited Apr. 27, 2022]).

4 The majority, in claiming that my view ignores the constitutional text and purpose (*see* majority op at 16 n 8), ignores that under the unique facts here, we must harmonize the constitutional process with the overriding intent of the amendment—to create a process for public, bipartisan input in redistricting to provide the legislature with background data and options for redistricting. The majority view rests on a distinction without a difference; had the IRC merely submitted the competing plans in succession, and if the legislature had not approved either, the majority would conclude, as I do, that there was no procedural error.

5 The majority's discussion of the legislative history of the 2014 amendment is incomplete (*see* majority op at 18-20). Several legislators and commentators recognized, prior to adoption, that—contrary to the views of its sponsors—the amendment did not guarantee that the IRC would follow the constitutional process (*see e.g.* NY Senate Debate on Assembly Bill A2086, Jan. 23, 2013 at 252 [warning that an evenly-divided IRC might "foster gridlock"]).

6 The statute's two percent rule would also control. If failure to comply with that rule were the sole alleged problem with the legislature's redistricting plan, the courts could mandate compliance as a targeted and narrow remedy rather than reject the entire redistricting plan as the majority does, thus creating confusion for candidates and their supporters, and necessitating the adoption of new deadlines (*see* majority op at 29-30; Troutman dissenting op at 4).

7 With respect to one of those alleged grounds, the majority is incorrect to the extent that it suggests that the legislature did not consider Republican views (*see* majority op at 6 n 3). As Judge Troutman and Judge Wilson explain in their dissents, the legislature enacted a plan that includes similar Upstate boundaries as the two IRC plans actually submitted to the legislature (*see* Troutman dissenting op at 3; Wilson dissenting op at 12-14). As for the other ground—that the legislature's redistricting differs from the 2012 district lines—the purpose of redistricting is to address demographic changes and so it is no surprise that population shifts in New York State would result in a different redistricting map in accordance with constitutional requirements (*see* Wilson dissenting op at 21-22).

2022 WL 129092
Supreme Court of Ohio.

ADAMS et al.
v.
DEWINE, Governor, et al.
League of Women Voters of Ohio et al.
v.
Ohio Redistricting Commission et al..

Nos. 2021-1428 and 2021-1449
|
Submitted December 28, 2021
|
Decided January 14, 2022.

**Synopsis**

**Background:** Voters, nonpartisan organization that encouraged participation in government, and labor rights organization filed complaints against Secretary of State, Speaker of the House, and President of the Senate alleging that congressional district plan violated the Ohio Constitution.

**Holdings:** The Supreme Court, Donnelly, J., held that:

congressional-district plan passed by the general assembly unduly favored the Republican Party and disfavored the Democratic Party in violation of the Ohio Constitutional, and thus was invalid, and

congressional district plan enacted by general assembly violated Ohio Constitution by unduly splitting urban counties in ways that were not required by Ohio's political geography, equal population, or any other constitutional redistricting requirement.

Relief granted.

O'Connor, C.J., filed a concurring opinion in which Brunner, J., joined.

Kennedy, Fischer, and DeWine, JJ., filed a dissenting opinion.

Original Actions filed pursuant to Ohio Constitution, Article XIX, Section 3(A).

**Attorneys and Law Firms**

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Chris Tavenor, urging granting of relief for amicus curiae, Ohio Environmental Council.

**Opinion**

Donnelly, J.

***1 {¶ 1}** In our representative democracy, the power rests at all times with the people. Their power is never more profound than when it is expressed through their vote at the ballot box. Those whom the people elect to represent them are given transitory authority to discharge their responsibilities under the Constitutions and laws of the United States and the state of Ohio, but the true power is expressed by the people when they exercise their right to vote on what Walt Whitman celebrated as "America's choosing day," when the heart of it is not in the chosen but in the act of choosing. Walt Whitman, *Election Day, November, 1884*, in *Leaves of Grass* 391 (1891-1892 Ed.).

**{¶ 2}** Gerrymandering is the antithetical perversion of representative democracy. It is an abuse of power—by whichever political party has control to draw geographic boundaries for elected state and congressional offices and engages in that practice—that strategically exaggerates the power of voters who tend to support the favored party while diminishing the power of voters who tend to support the disfavored party. Its singular allure is that it locks in the controlling party's political power while locking out any other party or executive office from serving as a check and balance to power. One avaricious proponent of congressional redistricting and gerrymandering declared redistricting "a great event," proclaiming gleefully: "Redistricting is like an election in reverse! Usually the voters get to pick the politicians. In redistricting, the politicians get to pick the voters!" Miles Parks, *Redistricting Guru's Hard Drives Could Mean Legal, Political Woes for GOP* (June 7, 2019), https://www.npr.org/2019/06/06/730260511/redistricting-gurus-hard-drives-could-mean-legal-political-woes-for-gop (accessed Jan. 3, 2022) [https://perma.cc/Q4WS-2VK2] (statements of Thomas Hofellor).

**{¶ 3}** Demanding change following Ohio's 2011 reapportionment of its state legislative and congressional districts, Ohio voters overwhelmingly voted to impose constraints on the government's ability to draw districts based on partisan gerrymandering, amending Article XI of the Ohio Constitution in 2015 for the drawing of state legislative districts, *see* Ohio Secretary of State, *Statewide Issue History*, https://www.ohiosos.gov/elections/election-results-and-data/historical-election-comparisons/statewide-issue-history/ (accessed Jan. 3, 2022) [https://perma.cc/CK6W-2KUC], and adopting Article XIX of the Ohio Constitution in 2018 for the drawing of congressional districts, *see* Ohio Secretary of State, *2018 Official Election Results*, https://www.ohiosos.gov/elections/election-results-and-data/2018-official-elections-results/ (accessed Jan. 3, 2022) [https://perma.cc/RG5P-39FT] (follow "Summary-Level Official Results for 2018 Primary Election–Statewide Issues" hyperlink). The adoption of these amendments to the Ohio Constitution made it unequivocally clear that more of the same was not an option.

**{¶ 4}** Despite the adoption of Article XIX, the evidence in these cases makes clear beyond all doubt that the General Assembly did not heed the clarion call sent by Ohio voters to stop political gerrymandering. Conducting business as usual with no apparent concern for the reforms contemplated by Article XIX, the General Assembly enacted 2021 Sub.S.B. No. 258, which passed by a simple majority and was signed into law by Governor Mike DeWine on November 20, 2021. The bill resulted in districts in which undue political bias is—whether viewed through the lens of expert statistical analysis or by application of simple common sense—at least as if not more likely to favor Republican candidates than the 2011 reapportionment that impelled Ohio's constitutional reforms. The petitioners in the two cases before us specifically allege that the congressional-district plan violates Article XIX, Section 1(C)(3)(a) of the Ohio Constitution, which prohibits the General Assembly from adopting by a simple majority a congressional-district plan that "unduly favors or disfavors a political party or its incumbents," and Section 1(C)(3)(b), which prohibits the General Assembly from "unduly split[ting] governmental units."

***2 {¶ 5}** We hold that the congressional-district plan is invalid in its entirety because it unduly favors the Republican Party and disfavors the Democratic Party in violation of Article XIX, Section 1(C)(3)(a). We also hold that the plan unduly splits Hamilton, Cuyahoga, and Summit Counties in violation of Section 1(C)(3)(b). We order the General Assembly to adopt a new congressional-district plan that complies in full with Article XIX of the Ohio Constitution.

## I. BACKGROUND

### A. Overview of the congressional-redistricting process

**{¶ 6}** In 2018, the General Assembly passed a joint resolution to amend the Ohio Constitution and enact Article XIX, which would establish a process and standards for congressional redistricting. 2018 Sub.S.J.R. No. 5. The General Assembly previously had enacted congressional-district plans by bill, without any guidance from the Ohio Constitution. When the initiative was placed on the ballot in 2018, the ballot language informed voters that the proposed amendment would, among other things:

> • Require the General Assembly or the Ohio Redistricting Commission to adopt new congressional districts by a bipartisan vote for the plan to be effective for the full 10-year period[; and]
>
> • Require that if a plan is adopted by the General Assembly without significant bipartisan support, it cannot be effective for the entire 10-year period

> and must comply with explicit anti-gerrymandering requirements.

Ohio voters overwhelmingly voted in favor of adopting the amendment. *See* Ohio Secretary of State, *2018 Official Election Results.*

**{¶ 7}** In 2019—before Article XIX became effective—a panel of federal judges declared Ohio's 2011 congressional-district plan an unconstitutional partisan gerrymandering, finding that it was designed to reliably elect 12 Republican representatives and 4 Democratic representatives as Ohio's 16-member delegation to the United States House of Representatives. *Ohio A. Philip Randolph Inst. v. Householder*, 373 F.Supp.3d 978, 994-995 (S.D. Ohio 2019). But later that year, the Supreme Court of the United States held that partisan-gerrymandering claims present political questions beyond the reach of federal courts, *Rucho v. Common Cause*, 588 U.S. ——, ——, 139 S.Ct. 2484, 2506-2507, 204 L.Ed.2d 931 (2019), and vacated the judgment in *Ohio A. Philip Randolph Inst.*., *see Householder v. Ohio A. Philip Randolph Inst.*, —— U.S. ——, 140 S.Ct. 101, 205 L.Ed.2d 1 (2019), and *Chabot v. Ohio A. Philip Randolph Inst.*, —— U.S. ——, 140 S.Ct. 102, 205 L.Ed.2d 1 (2019).

*1. Article XIX, Section 1: A new process for congressional redistricting*

**{¶ 8}** Article XIX, Section 1 sets forth a potential three-step process for enacting or adopting a congressional-district plan. First, by September 30 of any year ending in the numeral one after the release of the federal decennial census, the General Assembly must pass a district plan in the form of a bill by a vote of at least three-fifths of the members of each house, including the affirmative vote of at least one-half of the members of each of the two largest political parties. Ohio Constitution, Article XIX, Section 1(A). If the General Assembly passes such a plan, the plan remains effective for ten years. *See id.*

**{¶ 9}** Second, if no district plan is passed by September 30, the Ohio Redistricting Commission must adopt a plan by October 31. *Id.* at Section 1(B). The plan must be approved by at least four of the seven members of the commission, including at least two members from each of the two largest political parties. *Id.* If the commission adopts a plan in this way, the plan remains effective for ten years. *Id.*

***3 {¶ 10}** Third, if the commission fails to adopt a plan by October 31, the General Assembly must pass a district plan in the form of a bill by November 30. *Id.* at Section 1(C)(1). If the General Assembly passes the plan by a vote of at least three-fifths of each house, including at least one-third of the members of each of the two largest political parties, the plan remains effective for ten years. *Id.* at Section 1(C)(2). If the General Assembly passes the plan by only a simple majority in each house, the plan remains effective for four years. *Id.* at Section 1(C)(3).

**{¶ 11}** Of particular relevance in these cases, if the General Assembly passes a plan by a simple majority, Article XIX, Section 1(C)(3) provides that each of the following "shall apply":

> (a) The general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents[;]
>
> (b) The general assembly shall not unduly split governmental units, giving preference to keeping whole, in the order named, counties, then townships and municipal corporations[; and]
>
> (c) * * * The General Assembly shall attempt to draw districts that are compact.[1]

In addition, the General Assembly must include in the plan "an explanation of the plan's compliance with" Section 1(C)(3)(a) through (c). *Id.* at Section 1(C)(3)(d).

*2. Article XIX, Sections 2 and 3: New district-drawing standards and this court's jurisdiction*

**{¶ 12}** Article XIX, Section 2 imposes various requirements on the entity drawing the districts, including rules relating to the shape of the districts and the extent to which counties, townships, and municipal corporations may be split between districts. Article XIX, Section 3(A) provides that this court "shall have exclusive, original jurisdiction in all cases arising under" Article XIX.

**B. Factual background and procedural history**

*1. No redistricting plan is adopted by September 30 or October 31*

**{¶ 13}** Based on the results of the 2020 census, Ohio was apportioned 15 congressional seats—one fewer than it was apportioned in 2011. Although the United States Census Bureau released Ohio's 2020 population data on August 12, 2021, the General Assembly did not pass a congressional-district plan by its initial September 30 deadline. On September 29, Senate Minority Leader Kenny Yuko and Senator Vernon Sykes introduced a proposed congressional-district plan on behalf of the Senate Democrats. *See* 2021 S.B. No. 237. But the record does not indicate that any other plans were proposed in September, and the General Assembly did not vote on any proposal during that period.

**{¶ 14}** Nor did the redistricting commission adopt a plan by its October 31 deadline. Senator Sykes, a cochair of the commission, sent the other cochair, respondent Speaker of the House Robert Cupp, multiple letters in which Senator Sykes essentially pleaded with House Speaker Cupp to schedule commission hearings and take up the task of congressional redistricting. In one of those letters, Senator Sykes noted that over 40 congressional-district plans had been submitted to the commission and that he and Senator Yuko had submitted their own proposed plan to the commission. But the record does not indicate that any other member of the commission proposed a plan. And the commission held only one meeting—on October 28. At the meeting, the commission heard public testimony from multiple individuals who had submitted proposed congressional-district plans to the commission, but it did not vote on any proposed plan.

*2. The General Assembly passes a redistricting plan by a simple majority*

***4 {¶ 15}** On November 3—only a few days after the redistricting commission's deadline for adopting a plan had expired—Senator Rob McColley introduced 2021 S.B. No. 258, a congressional-district plan drawn primarily by Ray DiRossi, the finance director for the Ohio Senate. DiRossi was deeply involved in Ohio's 2001 and 2011 redistricting processes. Notably, he served as one of the Republicans' "principal on-the-ground map drawers" during the 2011 congressional-redistricting process, *Ohio A. Philip Randolph Inst.*, 373 F.Supp.3d at 995, 1019—a process that a federal court described as "rife with procedural irregularities and suspect behavior on the part of the map drawers," *id.* at 1099.

**{¶ 16}** Also on November 3, Representative Scott Oelslager introduced in the House a different proposed congressional-district plan drawn primarily by Blake Springhetti, the finance director for the Republican House majority. Over the next week, House and Senate committees held hearings on those proposed plans and other plans introduced by Democratic members of the House and Senate. On November 10 and 12, the Joint Committee on Congressional Redistricting held public hearings on all the proposed plans.

**{¶ 17}** On November 16, Senator McColley introduced 2021 Sub.S.B. No. 258 ("S.B. 258"), a revised district plan formulated by respondents President of the Senate Matthew Huffman and House Speaker Cupp, and Senator McColley, DiRossi, and Springhetti. During a Senate committee hearing, Senator McColley said that compared to the other proposed plans, S.B. 258 was the most competitive, split the fewest counties, kept more of Ohio's largest cities whole, and created compact districts. He also stated that the S.B. 258 plan contained seven competitive districts.

**{¶ 18}** During the present litigation, DiRossi explained how he, Senate President Huffman, and Senator McColley concluded that the S.B. 258 plan contained seven competitive districts. The determination involved two decisions: (1) which prior election results to use for predicting the partisan leanings of the proposed new districts under the plan and (2) how to define a "competitive" district.

**{¶ 19}** Regarding the first decision, DiRossi selected the election results from the statewide *federal* elections over the last ten years. Six elections fell into that category: the 2012, 2016, and 2020 presidential elections and the 2012, 2016, and 2018 United States Senate elections. Some of the parties in this case refer to this "dataset" of election results as "FEDEA." Based on the FEDEA dataset, DiRossi estimated —using a computer program—how a candidate from each political party might perform in the proposed new districts. Regarding the second decision, Senate President Huffman and Senator McColley defined a "competitive" election as one in which a candidate is expected to obtain 50 percent of the vote, plus or minus 4 percent, resulting in up to an 8-point spread between the winning and losing candidates. They determined that the S.B. 258 plan contained seven competitive districts because—based on the FEDEA dataset —Republican candidates would likely receive between 46 and 54 percent of the vote in seven districts.

**{¶ 20}** DiRossi, however, also analyzed the proposed district plan using other election datasets, and under those analyses, the plan had fewer competitive districts. For example, the

computer program that DiRossi used also showed the partisan leaning of the proposed districts based on election results from statewide federal *and* state elections from 2016 to 2020. Under that dataset, the S.B. 258 plan had only five competitive districts.

***5 {¶ 21}** On November 16—the same day that Senator McColley introduced the final version of S.B. 258 in committee—the full Senate voted along party lines to adopt it as the congressional-district plan. Two days later, the House passed S.B. 258 without any support by its Democratic Party members. During the House and Senate floor debates, Democratic members argued that S.B. 258 was less fair than the 2011 congressional map and that the enactment process did not comply with Article XIX. On November 20, Governor DeWine signed the bill into law.

**{¶ 22}** As required by Article XIX, Section 1(C)(3)(d), the final bill included an explanation of how it complied with Section 1(C)(3)(a) through (c). The explanation stated:

> (A) The congressional district plan does not unduly favor or disfavor a political party or its incumbents. The plan contains six Republican-leaning districts, two Democratic-leaning districts, and seven competitive districts. The number of competitive districts in the plan significantly exceeds the number of competitive districts contained in the congressional district plan described in the version of section 3521.01 of the Revised Code that was in effect immediately before the effective date of this section. Two incumbents expected to seek office again, both Republican, are paired in one district in the plan described in sections 3521.01 to 3521.0115 of the Revised Code, as enacted by this act. No other incumbent, either Republican or Democratic, expected to seek office again, is paired with another incumbent in a congressional district in this plan.
>
> (B) The congressional district plan does not unduly split governmental units and gives preference to keeping whole, in the order named, counties, then townships and municipal corporations. The plan splits only twelve counties and only fourteen townships and municipal corporations. The congressional district plan described in the version of section 3521.01 of the Revised Code that was in effect immediately before the effective date of this section split twenty-three counties and over thirty townships and municipal corporations.

*3. Petitioners[2] file two actions in this court*

**{¶ 23}** Within ten days of the governor's signing the bill, two lawsuits were filed in this court challenging the congressional-district plan. First, in case No. 2021-1428, 12 individual voters[3] filed a complaint alleging that the plan violates Article XIX, Section 1(C)(3)(a) and (b) of the Ohio Constitution. Second, in case No. 2021-1449, the League of Women Voters of Ohio, the A. Philip Randolph Institute of Ohio, and eight individual voters[4] filed a similar complaint alleging that the district plan violates Section 1(C)(3)(a) and (b).

**{¶ 24}** In either one or both of the lawsuits, the petitioners named as respondents the redistricting commission, the seven individual members of the commission, Governor DeWine in his official capacity as governor and a member of the redistricting commission, Secretary of State Frank LaRose in his official capacity as secretary of state and a member of the redistricting commission, House Speaker Cupp in his official capacity as speaker of the House and a member of the redistricting commission, and Senate President Huffman in his official capacity as president of the Senate and a member of the redistricting commission. We dismissed as respondents the commission, the seven members of the commission in their official capacities, and Governor DeWine in his official capacity as governor. 165 Ohio St.3d 1472, 2021-Ohio-4237, 177 N.E.3d 289; 165 Ohio St.3d 1474, 2021-Ohio-4267, 177 N.E.3d 292. The cases have proceeded against Secretary LaRose in his official capacity as secretary of state, House Speaker Cupp in his official capacity as speaker of the House, and Senate President Huffman in his official capacity as president of the Senate.

***6 {¶ 25}** Pursuant to our scheduling orders, the parties in these cases conducted discovery and submitted evidence and merit briefs. As evidence, the parties filed six expert reports, numerous deposition transcripts, multiple affidavits, and voluminous documents. This court held oral argument in both cases on December 28, 2021.

## II. ANALYSIS

### A. The burden and standard of proof

**{¶ 26}** Districting and apportionment are primarily legislative tasks that are subject to judicial review for constitutional compliance. *See Ely v. Klahr*, 403 U.S. 108, 114, 91 S.Ct. 1803, 29 L.Ed.2d 352 (1971), citing *Reynolds v. Sims*, 377 U.S. 533, 586, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *see also* Ohio Constitution, Article XIX, Section 3. As with any other legislation, the plan is "entitled to a strong presumption of constitutionality," *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 20.

**{¶ 27}** When a legislative act is challenged on its face, we require proof beyond a reasonable doubt that no set of circumstances exists under which the statute would be valid, while an as-applied challenge requires clear and convincing evidence of the statute's constitutional defect. *See Ohio Renal Assn. v. Kidney Dialysis Patient Protection Amendment Commt.*, 154 Ohio St.3d 86, 2018-Ohio-3220, 111 N.E.3d 1139, ¶ 26; *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 20. We may not override the General Assembly's judgment on policy questions that are committed exclusively to the legislative branch. *See Ohio Congress of Parents & Teachers* at ¶ 20.

**{¶ 28}** But that does not mean that we must defer to the General Assembly on questions of law. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). Our function here is to determine whether the act " 'transcends the limits of legislative power.' " *Ohio Congress of Parents & Teachers* at ¶ 20, quoting *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.*, 139 Ohio St. 427, 438, 40 N.E.2d 913 (1942).

**{¶ 29}** While petitioners' challenge here perhaps more closely resembles an as-applied challenge to S.B. 258's application to the particular set of facts existing at the time of this reapportionment as opposed to a frontal assault on the act's validity under any given set of facts, we will nevertheless assume without deciding that petitioners' challenge here is subject to the highest standard of proof; evidence that proves unconstitutionality beyond a reasonable doubt will necessarily satisfy the lesser standard of clear and convincing evidence.

**B. Section 1(C)(3)(a)**

*1. Section 1(C)(3)(a) establishes a judicially manageable standard*

**{¶ 30}** Article XIX, Section 1(C)(3)(a) prohibits the General Assembly from passing a congressional-district plan "that unduly favors or disfavors a political party or its incumbents." Senate President Huffman and House Speaker Cupp argue that this provision does not establish a judicially manageable standard, because it does not indicate how much favoring or disfavoring of a political party is *too much.* They contend that in the absence of a clear legal standard, the General Assembly alone has the discretion to determine whether a plan *unduly* favors a political party.

***7 {¶ 31}** Senate President Huffman and House Speaker Cupp rely on *Rucho*, 588 U.S. ——, 139 S.Ct. 2484, 204 L.Ed.2d 931, in which the Supreme Court of the United States held that partisan-gerrymandering claims arising under the federal Constitution present political questions that are not justiciable in federal courts. The *Rucho* court explained that to avoid " 'assuming political, not legal, responsibility,' " federal courts must "act only in accord with especially clear standards." *Id*. at ——, 139 S.Ct. at 2498, quoting *Vieth v. Jubelirer*, 541 U.S. 267, 307, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (Kennedy, J., concurring). The court held that "[a]ny standard for resolving such claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.' " *Id.*, quoting *Vieth* at 306-308, 124 S.Ct. 1769 (Kennedy, J., concurring).

**{¶ 32}** Two main factors underlie the *Rucho* holding: (1) the federal Constitution does not include a "plausible grant of authority" to federal courts to review partisan-gerrymandering claims, and (2) there are no "legal standards to limit and direct" the decision-making of federal judges in such claims. *Id*. at ——, 139 S.Ct. at 2507. The first factor is not present in these cases. The people of Ohio have prohibited the General Assembly from passing, by a simple majority, a congressional-district plan that unduly favors or disfavors political parties or their incumbents. Ohio Constitution, Article XIX, Section 1(C)(3)(a). And the people have granted this court "exclusive, original jurisdiction in all cases arising under" Article XIX. *Id.* at Section 3(A). That is more than a plausible grant of authority.

**{¶ 33}** Moreover, the fact that the Ohio Constitution expressly forbids partisan gerrymandering and grants authority to this

court lessens the degree to which a manageable standard is necessary:

> [C]ourts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear; whereas they are not justified in inferring a judicially enforceable constitutional obligation (the obligation not to apply *too much* partisanship in districting) which is both dubious and severely unmanageable.

(Emphasis sic.) *Vieth* at 286, 124 S.Ct. 1769 (plurality opinion). Indeed, in *Rucho*, the court suggested that state constitutional and statutory provisions similar to Section 1(C)(3)(a) provide standards and guidance that state courts can apply. *Rucho* at ——, 139 S.Ct. at 2507-2508, citing, inter alia, Florida Constitution, Article III, Section 20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent") and Del.Code Ann., Title xxix, Section 804 (providing that no state legislative district shall "be created so as to unduly favor any person or political party"). Chief Justice John Roberts, writing for the majority, noted: "We do not understand how the dissent can maintain that a provision saying that no districting plan 'shall be drawn with the intent to favor or disfavor a political party' provides little guidance on the question." *Id.* at ——, 139 S.Ct. at 2507.

**{¶ 34}** Contrary to what Senate President Huffman and House Speaker Cupp argue, Ohio voters intended that the anti-gerrymandering requirements in Article XIX, Section 1(C)(3) have teeth. Section 1(C)(3)(a) articulates a standard that is "grounded in a 'limited and precise rationale' and [that is] 'clear, manageable, and politically neutral,' " *Rucho*, 588 U.S. at ——, 139 S.Ct. at 2498, 204 L.Ed.2d 931, quoting *Vieth*, 541 U.S. at 306-308, 124 S.Ct. 1769, 158 L.Ed.2d 546 (Kennedy, J., concurring).

***8 {¶ 35}** Article XIX, Section 1(C)(3)(a) prohibits the General Assembly from passing, by a simple majority, a congressional-district plan that "unduly favors or disfavors a political party or its incumbents." In interpreting this language, we apply the rules that govern the interpretation of statutes. *See Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16. That is, we must begin with the language of the provision itself, *id.*, and consider "how the words and phrases would be understood by the voters in their normal and ordinary usage," *Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 22, citing *District of Columbia v. Heller*, 554 U.S. 570, 576-577, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). In other words, "[i]n construing constitutional text that was ratified by direct vote, we consider how the language would have been understood by the voters who adopted the amendment." *Centerville* at ¶ 22.

**{¶ 36}** Article XIX does not define "unduly." But "[i]n determining the 'common and ordinary meaning' of words, courts may look to dictionaries." *Athens v. McClain*, 163 Ohio St.3d 61, 2020-Ohio-5146, 168 N.E.3d 411, ¶ 30. The dictionary definition of "undue" is "[e]xcessive or unwarranted." *Black's Law Dictionary* 1838 (11th Ed.2019); *see also Webster's Third New International Dictionary* 2492 (defining "unduly" as "in an undue manner, *esp*: excessively" and defining "undue" as "exceeding or violating propriety or fitness: excessive, immoderate, unwarranted" [italics and small caps sic]). This, of course, raises questions: In excess of what? Or, unwarranted by what?

**{¶ 37}** Senate President Huffman and House Speaker Cupp assert that petitioners' benchmark is proportionality. And they note that Article XIX lacks any explicit proportionality standard like the one for General Assembly–district plans set forth in Article XI, Section 6(B).[5] But Senate President Huffman and House Speaker Cupp mischaracterize petitioners' argument. Although petitioners look to partisan proportionality as one metric in some aspects of their analysis, their claims do not rest on a demand for proportionality. Rather, petitioners assert that the General Assembly passed a plan with a partisan advantage that "is *unwarranted by valid considerations*, namely, the redistricting criteria set forth in Article XIX." (Emphasis added.)

**{¶ 38}** Those redistricting criteria are mainly set forth in Article XIX, Section 2. They include requirements that a congressional-district plan comply with all applicable state and federal constitutional provisions and with federal law protecting racial-minority voting rights and that a plan be composed of contiguous territory, with a single, nonintersecting boundary line. They also include guidelines on splitting or not splitting municipalities of various sizes and locations; limitations on the number of counties that may be split not more than once and the number that may be split not more than twice; a requirement that in districts containing only part of a particular county, the portion of the county within the district be contiguous with the boundaries of the county; a requirement that no two districts may share portions of more than one county, unless

the county's population exceeds 400,000; and a requirement that the General Assembly attempt to include at least one whole county in each district. Ohio Constitution, Article XIX, Section 2(B)(1) through (8). Also, Section 1(C)(3)(c) requires the General Assembly to attempt to draw districts that are compact.

***9 {¶ 39}** "Where provisions of the Constitution address the same subject matter, they must be read *in pari materia* and harmonized if possible." *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 292, 737 N.E.2d 529 (2000). That is, when possible, we must construe provisions to give each provision reasonable and operable effect. *State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 78, 765 N.E.2d 854 (2002).

**{¶ 40}** Reading Article XIX, Sections 1 and 2 together, we conclude that Section 1(C)(3)(a) 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 unwarranted by, the application of Section 2 's and Section 1(C)(3)(c)'s specific line-drawing requirements to Ohio's natural political geography. In other words, Section 1(C)(3)(a) does not prohibit a plan from favoring or disfavoring a political party or its incumbents to the degree that inherently results from the application of neutral criteria, but it does bar plans that embody partisan favoritism or disfavoritism in excess of that degree—i.e., favoritism not warranted by legitimate, neutral criteria.

*2. The enacted plan unduly favors the Republican Party and unduly disfavors the Democratic Party*

**{¶ 41}** The evidence overwhelmingly shows that the enacted plan favors the Republican Party and disfavors the Democratic Party to a degree far exceeding what is warranted by Article XIX's line-drawing requirements and Ohio's political geography.

***a. The enacted plan's expected performance***

**{¶ 42}** Although Ohio has not yet held any congressional elections under the enacted plan, the parties agree that, in general, voting history in prior elections can predict future voting patterns. As a starting point, we examine how the two major political parties are expected to perform under the enacted plan. The parties have submitted the reports of several experts to aid in this analysis.

**{¶ 43}** To start, Senate President Huffman and House Speaker Cupp argue that the enacted plan does not allocate each of Ohio's 15 congressional districts to one party or another but instead maximizes the number of competitive districts. They rely on the report of their only expert, Dr. Michael Barber, who is an associate professor of political science at Brigham Young University with significant experience in evaluating political and elections-related data. Dr. Barber explained that in Ohio, Democratic voters are heavily clustered in urban areas and Republican voters are more evenly distributed throughout the state. This political geography, he concluded, constrains map drawers. Indeed, using the FEDEA dataset, he found that the enacted plan is "quite similar" to the plans proposed by the House and Senate Democrats: they all include six districts that are solidly Republican and two districts that are solidly Democratic.

**{¶ 44}** Citing Dr. Barber's report, Senate President Huffman and House Speaker Cupp assert that 8 out of Ohio's 15 congressional districts must be drawn as "safe" districts for either Democrats or Republicans. Given that asserted reality, they decided to draw the remaining seven districts as competitive ones. Dr. Barber confirmed that under the FEDEA dataset, the enacted plan includes seven competitive districts. He also evaluated the enacted plan's competitiveness by determining whether a Democratic and Republican candidate for statewide federal office had won a majority of the two-party vote share in the district from 2012 to 2020. He again found seven competitive districts under the enacted plan.

***10 {¶ 45}** But "competitiveness" is not a prescribed standard under Article XIX of the Ohio Constitution. That term does not appear within Article XIX, and rules of statutory construction forbid us from adding to the text of Article XIX. While supposed district competitiveness was offered here as a post hoc rationalization for the mapped districts in the enacted plan, Article XIX itself does not require it and does not provide any calculable measure for it.

**{¶ 46}** Beyond that, petitioners submitted multiple expert reports showing that the enacted plan is not nearly as competitive as Senate President Huffman and House Speaker Cupp claim that it is. Dr. Jonathan Rodden is a professor of political science at Stanford University with expertise in the analysis of fine-grained geospatial data sets, including

election results. He concluded that *state* statewide election results have more reliably tracked how Ohioans have voted in congressional elections. Dr. Rodden therefore concluded that by relying on only the FEDEA dataset, respondents exclude the most relevant data to predict the partisan outcomes of the enacted plan. Dr. Rodden claimed that by using a more comprehensive dataset and considering an incumbency advantage, the enacted plan has only two or three competitive districts.

**{¶ 47}** Dr. Christopher Warshaw is an associate professor of political science at George Washington University and has written about elections and partisan gerrymandering. He noted that the FEDEA dataset excluded "the Republican wave year" of 2014 and heavily weighted the two federal elections in 2012, which was a "high-water mark for Democrats in Ohio." Dr. Warshaw found that the plan has three competitive districts, although Republican candidates are favored in each. Dr. Rodden and Dr. Warshaw both found that Republicans are likely to win 80 percent of the congressional seats (12 out of 15) under the enacted plan, even though Republicans have received about 53 percent of the vote in recent statewide elections.

**{¶ 48}** Petitioners also submitted the analysis of other experts who compared the enacted plan to thousands of computer-simulated plans that comply with Article XIX's neutral districting criteria. Dr. Kosuke Imai is a professor in the government and statistics departments at Harvard University and specializes in the development of statistical methods for social-science research. He used the FEDEA dataset in finding that Republicans likely will win 11 of 15 seats under the enacted plan.[6] He generated 5,000 Article XIX–compliant simulated plans, again using the FEDEA dataset. Those simulated plans did not split any counties that the enacted plan does not split, contained more compact districts and had fewer county splits than the enacted plan, and were—just like the enacted plan—applied to Ohio's particular political geography.

**{¶ 49}** Dr. Imai found that Republicans would win 8 seats in 80 percent of those plans and 9 seats in the other 20 percent of those plans. None of Dr. Imai's simulated plans awarded Republicans 11 or more seats. Dr. Imai therefore found—using the same dataset used by DiRossi—that Republicans are expected to win 2.8 more seats under the enacted plan than under the simulated plans. The enacted plan, Dr. Imai concluded, is "a clear statistical outlier," which means there is the presence of "systemic partisan bias." Dr. Imai concluded that the probability of the enacted plan's partisan favoritism resulting from the application of neutral criteria is essentially zero.

***11 {¶ 50}** Dr. Jowei Chen is an associate professor of political science at the University of Michigan and has published academic papers on legislative redistricting and political geography. He used the results of all statewide elections from 2016 to 2020 to generate 1,000 Article XIX–compliant simulated plans to assess whether the partisan outcome of the enacted plan is within the normal range of the simulated district plans. Dr. Chen found that Republicans will likely win 12 of 15 congressional seats under the enacted plan. In contrast, only 1.3 percent of the simulated plans created 12 Republican-favoring districts. Dr. Chen concluded that the enacted plan is a "statistical outlier" and that the plan's "extreme" partisan bias cannot be attributable to Ohio's political geography, which he accounted for in his simulations.[7]

**{¶ 51}** We conclude that the body of petitioners' various expert evidence significantly outweighs the evidence offered by respondents as to both sufficiency and credibility, compelling beyond any reasonable doubt the conclusion that the enacted plan excessively and unwarrantedly favors the Republican Party and disfavors the Democratic Party.

***b. Additional comparisons focusing on particular counties***

**{¶ 52}** Petitioners also submitted compelling evidence showing how the enacted plan's treatment of certain urban counties unduly favors the Republican Party and disfavors the Democratic Party.

**{¶ 53}** Dr. Imai examined districts in Hamilton, Franklin, and Cuyahoga Counties and concluded that "the enacted plan packs a disproportionately large number of Democratic voters into some districts while cracking Democratic voters in other districts to create Republican-leaning seats."[8] For each of those counties, he compared the Republican vote share of each precinct's assigned district in the enacted plan with the average of the Republican vote shares for each district that precinct was assigned to in each of his 5,000 simulated plans. For example, Precinct 061031BEZ, in Cincinnati, is in District 1 in the enacted plan, a district with an expected Republican vote share of 51.53 percent. The average Republican vote share of the districts to which that precinct is assigned (across Dr. Imai's 5,000 simulated plans) is 44.85

percent—6.68 percentage points lower than the enacted plan. This shows that the enacted plan assigned that precinct to a more Republican-leaning district than the average simulated plan.

**{¶ 54}** Dr. Imai states that performing this exercise for all the precincts in Hamilton County reveals that "the enacted plan cracks Democratic voters, leading to solely Republican districts." The enacted plan does this by splitting Hamilton County twice (placing county territory in three districts), whereas the simulated plans split it only once. According to Dr. Imai, the additional split in the enacted plan results in Hamilton County having no Democratic seats, "whereas the simulated plans are expected to yield a Democratic seat. So in Hamilton County alone, cracking of Democratic voters nets Republicans an entire seat."

***12 {¶ 55}** Again, Dr. Imai's analysis is particularly useful because he used the FEDEA dataset—i.e., the dataset preferred by Senate President Huffman and House Speaker Cupp. But petitioners presented evidence from several other experts who also concluded, using different datasets, that the enacted plan's treatment of urban counties disfavors the Democratic Party to an excessive degree that is unwarranted by Article XIX and the area's political geography.

**{¶ 56}** Dr. Rodden compared the enacted plan with alternative plans proposed by the Democratic caucuses and the Ohio Citizens Redistricting Committee. He explained that the enacted plan carves up the Black community in Cincinnati, splitting it into three districts and submerging it among predominantly white, exurban, and rural voters. He concludes:

> Under any method of counting splits, the Enacted Plan's approach involves at least two splits of Hamilton County—a line running north-south on the east side of the county and another one that carves out the northern suburbs. These maneuvers are clearly not necessary for any reason other than partisan advantage. Each of the alternative plans keeps metro Cincinnati together in a compact district remaining within the county, avoids splitting the Black community, and splits the county only once.

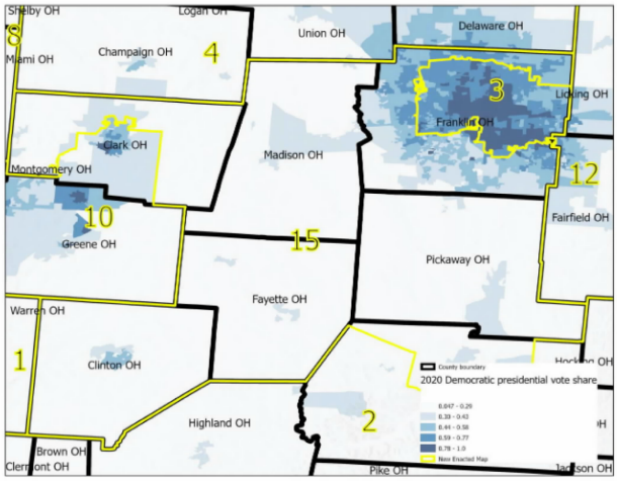
**{¶ 57}** Dr. Chen compared the enacted plan to his 1,000 simulated plans and found that more than 80 percent of those plans placed Cincinnati in a district with a 45 percent Republican vote share and that the vast majority of those plans kept Cincinnati in a compact district solely within Hamilton County, whereas the enacted plan placed it in a noncompact district connected to Warren County by a thin strip of territory—thereby combining the heavily Democratic city with a large rural area, resulting in a district with a Republican vote share Dr. Chen calculates at 51.6 percent. Dr. Chen concluded that the enacted plan included a noncompact district containing Cincinnati that was drawn to be favorable to Republicans. This resulted in a district that was more favorable to Republicans than the Cincinnati district in over 97 percent of his simulated plans.

**{¶ 58}** Petitioners' experts similarly concluded that the districts encompassing Franklin County were drawn to confer partisan advantages to the Republican Party. Dr. Imai found that the enacted plan packs Franklin County Democratic voters into a "single, heavily Democratic" district in order to create additional Republican-leaning districts, "leaving much of the city of Columbus in a Republican district stretching most of the way to Cincinnati." As a result, much of Franklin County—including parts of Columbus—belongs to a safe Republican district. By contrast, Dr. Imai's 5,000 simulated plans showed that the entirety of Franklin and Delaware Counties and a portion of Fairfield County would be expected to belong to a Democratic-leaning district. Dr. Imai concluded that by confining Democratic voters to a single district, the enacted plan packs voters in a way that yields an additional seat for Republicans as compared to Dr. Imai's simulated plans.

**{¶ 59}** Similarly, Dr. Rodden opined that the enacted plan packs Democrats into a single, very concentrated Columbus district, then "reaches around the city to extract its outer reaches and suburbs, connecting them with far-flung rural communities to the southwest—an arrangement that prevents the emergence of a second Democratic district by removing Democratic Columbus-area neighborhoods from their context and submerging them in rural Republican areas." The following figure from Dr. Rodden's report illustrates his point:

Figure 14: Partisanship and Enacted Districts, Columbus and Surroundings




***13** Alternative plans, Dr. Rodden notes, split Franklin County with a line that runs from east to west to create a compact southern district and a relatively compact northern district that crosses over into Delaware County, which would keep Columbus's northern suburbs together.

**{¶ 60}** Regarding Columbus and Franklin County, Dr. Chen opined:

> [T]he Enacted Plan's two Columbus-area districts are clear partisan outliers: CD-3, which contains most of Columbus' population, is more heavily Democratic than all 1,000 of the simulated plans' districts with the most Columbus population. Consequently, the Enacted Plan's CD-15, which contains the second-most of Columbus' population, is more heavily Republican than 98% of the simulated plans' districts with the second-most Columbus population.

And according to Dr. Chen, Districts 3 and 15 are also "less geographically compact" than nearly every simulated plan's districts containing the most and second most Columbus residents—which is not a result "one could reasonably expect from a districting process that follows the districting requirements of the Ohio Constitution." For these reasons, we conclude that the enacted plan divided Franklin County into noncompact districts to confer a partisan advantage on the party drawing the plan.

**{¶ 61}** Finally, Dr. Imai's examination of Cuyahoga and Summit Counties yielded a similar conclusion: "While under the simulated plans, the suburbs of Cleveland are expected to belong to either Democratic districts or highly competitive districts, the enacted plan packs urban Democratic voters, leaving the remainder of Cuyahoga County and nearby areas in Republican districts." This results in territory that would be expected to be in Democratic-leaning districts based on the simulated plans being divided to support the population needed for three Republican districts and one competitive district in the enacted plan. Dr. Rodden and Dr. Chen again concur. Dr. Rodden noted that the enacted plan splits Cuyahoga County into three districts and contains a district that would be noncontiguous except for a narrow corridor that is one precinct wide, and it also carves up Democratic-leaning areas around Akron. Dr. Chen concluded that the enacted plan engages in unnatural packing around Cleveland "to an extent that is not explained by Cuyahoga County's political geography."

**{¶ 62}** This expert analysis demonstrates that in each of Ohio's three largest metropolitan areas, the enacted plan contains districts that are not shaped according to Article XIX's neutral districting criteria or Ohio's political geography; instead, the inescapable conclusion is that they are the product of an effort to pack and crack Democratic voters, which results in more safe Republican districts or competitive districts favoring the Republican Party's candidates. Not only are such oddly shaped districts not required by the criteria set forth in Article XIX, but they are in tension, if not in conflict, with Section 1(C)(3)(c)'s exhortation that the General Assembly "shall attempt to draw districts that are compact." Ohio Constitution, Article XIX, Section 1(C)(3)(c). And they split communities of interest, such as the Black community in Hamilton County. *See Rucho*, 588 U.S. at ——, 139 S.Ct. at 2500, 204 L.Ed.2d 931 ("keeping communities of interest together" is a traditional redistricting criterion).

### *c. Other measures of partisan bias*

***14** **{¶ 63}** Petitioners' experts also found that the enacted plan unduly favors the Republican Party when considered under other analytical methods created by political scientists to measure partisanship in redistricting:

> • The "efficiency gap," which measures the difference between the parties' respective "wasted votes" (i.e., the number of votes above the 50 percent plus 1 that a party needs to win an election), divided by the total number of votes cast.
>
> • The "mean-median gap," which measures the difference between a party's vote share in the median district and its average vote share across all districts. If a party wins more votes in the median district than in the average district, then the mean-median gap

indicates that the plan gives that party an advantage in the translation of votes to legislative seats.

• "Declination," which measures the asymmetry in the distribution of votes across districts. For example, if the Democratic Party's average vote share in districts it won is significantly higher than the Republican Party's average vote share in the districts it won, the Democratic Party's districts are considered to be packed.

• "Partisan symmetry," which measures whether each party would receive the same share of seats under the plan assuming they had identical shares of votes. For example, if the Democratic Party would win 51 percent of the seats if it received 55 percent of the votes, but the Republican Party would win 66 percent of the seats if it received 55 percent of the votes, then the partisan-symmetry metric indicates that the map favors the Republican Party.

**{¶ 64}** Dr. Warshaw analyzed the enacted plan under each of these metrics using three different election datasets. He then compared the results to congressional elections across the nation from 1972 to 2020. He concluded that regardless of the approach used, "the enacted map has an extreme level of bias in favor of the Republican [P]arty." For example, using the election results from all statewide elections from 2012 to 2020, Dr. Warshaw found that the enacted plan is more extremely biased than 70 percent of previous plans and "more pro-Republican" than 85 percent of previous plans.

**{¶ 65}** Dr. Imai similarly considered the four partisan-bias metrics when comparing the enacted plan to his 5,000 simulated plans. He concluded that the enacted plan is a "clear outlier" favoring the Republican Party and is more biased than any of the 5,000 simulated plans under all four metrics. Dr. Rodden found that the enacted plan's efficiency gap—the difference in the number of "wasted votes" between Democratic and Republican candidates—was higher than the efficiency gaps in almost every other comparable state. Dr. Chen found that the enacted plan's efficiency gap is larger than 99.5 percent of his simulated plans.

**{¶ 66}** These various expert analyses further confirm beyond any reasonable doubt that the enacted plan excessively and unnecessarily favors the Republican Party and unduly disfavors the Democratic Party.

***d. Senate President Huffman and House Speaker Cupp did not effectively rebut petitioners' evidence***

**{¶ 67}** Senate President Huffman and House Speaker Cupp argue that the analyses of Dr. Rodden and Dr. Chen are flawed because they did not use the FEDEA dataset to predict election outcomes. Although Dr. Rodden and Dr. Chen used different datasets, they applied the *same* datasets to the enacted plan that they applied to the simulated or alternative plans and then compared partisan outcomes. Their analyses therefore are relevant to the question whether the enacted plan favors a party in a way unwarranted by the neutral factors in Article XIX. Moreover, Dr. Imai did use the FEDEA dataset, and Senate President Huffman and House Speaker Cupp's brief does not even mention Dr. Imai.

***15 {¶ 68}** Senate President Huffman and House Speaker Cupp also argue that we have previously "discounted the usefulness" of analyzing an enacted plan using alternative plans that were not presented to the General Assembly prior to its adoption of the enacted plan, citing *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 43-46. But *Wilson* does not prohibit consideration of alternative plans; it merely cites the fact that the two alternative plans presented by the expert witness in that case had not been before the apportionment board as one reason (among many others, including flawed methodology) that we did not find the evidence sufficient to carry the burden of proof in that case. *Id.* In *Wilson*, this court determined at ¶ 2, 14-16 that Article XI's provisions, as then written, did not mandate political neutrality in an apportionment plan—in contrast to other states that prohibited drawing plans that favored or disfavored a political party—and thereafter rejected the relators' claims that Sections 7 and 11 of former Article XI had been violated. Here, by contrast, the simulated plans go to the very question we held was not at issue in *Wilson*. The simulated plans are relevant evidence that the enacted plan unduly favors the Republican Party, which is proscribed by the very provision we are considering—Article XIX, Section 1(C)(3)(a).

**{¶ 69}** Senate President Huffman and House Speaker Cupp's expert, Dr. Barber, points out potential flaws in the plans submitted by the Democratic caucuses, but that evidence does not go to the relevant question: whether the plan *passed by the General Assembly* unduly favors or disfavors a political party. Based on the evidence discussed previously, we conclude that it does.

**{¶ 70}** Contrary to the insistence by the dissent[9] that our decision today is based on some amorphous notion of "proportional representation," Article XIX contains no such standard. And to be clear, our judgment here rests not on "proportional representation" but rather on the Constitution's explicit text stating that a plan cannot unduly favor or disfavor a political party or unduly split governmental units for partisan advantage.

**{¶ 71}** Finally, as noted above, Senate President Huffman and House Speaker Cupp claim that the General Assembly prioritized crafting *competitive* districts in areas where doing so was possible. Article XIX does not require, prohibit, or even mention competitive districts. But it does require the General Assembly to attempt to draw districts that are compact. Ohio Constitution, Article XIX, Section 1(C)(3)(c). And most importantly, Article XIX prohibits undue partisan favoritism. *Id.* at Section 1(C)(3)(a). The above evidence, particularly Dr. Imai's conclusion that the enacted plan will result in, on average, 2.8 more Republican seats than are warranted, shows that the General Assembly's decision to shift what could have been—under a neutral application of Article XIX—Democratic-leaning areas into competitive districts, i.e., districts that give the Republican Party's candidates a better chance of winning than they would otherwise have had in a more compactly drawn district, resulted in a plan that unduly favors the Republican Party and unduly disfavors the Democratic Party.

*3. Respondents' Fourteenth Amendment warning is unfounded*

**{¶ 72}** As an additional argument for rejecting petitioners' claims that the plan unduly favors the Republican Party at the expense of the Democratic Party, Senate President Huffman and House Speaker Cupp warn that imposing a proportionality requirement would itself be reverse partisan gerrymandering. They argue that remedying respondents' violations would run afoul of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

**{¶ 73}** Senate President Huffman and House Speaker Cupp's argument that the court's invalidation of the congressional-district plan in favor of strict proportionality is an "absurd" idea that would discriminate against Republican voters and minor-party voters mischaracterizes the issue in this case. For again, petitioners do not argue for strict proportionality. Petitioners' claims are based on Article XIX of the Ohio Constitution, which forbids the General Assembly from passing by a simple majority a plan that unduly favors or disfavors a political party. Because Section 1(C)(3)(a) does not require a strictly proportional plan, the General Assembly need not necessarily enact one.

***16 {¶ 74}** Moreover, Senate President Huffman and House Speaker Cupp's argument is at odds with *Rucho*'s holding that partisan-gerrymandering claims under the Fourteenth Amendment are not justiciable in federal courts. *See Rucho*, 588 U.S. at ——, 139 S.Ct. at 2506-2507, 204 L.Ed.2d 931. Senate President Huffman and House Speaker Cupp offer no reason why, after *Rucho*, any court would entertain a claim alleging partisan gerrymandering in violation of the Fourteenth Amendment.

**C. Section 1(C)(3)(b)**

**{¶ 75}** Article XIX, Section 1(C)(3)(b) provides: "The General Assembly shall not unduly split governmental units, giving preference to keeping whole, in the order named, counties, then townships and municipal corporations." Petitioners argue that the enacted plan violates Section 1(C)(3)(b) because it unduly splits urban counties in ways that are not required by Ohio's political geography, equal population, or any other redistricting requirements in Article XIX. Rather, petitioners contend that the splits were drawn purely for partisan advantage.

**{¶ 76}** Senate President Huffman and House Speaker Cupp argue that this court may "easily reject[ ]" this argument because it is undisputed that the plan "divides fewer governmental units than the 2011 Congressional Plan as well as the two Democratic proposed congressional plans." They also note that the plan complies with the limits on splitting counties, townships, and municipal corporations, as provided in Article XIX, Section 2(B). For example, they note that under Section 2(B)(5), 23 counties may be split into different congressional districts but that the enacted plan splits only 12 counties.

**{¶ 77}** For the reasons explained below, we conclude that the enacted plan unduly splits three counties in violation of Section 1(C)(3)(b). Those splits result in noncompact districts that cannot be explained by any neutral factor and serve no purpose other than to confer partisan advantage to the political party that drew the plan.

*1. Permissive splitting under Section 2(B) does not authorize partisan splitting*

**{¶ 78}** Senate President Huffman and House Speaker Cupp's arguments can be easily rejected. First, the fact that the enacted plan divides fewer governmental units than the 2011 congressional-district plan or the plans proposed by the House and Senate Democrats is immaterial. Showing that other plans would split more governmental units does not validate the enacted plan. Moreover, the 2011 congressional-district plan is an improper comparator because Article XIX was not part of the Ohio Constitution when the General Assembly passed that plan and no other provision of the Ohio Constitution addressed the undue splitting of governmental units with regard to congressional redistricting prior to its enactment. *See* 2018 Sub.S.J.R. No. 5.

**{¶ 79}** Second, the enacted plan's compliance with Article XIX, Section 2(B) does not foreclose a claim that the plan unduly splits governmental units under Section 1(C)(3)(b). No part of the Constitution "should be treated as superfluous unless that is manifestly required," and this court should avoid any construction that makes a provision "meaningless or inoperative." *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917). If compliance with the county-, township-, and municipal-corporation-splitting rules in Section 2(B) were sufficient for any plan enacted under Article XIX, there would be no need for the Constitution to contain a separate provision precluding the General Assembly from unduly splitting governmental units. To give meaning to Section 1(C)(3)(b), the provision must be interpreted to contemplate that a congressional-district plan could unduly split governmental units even though the splits are not otherwise prohibited under Section 2(B).

***17 {¶ 80}** For example, a district plan may violate Article XIX, Section 1(C)(3)(b) by splitting governmental units as a means to confer an undue partisan advantage—even if the district plan otherwise complies with Section 2(B). As discussed above, the ordinary meaning of "undue" is "[e]xcessive or unwarranted." *Black's* at 1838; *see also Webster's* at 2492. A split may be unwarranted if it confers an undue partisan advantage on the political party that drew the map and if it cannot otherwise be explained by neutral redistricting criteria.

**{¶ 81}** If there were any doubt as to that interpretation of Section 1(C)(3)(b), the structure of Article XIX and the purpose of the amendment also lead to that conclusion. In construing constitutional text that was ratified by direct vote, "our inquiry must often include more than a mere analysis of the words found in the amendment." *Centerville*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, at ¶ 22. If the meaning of constitutional text is unclear, we "may review the history of the amendment and the circumstances surrounding its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide to assist the court in its analysis." *Id.*

**{¶ 82}** Here, the General Assembly is prevented from unduly splitting governmental units *only* when the district plan is passed by a simple majority—that is, when the political party in power enacted the plan without sufficient bipartisan support. When the amendment was placed on the 2018 ballot, the language specifically informed voters that if the General Assembly adopted a plan without significant bipartisan support, the plan "must comply with explicit anti-gerrymandering requirements." *See* Statewide Issue Ballot Language for the Primary Election Occurring May 8, 2018, available at https://www.ohiosos.gov/globalassets/ballotboard/2018/2018_primary_issuesreport.pdf#page=1 (accessed Jan. 4, 2022) [https://perma.cc/7E9V-Q3B]. *Black's Law Dictionary* defines "gerrymandering" as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." *Id.* at 830.

**{¶ 83}** Therefore, the splitting of a governmental unit may be "undue" if it is excessive or unwarranted. A split may be unwarranted if it cannot be explained by any neutral redistricting criteria but instead confers a partisan advantage on the party that drew the map—regardless of whether the plan complies with Article XIX, Section 2(B). In other words, permissive splitting under Section 2(B) does not authorize partisan splitting.

*2. The district plan unduly splits Hamilton County*

**{¶ 84}** The enacted plan splits Hamilton County into three districts for no apparent reason other than to confer an undue partisan advantage on the Republican Party. In the 2020 presidential election, the Democratic candidate received 58 percent of the vote in Hamilton County and

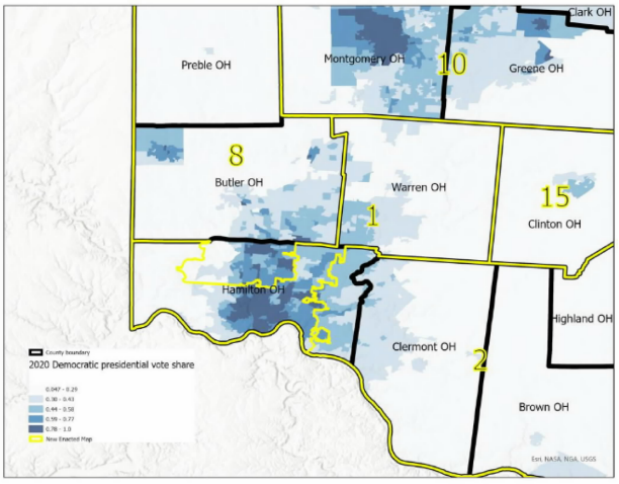
  

the Republican candidate received 42 percent of the vote. But under the enacted plan, two of Hamilton County's new districts (Districts 2 and 8) would be safe Republican districts and the third new district (District 1) would lean slightly Republican—even using the FEDEA dataset. None of those districts are entirely within Hamilton County.

**{¶ 85}** Dr. Imai found that Hamilton County's "Democratic areas are cracked to yield three Republican-leaning districts, despite a significant concentration of Democratic voters in and around Cincinnati." The result of the "manipulations and additional splits of Hamilton County," he concluded, "nets Republicans an entire seat," while the simulated plans are expected to yield a Democratic seat.

***18 {¶ 86}** Dr. Rodden similarly found that any attempt to "minimize splits and keep Cincinnati-area communities together would produce a majority-Democratic district." The enacted plan, he concluded, carves out Hamilton County's northern Black population from its surroundings neighborhoods and combines it with a mostly rural district that ends 85 miles to the north, extracts Cincinnati from its immediate inner-ring suburbs and combines the city proper with Warren County via a narrow corridor, and extracts Cincinnati's eastern suburbs and combines them with "extremely rural" counties to the east. The following map from Dr. Rodden's report illustrates his point:

**Figure 9: Partisanship and the Enacted Plan's Districts, Hamilton County and Surroundings**




Alternative plans submitted to the General Assembly, Dr. Rodden noted, kept metro Cincinnati together in a compact district *within* Hamilton County, avoided splitting the Black community, and split the county only once. Dr. Rodden concluded that the splits in Hamilton County "are clearly not necessary for any reason other than partisan advantage."

**{¶ 87}** Dr. Chen concluded that splitting Hamilton County into three districts is "statistically anomalous" and that only 1.3 percent of his simulated plans similarly split the county into three districts. He further found that one Cincinnati district in the enacted plan—District 1—has a higher Republican vote share than 98 percent of the computer-simulated Cincinnati districts. According to Dr. Chen, the enacted plan achieves this "unnaturally high" Republican-vote share by "splitting Hamilton County into three districts and combining the Cincinnati portion of Hamilton County with Warren County"; the result is a "very non-compact shape[d]" District 1, with a compactness score that is much lower than the Cincinnati-based districts in virtually all the computer-simulated districts. The enacted plan, Dr. Chen concluded, creates "an extreme partisan outcome" in District 1 "by splitting Hamilton County excessively and sacrificing geographic compactness in this district."

**{¶ 88}** In their brief, Senate President Huffman and House Speaker Cupp do not adequately explain why the enacted plan splits Hamilton County into three districts. Based on this record, we find that the two splits in Hamilton County were excessive and unwarranted. The evidence overwhelmingly shows that the effect of those splits was to confer significant partisan advantage on the party that drew the districts.

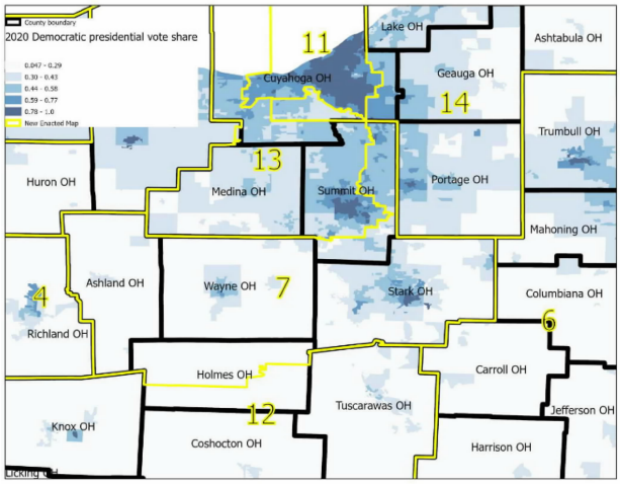
*3. The district plan unduly splits Summit and Cuyahoga Counties*

**{¶ 89}** The evidence also demonstrates that the enacted plan splits Summit and Cuyahoga Counties to confer partisan advantages on the Republican Party.

**{¶ 90}** Dr. Rodden concluded that the enacted plan splits Summit County by cutting Akron off from its eastern Democratic-leaning suburbs, placing those suburbs in a "long, narrow north-south corridor that is, in one spot, less than one mile wide" and connecting those areas with highly Republican rural areas up to 70 miles away. Dr. Rodden further noted that rather than combining Akron with its own suburbs, the enacted plan combines the city with Medina County in District 13 and "the most Republican outer exurbs of Cleveland." Alternative plans, he noted, mostly kept Summit County together. Dr. Rodden concluded that District 13 "appears to have been crafted as part of an effort to make sure there is only one very Democratic district in Northeast

Ohio." What would have otherwise been a comfortable Democratic, Akron-based district, he concludes, is instead a "toss up." The following illustration from Dr. Rodden's report demonstrates his points:

Figure 19: Partisanship and the Boundaries of the Enacted Plan, Northeast Ohio




***19** **{¶ 91}** As it does with Hamilton County, the enacted plan splits Cuyahoga County into three districts—although Dr. Imai found that only 8 of his 5,000 simulated plans split two counties twice. One of those Cuyahoga County districts—District 14—includes a narrow corridor jutting into the county that, according to Dr. Rodden, is "in one spot, the width of one census block, with no road connecting" the two portions of the district. The result, according to Dr. Rodden, is that District 14 extracts large numbers of Democrats in suburban Cuyahoga County and places them in a district that is far more Republican.

**{¶ 92}** Dr. Imai concluded that the enacted plan overly packs Democratic voters into District 11—the district that includes Cleveland—and that the surrounding districts were drawn to "crack the remaining Democratic voters outside of Cleveland and in the cities of Lorain and Akron." As a result, in northeast Ohio, the enacted plan creates three Republican-leaning districts and one competitive district, even though Dr. Imai's simulated plans generally show that the areas south and west of Cleveland would otherwise belong to a competitive or Democratic-leaning district. Dr. Chen similarly found that the Cleveland-based district was "less geographically compact than is reasonable for a Cleveland-based district" and instead appears "to have been drawn in order to create an extreme packing of Democratic voters that would not have naturally emerged from drawing a more compact Cleveland-based district."

**{¶ 93}** Senate President Huffman and House Speaker Cupp do not explain the basis for the splits in Summit or Cuyahoga Counties, nor do they attempt to explain the irregular shapes of the districts resulting from those splits. Under these circumstances, we conclude that the evidence shows that the enacted plan splits Summit and Cuyahoga Counties in ways that cannot be explained by any neutral criteria and instead confers a partisan advantage on the political party that drew the map.

### D. Systemic defects require the passage of a new plan that complies with Article XIX

**{¶ 94}** Article XIX, Section 3(B)(1) authorizes this court to determine that a congressional-district plan, or any congressional district or group of congressional districts, is invalid. It further provides that a corrective plan "shall remedy any legal defects in the previous plan identified by the court but shall include no changes to the previous plan other than those made in order to remedy those defects." *Id.*

**{¶ 95}** Article XIX, Section 3(B)(1) thus recognizes that in some circumstances, congressional plans that contain isolated defects may be subject to remediation by simply correcting the defects in the affected district or districts. But when a congressional-district plan contains systemic flaws such that constitutional defects in the drawing of some district boundaries have a consequential effect on the district boundaries of other contiguous districts, such a plan is incapable of being remediated with the surgical precision necessary to correct only isolated districts while leaving the rest of the plan intact.

**{¶ 96}** In this case, the partisan gerrymandering used to generate the 2021 congressional-district plan, through undue party favoritism and/or undue governmental-unit splits, extends from one end of the state to the other. This plan defies correction on a simple district-by-district basis, if only as a consequence of the equal-population requirement prescribed by Article XIX, Section 2 and governing law. We therefore see no recourse but to invalidate the entire congressional-district plan.

***20** **{¶ 97}** Article XIX, Section 3(B)(1) and (2) describe what happens next. Section 3(B)(1) provides that if any congressional-district plan is determined to be invalid by an unappealed final court order, the general assembly "shall pass" a congressional-district plan that complies with the

Constitution. Section 3(B)(1) mandates both the timing and substance of any plan so passed. The plan shall be passed "not later than the thirtieth day after the last day on which an appeal of the court order could have been filed or, if the order is not appealable, the thirtieth day after the day on which the order is issued." *Id.* And the plan "shall remedy any legal defects in the previous plan identified by the court but shall include no changes to the previous plan other than those made in order to remedy those defects." *Id.*

**{¶ 98}** If the new congressional-district plan is not passed as Section 3(B)(1) describes, "the Ohio redistricting commission shall be reconstituted and reconvene and shall adopt a congressional district plan" in accordance with the Constitution. Article XIX, Section 3(B)(2). Again, this provision mandates both the timing and substance of the commission's actions. "The commission shall adopt that plan not later than the thirtieth day after the deadline described in division (B)(1) of this section," and such plan "shall remedy any legal defects in the previous plan identified by the court but shall include no other changes to the previous plan other than those made in order to remedy those defects." Article XIX, Section 3(B)(2).

**{¶ 99}** By the plain language of Article XIX, Section 3(B), both the General Assembly and the reconstituted commission, should that be necessary, are mandated to draw a map that comports with the *directives of this opinion.*

**III. Conclusion**

**{¶ 100}** When the dealer stacks the deck in advance, the house usually wins. That perhaps explains how a party that generally musters no more than 55 percent of the statewide popular vote is positioned to reliably win anywhere from 75 percent to 80 percent of the seats in the Ohio congressional delegation. By any rational measure, that skewed result just does not add up.

**{¶ 101}** The incontrovertible evidence in these cases establishes that the plan passed by the General Assembly fails to honor the constitutional process set out in Article XIX to reapportion Ohio's congressional districts. The General Assembly produced a plan that is infused with undue partisan bias and that is incomprehensibly more extremely biased than the 2011 plan that it replaced. This is not what Ohio voters wanted or expected when they approved Article XIX as a means to end partisan gerrymandering in Ohio for good. The time has now come for the General Assembly to faithfully discharge the constitutional responsibilities imposed by Article XIX and by oath of office.

**{¶ 102}** We hold that the General Assembly did not comply with Article XIX, Sections 1(C)(3)(a) and (b) of the Ohio Constitution in passing the congressional-district plan. We therefore declare the plan invalid and we order the General Assembly to pass a new congressional-district plan, as Article XIX, Section 3(B)(1) requires, that complies in full with Article XIX of the Ohio Constitution and is not dictated by partisan considerations.

Relief granted.

Stewart and Brunner, JJ., concur.

O'Connor, C.J., concurs, with an opinion joined by Brunner, J.

Kennedy, Fischer, and DeWine, JJ., dissent, with an opinion.

O'Connor, C.J., concurring.

**{¶ 103}** I fully concur in the majority opinion. I write separately to emphasize the following point from the reply brief of petitioners in case No. 2021-1449: "[Petitioners] 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."

***21 {¶ 104}** The dissenting opinion's dismissive characterization of all the metrics used by petitioners' experts as simply being measures of "proportional representation" is sleight of hand. No magician's trick can hide what the evidence overwhelmingly demonstrates: the map statistically presents such a partisan advantage that it unduly favors the Republican Party.

**{¶ 105}** The "competitiveness" standard that respondents offer—a standard absent from the constitutional language—is another illusion. It asks that voters be satisfied by a "coin toss" without acknowledging the significant partisan advantage created across the state.

**{¶ 106}** For these reasons, I am not persuaded that the dissenting opinion offers a framework supported by the language of Article XIX of the Ohio Constitution or reflective of the evidence presented.

Brunner, J., concurs in the foregoing opinion.

Kennedy, Fischer, and DeWine, JJ., dissenting.

**{¶ 107}** The majority today declares the congressional-district plan enacted by the legislature to be unconstitutional on the basis that it "unduly" favors a political party and "unduly" splits governmental units. It does so without presenting any workable standard about what it means to unduly favor a political party or divide a county.

**{¶ 108}** To the extent that one can find a guiding legal principle in what the majority does, it is that results under a district-based election system should roughly equate to what would happen under a system of proportional representation. But, of course, this country has never adopted a system of proportional representation, and nothing in Article XIX, Ohio's congressional-redistricting amendment, imposes one as a standard against which a legislative-redistricting plan must be measured. In stark contrast to Article XI, which establishes the standards for adopting a General Assembly-district plan, Article XIX does not require a congressional-district plan to even *attempt* to provide proportionately representative districts. *See* Article XI, Section 6(B), Ohio Constitution.

**{¶ 109}** Equally suspect is the majority's conclusion that the map unduly divides counties. Its analysis addresses only four of Ohio's 88 counties and wholly disregards the divisions of townships and municipalities. Moreover, Article XIX, Section 2(B)(5) expressly authorizes the congressional-district plan to split 18 counties one time and five counties two times. The plan not only complies with that provision, it also splits counties the bare mathematical minimum number of times: 14. It is impossible to draw a map with equally populated districts that contains fewer county splits and still meets the other criteria of the amendment. So what the majority is essentially saying is: we don't like the legislature's choices of counties to divide; it should have divided different ones. But that's a matter of policy preference—it has nothing to do with the law.

**{¶ 110}** No doubt, there are those who will be quite happy about the policy choices that the majority makes today. But no one should lose sight of the fact that what the majority does today is make policy, not apply the law. While none of us question that the majority sincerely believes that what it is crafting constitutes good policy, we have grave concerns about the majority's untethered-by-law eagerness to wrest from the political branches of our government the authority that rightly belongs to them. "The document that the Court releases is in the form of a judicial opinion," *Bostock v. Clayton Cty.*, —— U.S. ——, 140 S.Ct. 1731, 1754, 207 L.Ed.2d 218 (2020) (Alito, J., dissenting), but the majority exercises political "will," not legal "judgment," *see* Alexander Hamilton, The Federalist No. 78.

***22 {¶ 111}** We believe that our authority is limited by the text of Article XIX and the constitutional restraints on the judicial power. Because the majority strays well beyond both, we respectfully dissent.[10]

## I. BACKGROUND

### A. The congressional-redistricting process

**{¶ 112}** In February 2018, the General Assembly enacted legislation to place on the ballot an amendment to the Ohio Constitution providing a new process for drawing congressional districts. The people of Ohio ratified the amendment in May 2018 with an effective date of January 1, 2021.

**{¶ 113}** Article XIX is designed to incentivize the political branches to reach bipartisan compromise on redistricting plans. It does this by providing that a plan that garners bipartisan, supermajority support lasts ten years while a plan passed by only a simple majority lasts four years. Article XIX, Sections 1(A), 1(C)(2), and 1(C)(3), Ohio Constitution. The amendment places primary responsibility for congressional redistricting on the General Assembly. *See* Section 1(A). Section 1(A) requires the General Assembly to pass a congressional-district plan by the affirmative vote of three-fifths of the members of each house in the legislature, including the affirmative vote of at least one-half of the members of each of the two largest political parties. If the plan is enacted by the required vote, it remains effective until the next year ending in the numeral one, i.e., ten years. *Id.*

**{¶ 114}** If the General Assembly fails to enact a plan by the requisite vote in September of a redistricting year, then the redistricting commission established in Article XI must adopt a congressional-district plan by a majority vote including at least two members of the commission who represent each of

the two largest political parties. Section 1(B). If that happens, the plan remains in effect for ten years. *Id.*

**{¶ 115}** If the commission fails to agree on a plan by October 31, then the General Assembly *must* pass a congressional-district plan in the form of a bill not later than November 30. Section 1(C)(1). The plan is effective for ten years if it is passed by a three-fifths vote in each house, including an affirmative vote of at least one-third of the members of each of the two largest political parties. Section 1(C)(2).

**{¶ 116}** Should the legislature fail to reach bipartisan consensus, Article XIX authorizes the General Assembly to pass a congressional-district plan by a simple majority vote of both houses. Section 1(C)(3). The penalty is that the plan lasts just four years. *See* Section 1(C)(3)(e). Such a plan must not "unduly favor[ ] or disfavor[ ] a political party or its incumbents," Section 1(C)(3)(a), or "unduly split governmental units," Section 1(C)(3)(b).

**{¶ 117}** The process repeats itself once the four-year plan expires. Article XIX, Section 1(D), (E), and (F). Further, when a congressional-district plan ceases to be effective, "the district boundaries described in that plan shall continue in operation for the purpose of holding elections until a new congressional district plan takes effect." Section 1(J).

***23 {¶ 118}** Article XIX, Section 2 provides additional requirements for a congressional-district plan. All plans must include single-member districts divided by population according to the congressional ratio of representation. Section 2(A)(1) and (2). The ratio is the population of Ohio (11,799,448 according to the 2020 federal decennial census) divided by the number of House seats apportioned to this state (15), which equals 786,629 or 786,630 people per district. Section 2(A)(2). Section 2 further states that the plan "shall comply with all applicable provisions of the constitutions of Ohio and the United States and of federal law," Section 2(B)(1), that "[e]very congressional district shall be composed of contiguous territory," Section 2(B)(3), and that "the boundary of each district shall be a single nonintersecting continuous line," *id.* Ten-year plans must contain compact districts, Section 2(B)(2), but a four-year plan requires only an attempt to make districts compact, Section 1(C)(3)(c).

**{¶ 119}** Section 2 of Article XIX also includes requirements for dividing counties, townships, and municipal corporations. When the county has a municipality or township with a population that exceeds the size of a congressional district, the authority drawing the districts "shall attempt to include a significant portion of that municipal corporation or township in a single district and may include in that district other [governmental units] that are located in that county and whose residents have similar interests as the residents of the municipal corporation or township." Section 2(B)(4)(a). When the population of a municipality or township falls between 100,000 and the size of a congressional district, the city or township "shall not be split," unless the county contains two or more such governmental units, in which case only the most populous "shall not be split." Section 2(B)(4)(b).

**{¶ 120}** "The authority drawing the districts may determine which counties may be split." Section 2(B)(5). However, "sixty-five counties shall be contained entirely within a district, eighteen counties may be split not more than once, and five counties may be split not more than twice." *Id.* Further, "[n]o two congressional districts shall share portions of the territory of more than one county, except for a county whose population exceeds four hundred thousand," Section 2(B)(7), and "[t]he authority drawing the districts shall attempt to include at least one whole county in each congressional district," unless compliance would violate federal law or the district is entirely within one county, Section 2(B)(8).

**{¶ 121}** Article XIX, Section 3(A) vests this court with "exclusive, original jurisdiction in all cases arising under this article." If a court invalidates a congressional-district plan, a congressional district, or group of districts, then the General Assembly must pass a new district plan that remedies the legal defects the court identified in the previous plan. Section 3(B). However, if the General Assembly fails to enact a new plan within a 30-day period, the Ohio Redistricting Commission is reconstituted and must adopt a compliant congressional-district plan within 30 days. Section 3(B) and (C). Once the General Assembly or the redistricting commission produces a new plan, it is to be used until the next time for redistricting. *Id.*

**B. The legislature enacts a redistricting plan that purports to maximize the number of competitive districts**

**{¶ 122}** Based on the most recent census, Ohio is allotted 15 seats in the U.S. House of Representatives, one fewer than in the previous census cycle. The census data arrived late and in unconsumable format, *see Ohio v. Raimondo*, 848 Fed.Appx.

187, 188 (6th Cir. 2021), and the General Assembly failed to meet the September 30 deadline to pass with bipartisan support a congressional-district plan good for ten years, *see* Article XIX, Section 1(A). The redistricting commission then had the month of October to enact a bipartisan redistricting plan but was unable to do so. Section 1(B).

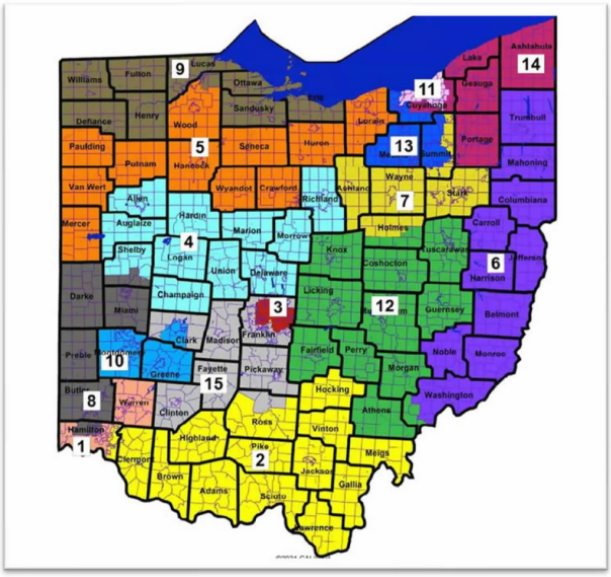
*24 **{¶ 123}** This left the General Assembly the month of November to enact a plan "in the form of a bill." Section 1(C)(1). After attempts to reach bipartisan consensus in the legislature failed, both houses passed a plan with simple-majority support. The bill was signed into law by the governor soon thereafter. *See* R.C. 3521.01 et seq. Because the plan was enacted by only a simple majority, the plan is to remain in effect for four years. Section 1(C)(3)(e).

**{¶ 124}** The General Assembly included in the legislation "an explanation of the plan's compliance with" Section 1(C)(3). Section 1(C)(3)(d). The following constitute its legislative findings: "The plan contains six Republican-leaning districts, two Democratic-leaning districts, and seven competitive districts"; only one district pairs incumbents, and they are members of the Republican party; "[t]he plan splits only twelve counties and only fourteen townships and municipal corporations"; and "visual inspection of the congressional district plan demonstrates that it draws districts that are compact." 2021 Sub.S.B. No. 258, Section 3, 733-734, available at https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb258/EN/05/sb258_05_EN?format=pdf (accessed Jan. 12, 2022) [https://perma.cc/DF75-WC9K]. The General Assembly reports that on each score, this plan improves upon the congressional-district plan enacted in 2011. The governor added his approval:

> SB 258 makes the most progress to produce a fair, compact, and competitive map. The SB 258 map has fewer county splits and city splits than these recent proposals and the current congressional map. The SB 258 map keeps Lucas and Stark counties, as well as the Mahoning Valley, whole within single congressional districts for the first time in decades, and also keeps the cities of Akron, Canton, Cincinnati, Cleveland, Dayton, and Toledo all whole within the same congressional map for the first time since the 1840s. With seven competitive congressional districts in the SB 258 map, this map significantly increases the number of competitive districts versus the current map.

Governor of Ohio News Releases, *Governor DeWine Signs Senate Bill 258* (Nov. 20, 2021), https://governor.ohio.gov/wps/portal/gov/governor/media/news-andmedia/governor-dewine-signs-senate-bill-258-11222021 (accessed Jan. 12, 2022) [https://perma.cc/9JLS-X2W6].

**{¶ 125}** Here is the plan:




**{¶ 126}** Start with the basics. Each of the 15 districts are virtually equipopulous, containing either 786,629 or 786,630 people. The plan splits 12 counties, down from 23 in the 2011 plan. Two counties—Hamilton and Cuyahoga—are split twice. Lucas and Stark counties are kept whole for the first time in decades. The plan splits 14 townships and municipalities, down from 35 in the 2011 plan. Of Ohio's cities not naturally split by county lines, 98 of the largest 101 are unsplit. Columbus accounts for one split because the state and federal Constitutions require it. *See* Sections 2(B)(1) (incorporating the one-person, one-vote requirement) and 2(B)(4)(a); *see also Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (same).

**{¶ 127}** The seven competitive districts are District 1, District 6, District 9, District 10, District 13, District 14, and District 15. Those districts respectively encompass greater Cincinnati, Ohio's eastern corridor, Toledo and surrounding counties, greater Dayton, greater Akron, northeast Ohio, and central Ohio between Cincinnati and Columbus. District 6, notably, was adjusted to keep the entire Mahoning Valley (all of Mahoning, Trumbull, and Columbiana counties) in a single district.

*25 **{¶ 128}** By any measure, several of the districts are hypercompetitive. In the Cincinnati-area District 1, for

example, statewide federal-election data from 2012 through 2020 ("FEDEA") show a district with a 51.5 percent Republican advantage; yet in the most recent election, the Democratic presidential candidate won the district. The Toledo-area District 9, in contrast, shows only a 47.7 percent Republican average, yet the Republican presidential candidate carried the district in the most recent election. The Dayton-area District 10 has a 52.2 percent Republican federal average and gave the Republican presidential candidate 51.8 percent of the vote in the last election. The Akron-area District 13 may be the most competitive of all, manifesting a 48.6 percent Republican average and giving the Democratic presidential candidate a razor-thin 50.4 percent majority in the last presidential election.

**{¶ 129}** Each of the seven competitive districts, whether it leans left or right, is more competitive than it was in the 2011 plan. That leaves as noncompetitive the eight districts encompassing Cleveland, Columbus, Canton, and Ohio's rural regions. More than 46 percent of Ohioans live in competitive districts where candidate strength and voter turnout will dictate results; the rest are overwhelmingly likely to live in districts where their party has a decided advantage.

**{¶ 130}** Two groups of petitioners filed complaints in this court asserting that the enacted plan violates Article XIX of the Ohio Constitution. Petitioners assert the same two causes of action: first, the plan "unduly favors or disfavors a political party or its incumbents" in contravention of Section 1(C)(3)(a); second, the plan "unduly split[s] governmental units," contravening Section 1(C)(3)(b). The primary thrust of their claims is that under the plan, Democratic candidates will fail to win what they consider to be a fair number of seats in Ohio and the plan thus "unduly" favors the Republican party. They also claim that the plan unduly splits governmental units in Hamilton, Cuyahoga, and Summit Counties, creating competitive seats in those areas rather than seats where Democrats have an electoral advantage.

## II. ANALYSIS

**{¶ 131}** The two questions before this court—whether the enacted congressional-district plan "unduly favors or disfavors a political party or its incumbents" or "unduly split[s] governmental units," Article XIX, Section 1(C)(3)(a) and (b), Ohio Constitution—are questions of first impression. Words in the Ohio Constitution mean what they meant to the layperson at the time of enactment. We are to accord Article XIX its original public meaning, free from policy-oriented gloss. *Accord Rutherford v. M'Faddon* (1807) (unpublished), available at https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2001/2001-Ohio-56.pdf (jury-trial right has the meaning it had "at the time of the framing [of] the constitution").

### A. The applicable standard

**{¶ 132}** The questions in these cases are the same for both claims: Is it "undu[e]"? Does the enacted congressional-district plan "unduly favor or disfavor"? Does the plan "unduly split"?

**{¶ 133}** We first discern what we can about the adverb "unduly"—which is an "amorphous" word, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 985, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part)—and then apply those insights to analyze the alleged partisan favoritism and governmental-unit splits at issue.

**{¶ 134}** The Constitution does not define "unduly," *see contra* Article XIX, Section 2(C)(1) (defining "split"), so we turn first to the dictionary, *see Centerville v. Knab*, 162 Ohio 623, 2020 -Ohio- 5219, 166 N.E.3d 1167, ¶ 24. "Undue" means "[e]xcessive or unwarranted," *Black's Law Dictionary* 1838 (11th Ed.2019), "exceeding or violating propriety or fitness," *Webster's Third New International Dictionary* 2491 (2002), and "contrary to justice, right, or law," *id.* (with "archaic" status label). The parties agree on these definitions.

***26 {¶ 135}** With these definitions come two basic ideas. Something can be undue simply because it is excessive or too much. Thus, *Webster's* provides the example, " 'his sartorial equipment stops just short of undue elegance.' " *Id.*, quoting Philip Hamburger. But "undue" also connotes the sense of being unwarranted by valid considerations. Thus, when we talk about exercising "undue influence," we don't simply mean that one had too much influence over another; we also mean that there was something improper about the influence. *See West v. Henry*, 173 Ohio St. 498, 501, 184 N.E.2d 200 (1962).

**{¶ 136}** Under either sense, "undue" is a comparison word. Whether something is undue depends on how much of something is "due" or appropriate. So before we can say whether a plan "unduly" favors a political party, we must

have some baseline understanding of what a fair plan that does not favor one political party would look like. As the United States Supreme Court explained in *Rucho v. Common Cause*, "it is only after determining how to define fairness"—that is, determining a baseline—"that you can even begin to answer the determinative question: 'How much is too much?' At what point does permissible partisanship become unconstitutional?" 588 U.S. ——, ——, 139 S.Ct. 2484, 2501, 204 L.Ed.2d 931 (2019). Only with some understanding of what the baseline is can one answer the question whether favoritism is excessive or exists for an improper reason.

**{¶ 137}** Indeed, by prohibiting only "undu[e]" favoritism, Section 1(C)(3)(a) presupposes that *some* degree of partisan favoritism and *some* amount of governmental-unit splitting is permissible. Only that which is "undu[e]" is impermissible. *See State ex rel. Carmean v. Hardin Cty. Bd. of Edn.*, 170 Ohio St. 415, 422, 165 N.E.2d 918 (1960) ("It is axiomatic in statutory construction that words are not inserted into an act without some purpose"); *compare* Article XIX, Section 1(C)(3)(a) and (b), Ohio Constitution *with* Article III, Section 20(a), Florida Constitution (proscribing partisan "intent" in redistricting).

**{¶ 138}** So what is the benchmark against which "unduly" is to be measured? It cannot be whether one party is likely to win more seats than the other in Congress. Imagine, for example, that every precinct in Ohio is a perfect microcosm of the state with each precinct having 54.5 percent of voters who tend to vote for a generic Republican candidate and 45.5 percent for a generic Democratic candidate.[11] In such a scenario, no matter how one draws the districts, in a typical year Republicans could win every last district. But no one could seriously say that the redistricting map "unduly" favored the Republican party.

**{¶ 139}** The majority thinks that it has a way to fill in this blank spot in the constitutional text. It announces that although the Constitution "does not prohibit a plan from favoring or disfavoring a political party or its incumbents to the degree that inherently results from the application of neutral criteria, * * * it does bar plans that embody partisan favoritism or disfavoritism in excess of that degree—i.e., favoritism not warranted by legitimate, neutral criteria." Majority opinion at ¶ 40. The problem, though, is that this rule still fails to establish a benchmark. Saying "not warranted by legitimate, neutral criteria" cannot be the solution in itself, because there are a lot of ways a plan could comply with "legitimate, neutral criteria." Indeed, no one disputes that the current plan complies with all the neutral criteria in the Constitution (population equality, division of political subdivisions, etc.), as, no doubt, might a good many different plans. So to engage in the majority's exercise, one still needs some idea of the baseline that the favoritism is to be measured against. *See Rucho*, 588 U.S. at ——, 139 S.Ct. at 2505, 204 L.Ed.2d 931.

***27 {¶ 140}** Though the majority does not plainly state its baseline, its analysis makes clear the baseline that it is using: the results that would be obtained under a system of proportional representation. Popular in Europe, proportional representation is a system of apportionment "designed to represent in a legislative body each political group or party in optimum proportion to its actual voting strength in a community." *Webster's* at 1819. So what the majority is really saying is that a plan unduly favors a political party if it fails to achieve proportional representation for reasons other than the application of neutral redistricting criteria.

**{¶ 141}** The majority opinion leaves little doubt that a proportional-representation system is its baseline. It begins its application of the standard it has adopted by telling us, "As a starting point, we examine how the two major political parties are expected to perform under the enacted plan." Majority opinion at ¶ 42. It then supplies an answer: "Dr. Rodden and Dr. Warshaw both found that Republicans are likely to win 80 percent of the congressional seats (12 out of 15) under the enacted plan, even though Republicans have received about 53 percent of the vote in recent statewide elections." *Id.* at ¶ 47. It next looks to testimony from petitioners' experts about metrics that measure the extent to which a plan achieves proportional representation—the "efficiency gap," the "mean-median gap," "declination," and "partisan symmetry"—and uses these proportional-representation metrics to conclude that the plan violates constitutional standards. *Id.* at ¶ 63. The majority wraps up by decrying the plan's failure to meet its proportional-representation standard: a stacked deck "perhaps explains how a party that generally musters no more than 55 percent of the statewide popular vote is positioned to reliably win anywhere from 75 percent to 80 percent of the seats in the Ohio congressional delegation." *Id.* at ¶ 100.

**{¶ 142}** The problem, though, is that nothing in Article XIX mandates this proportional-representation standard. While Article XI directs the Ohio Redistricting Commission to attempt to draw a General Assembly–district plan in which the statewide proportion of districts that favors each political

party "correspond[s] closely to the statewide preferences of the voters of Ohio" based on a proportionality formula, there is no similar language in Article XIX.

**{¶ 143}** Thus, what the majority does is completely untethered from the text of Article XIX. When it says that the plan unduly favors the Republican Party, what it means is that the plan unduly favors the Republican Party *as compared to the results that would be obtained if we followed a system of proportional representation.*

**{¶ 144}** So where does that leave us? What the majority does has no relation to the Constitution; the majority simply substitutes its own sense of fairness for the text of Article XIX. That's obviously wrong, but what is the proper course?

**{¶ 145}** Respondents Cupp and Huffman argue that it is impossible to derive from "unduly favors" any judicially manageable standard and that as a result, we should declare the case to be nonjusticiable. Unwittingly, the majority opinion makes a strong case that they are right. Indeed, the majority offers no principled, judicially manageable standard that can be neutrally applied without respect to the interests of the parties in the case. *See Rucho*, 588 U.S. at ——, 139 S.Ct. at 2498, 204 L.Ed.2d 931.

**{¶ 146}** "[T]he judicial responsibility to avoid standardless decisionmaking is at its apex in ' "the most heated partisan issues." ' " *June Med. Servs., L.L.C. v. Russo*, 591 U.S. ——, ——, 140 S.Ct. 2103, 2179, 207 L.Ed.2d 566 (2020) (Gorsuch, J., dissenting), quoting *Rucho* at ——, 139 S.Ct. at 2499, quoting *Davis v. Bandemer*, 478 U.S. 109, 145, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). In *Rucho*, after struggling "without success over the past several decades to discern judicially manageable standards for deciding" partisan-gerrymandering claims, the United States Supreme Court held that federal courts would no longer entertain such claims. *Rucho* at ——, 139 S.Ct. at 2508. Just recently, our sister court in the Badger State reached a similar conclusion, pronouncing certain gerrymandering claims arising under the Wisconsin Constitution to be nonjusticiable. *Johnson v. Wisconsin Elections Comm.*, 399 Wis.2d 623, 2021 WI 87, 967 N.W.2d 469. "Claims of political unfairness in the maps present political questions," the court held, "not legal ones." *Id.* at ¶ 4.

***28 {¶ 147}** Nonetheless, we are loath to simply declare that this court may never consider a claim that a plan unduly favors a political party or unduly divides political subdivisions. For three reasons, we decline to reach the same nonjusticiability holding as our sister and federal high courts. The first reason is that we need not: as we shall make clear below, even assuming arguendo the justiciability of petitioners' claims, their claims fail under *any reasonable* measure.

**{¶ 148}** Our second reason follows from the Supreme Court's example. *Rucho* was not the first case in its line. It was only after "considerable efforts" over decades and no fewer than one dozen justices' opinions on the topic that the court ultimately deemed the question a political one. *Gill v. Whitford*, —— U.S. ——, 138 S.Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (citing cases); *Rucho*, 588 U.S. at ——, 139 S.Ct. at 2496-2498, 204 L.Ed.2d 931. This court, by contrast, is asked to adjudicate gerrymandering for the first time. Although the majority comes up short today, we do not rule out that "in another case a standard might emerge," *Vieth v. Jubelirer*, 541 U.S. 267, 312, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (Kennedy, J., concurring).

**{¶ 149}** Lastly, and most fundamentally, the Ohio Constitution provides more guidance than does the United States Constitution. The Ohio Constitution expressly confers on this court "exclusive, original jurisdiction in all cases arising under this article." Article XIX, Section 3(A). Article XIX says that a plan shall neither "unduly favor[ ] or disfavor[ ] a political party" nor "unduly split governmental units," Section 1(C)(3)(a) and (b), and that it is this court's job to identify "legal defects," Section 3(B)(1). "At no point" did the Framers of the federal Constitution "suggest[ ] that the federal courts had a role to play." *Rucho*, 588 U.S. at ——, 139 S.Ct. at 2496, citing Hamilton, The Federalist No. 59. Ohio's story is different. The Ohio Constitution assigns this court a role to play in congressional districting.

**{¶ 150}** Although we are not willing to say such claims are never justiciable, we are cognizant that by failing to provide any type of baseline by which the partisan tilt of a plan is to be measured, the Ohio Constitution vests considerable discretion in the political branches. This follows for several reasons. First, Article XIX explicitly vests the primary responsibility for drawing district lines in the General Assembly. *See* Section 1(A) ("Except as otherwise provided in this section, the general assembly shall be responsible for the redistricting of this state for congress based on the prescribed number of congressional districts apportioned to the state pursuant to Section 2 of Article I of the Constitution of the United States"). Second, our precedent in redistricting cases applies a strong presumption that a plan is constitutional. *Wilson v.*

*Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 22. Indeed, we have even said that "[i]n the absence of evidence to the contrary, we presume that the [redistricting authority] properly performed its duties in a lawful manner." *Id.* at ¶ 24. Third, the Ohio Constitution entrusts to us only the "judicial power." Article IV, Section 1. The legislative power is reserved to the legislature and to the people through the initiative and the referendum. Article II, Section 1, Ohio Constitution. Only the people have the authority to amend our Constitution. *Id.* at Section 1a. We have no authority to add terms and requirements to Article XIX that the people have not put there.

***29 {¶ 151}** With these principles in mind, we now turn to the question whether petitioners have met their burden to show that the congressional-redistricting plan violates Article XIX's requirement that a plan not "unduly favor[ ] or disfavor[ ] a political party," Section 1(C)(3)(a), or "unduly split governmental units," Section 1(C)(3)(b). Petitioners have failed to establish that the plan violates either provision under any standard of review, much less the beyond-a-reasonable-doubt standard that the majority opinion holds is applicable in this case.

**B. Undue partisan favoritism**

**{¶ 152}** By any measure, petitioners have failed to meet their burden to establish a violation of the Constitution's requirement that a plan not unduly favor a political party.

**{¶ 153}** Begin with a point of agreement by all: of Ohio's 15-seat allotment, six districts will be "solidly Republican" and two will be "solidly Democratic," majority opinion at ¶ 43. The two blue districts encompass Cleveland and Columbus. The six red districts occupy more rural regions of the state. These eight nonnegotiable districts are the result of political geography—Republican voters disperse more uniformly about the state while Democratic voters cluster in urban centers—and only an extreme gerrymander could alter this arrangement.

**{¶ 154}** The present dispute involves the seven remaining congressional districts. Accompanying the General Assembly's enacted plan is a statement declaring that the seven districts in question were drawn to be "competitive." Our analysis proceeds as follows: (1) the maximization of competitive districts is a permissible goal under Article XIX, (2) this plan attempts to create competitive districts, (3) the General Assembly's determination of competitiveness was reasonable, and therefore, (4) the plan does not violate Section 1(C)(3)(a) of Article XIX.

*1. It is permissible to draw competitive districts*

**{¶ 155}** Since the founding, congressional districting has been the province of state legislatures. *See Rucho*, 588 U.S. at ——, 139 S.Ct. at 2495-2496, 204 L.Ed.2d 931. Article XIX of the Ohio Constitution provides neutral districting guidelines in Section 2(B) and places additional restrictions on four-year maps in Section 1(C)(3) but is largely discretion-conferring on the legislature (or redistricting commission).

**{¶ 156}** Generally, those seeking to end partisan gerrymandering have leveled two primary criticisms. First, they claim that partisan gerrymandering unfairly entrenches one political party in power by drawing lines that maximize that party's political representation.

**{¶ 157}** Second, critics assert that partisan gerrymandering deprives voters of meaningful elections by creating districts with lopsided majorities of voters of one political persuasion or the other. Doing so depresses voter interest and turnout because voters don't feel as if their votes matter. Drawing districts in this manner discourages political compromise and leads to increased polarization. This is because when a district is heavily Democratic or Republican, there is no need from an electoral standpoint for a candidate (or sitting representative) to appeal to the minority. The most important election is often the primary. *See* Jeffrey S. Sutton, *Who Decides? States As Laboratories of Constitutional Experimentation* 18 (2022) ("If we make nearly 90% of congressional districts safe for one political party or the other, that makes the party primaries nearly the only elections that matter, elections that occur long before the first Tuesday after November 1"). Rather than cater to the median, moderate voter, a candidate (or representative) is incentivized to appeal only to his or her own political base.

***30 {¶ 158}** These criticisms suggest two very different objectives that one might have in crafting a redistricting plan. To deal with the first, one could try to create a redistricting map that would ensure something akin to proportional representation. The idea would be to create a map that guarantees representatives who mirror as closely as possible the partisan makeup of the state. This is the objective sought by petitioners in these cases.

**{¶ 159}** To deal with the second criticism, though, mapmakers would need to create as many closely divided (or competitive) districts as possible. This is the objective that the General Assembly purports to have pursued.

**{¶ 160}** The rub is that to a large degree, the objectives are mutually exclusive. If mapmakers want to ensure representation that looks like the partisan makeup of the state, then they need to draw districts that are certain to favor one side or the other. But if they want to maximize competitive districts, then they need to draw districts that they aren't sure which side will win. *Rucho*, 588 U.S. at ——, 139 S.Ct. at 2500, 204 L.Ed.2d 931.

**{¶ 161}** In this case, the legislative respondents assert that they sought to maximize competitive districts. The first question we must answer is whether this is permissible under Article XIX. We are convinced that it is.

**{¶ 162}** We begin with the obvious. In the abstract, congressional districts that are competitive, by definition, do not unduly favor or disfavor a political party. The entire idea behind drawing competitive districts is to afford candidates from either party legitimate chances of election, to place the political power with the electorate, where it belongs.

**{¶ 163}** Competitive districts are in some ways the opposite of gerrymandered districts. The prototypical gerrymander involves "packing" certain districts in order to "crack" others. The stratagem is to concede a few districts by maximal margins in order to win more districts by narrower margins. In districts drawn to be competitive, the winner won't be known until the polls are closed and the votes tallied. This is democracy as we know it. Competitive districts are widely considered a laudable objective, the sort of objective voters desire; they do not unduly favor or disfavor political parties but allow the electorate to elect.

**{¶ 164}** That is not to say that the text of Article XIX mandates that mapmakers maximize competitive districts. Indeed, unlike Article XI, Section 6(B), nothing in Article XIX prescribes the General Assembly's goal in drawing congressional maps. The Article XIX provisions at issue impose negative restraints—what not to do. That leaves map-drawers tremendous leeway to target various goals in executing that function.

**{¶ 165}** Petitioners' experts have introduced statistical measures designed to approximate one concept of fairness. They all use as their baseline the idea that a plan is fair when it achieves a result that resembles proportional representation. One such measure is the "efficiency gap"—the comparative measure of wasted votes, votes cast toward a losing candidate or unnecessarily toward a winning candidate. *See* majority opinion at ¶ 63. In a perfectly efficient map, there would be no wasted votes and proportional representation would be achieved—a party's representation in Congress would exactly match its percentage of the statewide vote. Another measure used by petitioners' experts is partisan symmetry, an explicit measure of proportional representation that compares a party's statewide vote share to the percentage of districts it holds. We are also told about the "mean-median gap" and "declination," other measures that are similarly based on a proportional-representation ideal. *See id.* at ¶ 63 (defining the measures). Had the General Assembly sought to optimize any or several of these measures, we have little doubt that such a plan would satisfy constitutional standards. And so too would a plan that sought to maximize proportionally representative congressional districts.

***31 {¶ 166}** But there is nothing in the Ohio Constitution that mandates any of these things as a goal. And there is nothing in the Constitution that precludes mapmakers from seeking to maximize competitive districts. Thus, we conclude that the General Assembly did not violate the Constitution by prioritizing the creation of competitive districts over other objectives, such as achieving proportional representation.

*2. The General Assembly pursued competitive districts*

**{¶ 167}** The General Assembly found that the plan contains "seven competitive districts." 2021 Sub.S.B. No. 258, Section 3. When the governor signed the bill, he stated: "With seven competitive congressional districts in the SB 258 map, this map significantly increases the number of competitive districts versus the [2011] map." Governor of Ohio News Releases, *Governor DeWine Signs Senate Bill 258*, https://governor.ohio.gov/wps/portal/gov/governor/media/newsand-media/governor-dewine-signs-senate-bill-258-11222021 (accessed Jan. 12, 2022) [https://perma.cc/7QFL-ZSYY]. A majority of both houses of the legislature joined by the state's chief executive officer thus agree that the seven districts in question are competitive.

**{¶ 168}** The majority asserts that "competitiveness was offered here as a post hoc rationalization." Majority opinion at ¶ 45. But nothing in the record backs that up. Before

drawing up the plan, Senate President Huffman and Senators Rob McColley, Vernon Sykes, and others heard public testimony regarding congressional redistricting. Among the topics debated was defining "competitive." During that debate, a representative of Fair Districts Ohio said: "[T]here are going to be tradeoffs. But just because there's a creation of a few more competitive districts, that doesn't mean that those districts aren't compact, don't keep counties together." Later, Senator Sykes asked another citizen what in terms of percentages he "consider[ed] to be competitive." House Speaker Cupp expressed concern that championing competitive districts might lead to increased polarization within districts.

**{¶ 169}** The person primarily responsible for drawing the eventually enacted map, Raymond DiRossi, stated in a deposition: "[T]here was a tremendous amount of public testimony about the existence of competitive districts and what type of range would be used to determine what was a competitive district. And I know [Senator McColley] had put a lot of thought into that." Later he explained, "[T]hat's the point, that we're trying to draw competitive districts now; whereas, the [2011] map doesn't have them."

**{¶ 170}** All of this goes to demonstrate that competitive districts were front of mind for the General Assembly before and during the map-drawing process. The majority may prefer a different objective—namely, proportional representation—but competition within districts is the valid interest respondents have always asserted to justify the enacted plan.

*3. The determination of competitiveness was reasonable*

**{¶ 171}** Still there remains a question of fact whether the seven districts under review *actually* are competitive. The majority opinion correctly observes that Article XIX does not "prescribe[ ]" competitiveness, nor define it, and we are "forbid[den]" from "adding to the text." Majority opinion at ¶ 45. Because we agree with the majority that "Article XIX itself does not * * * provide any calculable measure for it," *id.*, competitiveness is not this court's measure to define.

***32 {¶ 172}** We are guided by a " 'universally recognized principle' " by which this court has long abided:

> "[A] court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power."

*Brady v. Safety-Kleen Corp.*, 61 Ohio St.3d 624, 632, 576 N.E.2d 722 (1991) (plurality opinion), quoting *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.*, 139 Ohio St. 427, 438, 40 N.E.2d 913 (1942). Just as with congressional redistricting, the General Assembly is "entrusted with making complicated decisions about our state's educational policy," *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 73. In that realm we have said, "[P]olicy decisions are within the purview of [the General Assembly's] legislative responsibilities, and that legislation is entitled to deference." *Id.* That principle of deference to legislative prerogatives must apply with equal force to the congressional-district plan before us today.

**{¶ 173}** The General Assembly chose to define a competitive district as one within 4 percent of a coin flip. A district with a projected 53-47 partisan split, in either direction, is considered competitive. A 55-45 split is not. Senator McColley and Senate President Huffman, the lead sponsors of the districting plan, arrived at this number after taking considerable public testimony. What's important for judicial-review purposes, though, is that plus or minus 4 percent is the range that the General Assembly as a legislative body countenanced by enacting this map "in the form of a bill," Article XIX, Section 1(C)(1), Ohio Constitution.

**{¶ 174}** In determining the partisan propensity of a district, the drafters of the enacted plan relied upon a data set ("the FEDEA index") comprised of all the statewide federal elections that occurred in the last decade: the 2012, 2016, and 2020 presidential elections and the 2012, 2016, and 2018 senatorial contests. The plan also took measures to, when feasible, avoid splitting counties and placing two incumbents in the same district ("double bunking").

**{¶ 175}** The result was a congressional-district plan with seven—the maximum—competitive districts, by the General Assembly's definition, with 14 total county splits and one doubly bunked district that contains two incumbents.[12] To be thorough, the seven FEDEA competitive districts are District 1 (51.5-48.5%), District 6 (52.9-47.1%), District 9 (47.7-52.3%), District 10 (52.2-47.8%), District 13 (48.6-51.4%), District 14 (53.2-46.8%), and District 15 (53.7-46.3%). Of the seven competitive districts, two are plus or minus 2 percent, five are plus or minus 3 percent, and all are

plus or minus 3.75 percent. And Democratic candidates have fared well recently in these seven competitive districts. Out of the six statewide federal elections since 2012, a Democratic candidate has won in each district, in some districts securing more than 59 percent of the vote. Competitive indeed.

*33 **{¶ 176}** For reference, the other plans presented to the legislature included fewer competitive districts. The House and Senate minority party offered separate plans, each with just five competitive districts.

**{¶ 177}** Petitioners respond that plus or minus 4 percent is an arbitrary measure of competitiveness and that FEDEA is not the best index. On the first score, of course the measure (like any such measure) contains a degree of arbitrariness. That is precisely why judicial intervention is unwarranted. The General Assembly, this state's policymaking body, chose that range. We have no authority or competence to monitor the dividing line between competitive and not. Would a plus-or-minus-3-percent boundary have produced more competition? Of course. Does the Constitution mandate that? Of course not.

**{¶ 178}** The General Assembly purported to draw seven competitive districts and defined competitive as within 4 percent of 50/50. All that we as judges can say is that based on the record before us, using plus or minus 4 percent as the determinative measure was not unreasonable. Had the General Assembly chosen an inflated number, say plus or minus 15 percent, then we could fairly intervene to call it unreasonable as a matter of law to define as "competitive" a projected 65-35-percent district. We must remember that the FEDEA index supplies ex ante *projections*, not ex post results. The index does not take into account the relative political experience and ability of the candidates running vis-à-vis the past elections, changes to national and statewide circumstances and attitude, party platform, control over the White House, and dozens of additional factors—all the way down to gas prices—that can sway a given election regardless of what the data predict. To this point, one expert reports that "in the 2020 congressional election, the actual results in Ohio's sixteen congressional districts varied, on average, by 5.8 percentage points from the average of the 2011-2020 partisan index," including variances upwards of 15 percentage points. Exhibit No. 36, Expert Report of Dr. Michael Barber at 18.

**{¶ 179}** And lawmakers routinely make line-drawing decisions akin to the plus-or-minus-4-percent line. Think budgetary decisions. The General Assembly allocates funds. Is the decision to allocate $1 million instead of $1.2 million "arbitrary" in one sense of the word? Yes. But is it arbitrary in the judicial-review sense—i.e., arbitrary and capricious as a matter of law? Again, of course not. Or think speed limits. Why 35 miles per hour and not 30? Why is 270 days the statutory limit to conduct a speedy felony trial? *See* R.C. 2945.71(C)(2). Why not 250 days? The point is this: drawing policy-oriented lines is at the heart of the legislative power. *Vieth*, 541 U.S. at 291, 124 S.Ct. 1769, 158 L.Ed.2d 546. Save for unreasonableness, the judiciary is to steer clear.

**{¶ 180}** The majority and petitioners do not contend, and experts have not reported, that 4 percent is too wide a margin to qualify as competitive. Suffice it to say that defining "competitive" as within 4 percent of dead even is not unreasonable as a matter of law.

**{¶ 181}** Then comes the refrain that the FEDEA index is flawed, that other indices provided a more accurate account of where voter sentiments lie. The chief complaint seems to be that by using only federal elections, the index omits the statewide elections that occurred in 2014. But we are hard-pressed as judges to say that the legislature was wrong in choosing to use federal-election data to predict voter tendencies in federal elections. Indeed, one might reasonably argue that including 2014 state-election data would skew the data set. After all, that year it was revealed that the Democratic gubernatorial candidate did not have an Ohio driver's license,[13] leading to an election in which he received only 33 percent of the vote.[14] The down-ballot races followed suit with the Democratic candidates for attorney general, secretary of state, treasurer, and auditor receiving 38.5, 35.5, 43.4, and 38.3 percent, respectively. 2014 Elections Results, https://www.ohiosos.gov/elections/election-results-and-data/2014-electionsresults/?__cf_chl_jschl_tk__=5BNyaJhQ5eJBu.i7qqj_uZJzFJrSNgYduJ.hClWxzvgaNycGzNCP0 (accessed Jan. 12, 2022).

*34 **{¶ 182}** Importantly, in contrast to Article XI, which tells the redistricting commission exactly what type of election data to use in drawing a General Assembly-district plan, *see* Article XI, Sections 6(B) and 9(D)(3)(c)(i), Ohio Constitution, the congressional-redistricting amendment, Article XIX, is silent on that issue. The point is not that we need to resolve the debate about whose data set is better but, rather, that this is exactly the kind of question that is entrusted to the General Assembly, not to the courts.

**{¶ 183}** Drs. Christopher Warshaw, Kosuke Imai, and Jowei Chen all say that the plan could have been even more competitive. No doubt this is true. But bring in any group of expert economists, and they will tell you that the tax code is suboptimal. Environmental scientists will report that the pollution laws are inadequate. And criminologists will demonstrate that the sentencing laws do not minimize recidivism.

**{¶ 184}** Legislating is—and was designed to be—an act of give-and-take, compromise. *See* Hamilton, The Federalist No. 85. The question we must answer is not whether the plan is *optimally* competitive. It is whether the plan is *sufficiently* competitive to avoid violating the Constitution's prohibition of undue favoritism. And we are guided by the principles of legislative deference this court has long honored in policy-oriented matters.

**{¶ 185}** The General Assembly determined that the FEDEA data comprise an appropriate index of district competitiveness. And it gave its reasons. The FEDEA index (which, recall, factors in recent statewide elections to federal office) was used because the plan is for a *federal* election. The General Assembly chose a data set that is smaller but, in its determination, more precise than others available. Electoral data including statewide elections to state offices risked incorporating inputs irrelevant to federal elections: purely local voter motivations. Presidents and senators face the same issues with which U.S. representatives must grapple, but that is not the case for governors and state auditors.

**{¶ 186}** We cannot say that the General Assembly acted unreasonably by enacting a plan based on the FEDEA index. The Constitution does not prohibit the legislature from making the determination that it made. That leaves us no reason to quibble with the legislature's determination that the plan creates seven competitive districts.

*4. The majority's flawed analysis*

**{¶ 187}** Our deferential approach looks nothing like the majority's. This is because the majority undertakes the legislative act of evaluating the plan from a policy-oriented perspective, not a legal one. The majority's approach is undergirded by an "instinct" that proportionality is the essence of fairness, *Rucho*, 588 U.S. at ——, 139 S.Ct. at 2499, 204 L.Ed.2d 931. But, as we have explained, nothing within Article XIX mandates proportional representation as a standard against which a plan should be measured. To the contrary, proportional representation is a " 'norm that does not exist' in our electoral system" generally, *id.*, quoting *Davis v. Bandemer*, 478 U.S. 109, 159, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (O'Connor, J., concurring), or in Article XIX specifically. In assuming that proportional representation is the ideal, the majority ignores the fact that such a norm "comes at the expense of competitive districts and of individuals in districts allocated to the opposing party," *id*. at ——, 139 S.Ct. at 2500. The General Assembly and respondents never proclaimed to have sought proportionality; they pursued the alternative but equally permissible goal of competitive districts.

***35 {¶ 188}** The majority concludes that the plan favors the Republican Party unduly—to a degree "exceeding what is warranted by Article XIX's line-drawing requirements and Ohio's political geography," majority opinion at ¶ 41—by looking across an array of measures: expected performance, treatment of selected counties, and statistical measures of partisanship. We are not told which one of these considerations is conclusive but are told to trust that taken altogether, the map is unconstitutional.

**{¶ 189}** As far as the plan's expected performance, the majority highlights expert reports submitted by petitioners that it claims show that "the enacted plan is not nearly as competitive as Senate President Huffman and House Speaker Cupp claim that it is." *Id.* at ¶ 46. It cites reports of three of petitioners' experts that predict that Republicans will win 12 seats under the plan and another report predicting that Republicans will win 11 seats. Some experts factored in an "incumbency advantage" in their predictions. (One has to wonder about the logic that says a district should not be characterized as "competitive" because it contains an incumbent who is popular with voters in a district.) Two of the experts cited by the majority prepared simulated maps that they contend show that the enacted plan is a statistical outlier favoring Republicans. None of these maps, however, have been submitted as part of the record, so we are little able to evaluate them. Another flaw, most of these experts used election results from statewide elections instead of the FEDEA data set relied on by the legislature.

**{¶ 190}** The majority leans heavily on the expert report of the Harvard statistician Dr. Imai, for his report is based on the FEDEA index. But Dr. Imai's report suffers a more fundamental defect. His hypothetical districts were not equipopulous. In generating 5,000 simulated maps based on

FEDEA data, Dr. Imai allowed for up to "0.5% deviation from population parity," or roughly a 4,000-person variance. Expert Report of Kosuke Imai, Ph.D. In accordance with Article XIX, Section 2(A)(2), however, the General Assembly constructed districts varying by no more than one person —that's a 0.00013% deviation, one ten-thousandth of a percentage point. Achieving absolute population equality in congressional districts is, after all, a "paramount objective of apportionment." *Karcher v. Daggett*, 462 U.S. 725, 732-733, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983). To compare Dr. Imai's maps to the enacted plan (as is central to the majority's analysis) is rather like comparing watermelons to walnuts.

**{¶ 191}** Abruptly, the majority transitions from summarizing the expert evidence to announcing that it "conclude[s] that the body of petitioners' various expert evidence significantly outweighs the evidence offered by respondents as to both sufficiency and credibility, compelling beyond any reasonable doubt the conclusion that the enacted plan excessively and unwarrantedly favors the Republican Party and disfavors the Democratic Party." Majority opinion at ¶ 51. This is not legal analysis; it is cherry-picking evidence from an expansive record to meet policy preferences, crediting it, and regurgitating the language of a generic holding based on an illegitimate legal standard. More is required.

**{¶ 192}** Indeed, the majority's focus on expected performance underscores that it is simply assessing the plan for how closely it comes to achieving proportional representation. The expert reports pertaining to expected performance are couched as "conclusions" but are better described as *informed predictions.* The unspoken reality is that the majority clings to expected-performance reports because they predict that statewide votes per party may not perfectly correlate with seats elected per party. But the Constitution does not require such a correlation. The majority also fails to account for the fact that political geography dictates the outcome of eight out of 15 districts. Moreover, because the seven remaining districts are competitive, there is no guarantee that even the predictions of experts will turn out to be accurate.

***36 {¶ 193}** With respect to competitiveness, these extrapolations at most establish that the districts could have been more competitive. Nowhere do the reports establish that the enacted districts are uncompetitive. To do so would require evidence that a 4 percent variance is too wide or the FEDEA data too misleading. Even Dr. Imai's flawed report, in which the majority is so heavily leveraged, does not refute that seven districts are competitive; it simply suggests that Republican candidates may win a number of these competitive districts.

**{¶ 194}** Next, the majority states that the splits of Cuyahoga, Franklin, and Hamilton Counties unduly favor the Republican party. Dr. Imai reports that in Hamilton County, the Democratic vote share is cracked across three districts. Drs. Chen and Rodden explain that these splits are not necessary. The question, however, is whether they are *permissible.* The majority's primary complaint is that the strongly Democratic city of Cincinnati is in a district that contains the entirety of Warren County. But there is a perfectly valid justification for this: the Ohio Constitution requires an "attempt to include at least one whole county in each congressional district." Article XIX, Section 2(B)(8).

**{¶ 195}** Maybe the predictions made by petitioners' experts will turn out to be correct and the incumbent Republican congressman will win reelection in District 1. The question, however, is whether the party is favored *unduly.* The answer is obviously no: District 1 is "hyper" competitive, with the FEDEA data showing a slight 51.5 to 48.5 percent Republican advantage. Indeed, President Biden won District 1 by 0.9 percent in 2020. District 1 is up for the taking.

**{¶ 196}** Dr. Rodden also claims, as the majority puts it, that the plan "carves up the Black community in Cincinnati." Majority opinion at ¶ 56. Petitioners have not, however, asserted a racial-gerrymandering claim under the framework required by *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

**{¶ 197}** As we consider in detail below, the majority makes similar arguments regarding the splits of Cuyahoga and Franklin Counties. In the end, the General Assembly explained why it split the counties the way it did: to make seven districts competitive. The majority seems to prefer proportional representation over competitive districts, but proportionality is not prescribed in Article XIX.

**{¶ 198}** Finally, and as stated above, statistical measures like efficiency gap, mean-median gap, declination, partisan symmetry, and others are perfectly informative data measures. They tell a useful story about how closely an enacted plan achieves an ideal of proportional representation. But they are not in the Constitution. The General Assembly had no obligation, only the option, to use these fancy metrics. It chose, instead, to pursue competitive districts, which was its prerogative.

**{¶ 199}** Summing all this up: competitive districts do not unduly favor or disfavor a political party. The General Assembly enacted a plan with what it considers to be seven competitive districts. Its definition of competitive (plus or minus 4 percent) is not unreasonable. Neither is the data it used to calculate variance (FEDEA). We have no basis to pronounce that the enacted plan "transcends the limits of legislative power," *Bishop*, 139 Ohio St. at 438, 40 N.E.2d 913. Despite everything the majority says today, petitioners have not established that the congressional-district plan unduly favors or disfavors a political party in contravention of Article XIX, Section 1(C)(3)(a).[15] The General Assembly, therefore, is entitled to the last word on this quintessential policy matter.

**C. Undue division of governmental units**

***37 {¶ 200}** Article XIX, Section 1(C)(3)(b) prohibits the General Assembly from unduly splitting governmental units when it enacts a congressional-district plan by a simple majority vote. That provision states:

> If the general assembly passes a congressional district plan under division (C)(1) of this section by a simple majority of the members of each house of the general assembly, and not by the vote described in division (C)(2) of this section [i.e., three-fifths majority with at least one-third of the members of each of the two largest political parties in the house], all of the following apply:
>
> * * *
>
> (b) The general assembly shall not unduly split governmental units, giving preference to keeping whole, in the order named, counties, then townships and municipal corporations.

Section 1(C)(3).

**{¶ 201}** The majority's reasoning that the congressional-district plan adopted by the General Assembly unduly splits counties is flawed for several reasons: first, it relies on evidence of partisan favoritism and lack of compactness even though those are the subject of other provisions; second, it looks at county splits in isolation without considering them in the context of the division of other governmental units (townships and municipalities); third, it disregards Section 2(B)(5), which allows the General Assembly to split five counties more than once; fourth, it ignores evidence that the congressional-district plan does not unduly split governmental units; and lastly, the plan's division of Hamilton, Summit, Franklin, and Cuyahoga Counties is supported by the neutral map-making criteria of Section 2.

**{¶ 202}** Article XIX, Section 1(C)(3) imposes three limits on a congressional-district plan that is not passed by a sufficiently bipartisan vote. Such a plan may not (1) "unduly favor[ ] or disfavor a political party or its incumbents," Section 1(C)(3)(a), or (2) "unduly split[ ] governmental units," Section 1(C)(3)(b), and (3) the General Assembly must attempt to draw compact districts, Section 1(C)(3)(a). The majority, however, conflates these three limitations by concluding that a plan unduly splits governmental units if the line drawing appears to give undue partisan advantage and to result in noncompact districts. But undue partisan advantage and lack of compactness cannot be the measure of whether governmental units have been unduly split, because it would render the separate limitations imposed by Section 1(C)(3) redundant. "[E]ffect should be given to every part of the instrument as amended, and in the absence of a clear reason to the contrary no portion of a written Constitution should be regarded as superfluous." *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 120, 110 N.E. 648 (1915).

**{¶ 203}** The majority's analysis also fails to give effect to Article XIX, Section 2(B)(5). That provision states that "[o]f the eighty-eight counties in this state, sixty-five counties shall be contained entirely within a district, eighteen counties may be split not more than once, and five counties may be split not more than twice. The authority drawing the districts may determine which counties may be split." Not only does the plain language of Section 2(B)(5) vest the General Assembly with express authority to determine which counties should be split, but it also tells the legislature how many counties it may split once or twice.

***38 {¶ 204}** The majority claims that county splits may be undue under Section 1(C)(3)(b) even if they fall within the express authority to divide up to five counties twice as granted by Section 2(B)(5). But this analysis is flawed. First, the majority improperly again reads Section 1(C)(3)(a)'s prohibition on undue partisanship into Section 1(C)(3)(b), stating that Section 1(C)(3)(b) prohibits county splits that "confer a partisan advantage on the party drawing the plan," majority opinion at ¶ 60. That is, under the majority's reasoning, Section 1(C)(3)(b) means that "[t]he general assembly shall not unduly split governmental units *by unduly*

*favoring or disfavoring a political party or its incumbents*, giving preference to keeping whole, in the order named, counties, then townships and municipal corporations." We lack the power to add this italicized language to the Constitution under the guise of judicial interpretation. *See Braddock v. Pub. Util. Comm.*, 137 Ohio St. 59, 65, 27 N.E.2d 1016 (1940). Rather, the authority to amend the Ohio Constitution is reserved to the people of this state under Article XVI, Section 1.

**{¶ 205}** Second, in purporting to harmonize Sections 1(C)(3)(b) and 2(B)(5) of Article XIX, the majority fails to appreciate that these provisions are worded differently. Section 1(C)(3)(b) prohibits the undue division of *governmental units*; a county is only one type of governmental unit. Section 1(C)(3)(b) also applies to municipal corporations and townships. Section 2(B)(5), on the other hand, specifically addresses the division of *counties*. Different words, of course, signal a different meaning. *See Obetz v. McClain*, 164 Ohio St.3d 529, 2021-Ohio-1706, 173 N.E.3d 1200, ¶ 21. And in the event of a conflict, a more specific provision like Section 2(B)(5) controls over a more general provision like Section 1(C)(3)(b). *See State ex rel. Maxcy v. Saferin*, 155 Ohio St.3d 496, 2018-Ohio-4035, 122 N.E.3d 1165, ¶ 10. For this reason alone, because the plan divides fewer than five counties twice, it cannot violate Section 1(C)(3)(b)'s prohibition on unduly splitting governmental units.

**{¶ 206}** Section 1(C)(3)(b) focuses on whether a congressional-district plan unduly splits governmental units —counties, municipalities, and townships. It is therefore not possible to look at individual county splits in a vacuum, as the majority does. This provision does not say that the General Assembly shall not unduly divide any individual county, municipality, or township, but rather, it provides that "[t]he general assembly shall not unduly split governmental units," with units expressed in the plural. That means we have to consider the division of governmental units in the context of the statewide plan as a whole to determine whether the splits are undue, and counties are only one part of the analysis. Yet the majority examines only 4 of the 12 county splits, and the division of townships and municipalities does not factor into its analysis at all. How can the majority reasonably decide that the congressional-district plan "unduly splits governmental units," Section 1(C)(3)(b), without considering all the governmental-unit splits made in that plan? Plainly, it cannot.

**{¶ 207}** Consider for a moment that the enacted plan contains 14 splits in relation to counties. (Twelve counties are split, with two of those being split twice.) Now consider that there are 15 districts in the state. In order to have 15 districts that are evenly populated (i.e., with 786,629 or 786,630 people), one must split at least 14 counties. That is because there is no way to group whole contiguous counties and end up with even one district that adds up to exactly 786,629 or 786,630. Each district must contain a divided county. Because one county can be divided into two districts, the minimum possible number of splits is 14 (the total number of districts minus one). Think of it this way: a train composed of 15 cars requires 14 connectors. County splits are the "connectors" that allow for equal population. Expert testimony confirms that 14 is the minimum possible number. Therefore, the enacted plan contains the minimum possible number of county splits. So when the majority finds that the plan unduly divides counties, what it is actually saying is that the plan divides the wrong counties. Nowhere, though, does the majority propose what counties should be divided instead of the ones the legislature chose.

***39 {¶ 208}** One of petitioners' experts, Dr. Jonathan Rodden, a professor of political science at Stanford University, compared the governmental-unit splits in the enacted congressional-district plan to the plans presented by House Democrats, Senate Democrats, and the Ohio Citizens' Redistricting Commission ("OCRC"). The enacted plan contains 14 splits with respect to counties (including Hamilton and Cuyahoga Counties being split twice). Although the other three plans did not contain any counties split more than once, they nonetheless had a similar total number of county splits. The plans Dr. Rodden reviewed also had similar divisions of townships and municipalities: the enacted plan divided 8 townships and 9 cities (17 splits); the Senate Democrats' plan divided no townships and 15 cities (15 splits); the House Democrats' plan divided 13 townships and 6 cities (19 splits); and the OCRC's plan divided 26 townships and 1 city (27 splits). (Raymond DiRossi averred that the House Democrats' plan in fact contained 20 splits.) Petitioners' own expert, Dr. Rodden, even opined that the General Assembly "clearly placed considerable effort into minimizing these splits."

**{¶ 209}** Petitioners' expert Dr. Jowei Chen, an associate professor of political science at the University of Michigan, explained that "an entire plan of 15 congressional districts requires only 14 county splits." And in the 1,000 simulated plans he prepared, the number of township and city splits

ranged from 13 to 19, with most simulated plans containing 14 to 16 divisions. His report also stated that "the Enacted Plan certainly does not create an excessively large number of total county splits statewide." (Emphasis deleted.)

**{¶ 210}** Dr. Imai prepared 5,000 simulated congressional-district plans that he asserts complied fully with Article XIX. And of those simulated plans, none of them split counties once more than nine times, split counties twice more than once, or split more than nine counties in total. But as explained above, Dr. Imai is comparing watermelons and walnuts—unlike the enacted plan, his plans did not create equally populated districts. His report states that "the total number of counties split under the enacted plan is much greater than that under any of the simulated plans." Of course it is: if one doesn't require that every district have the same population, fewer county splits are necessary. Furthermore, Dr. Imai does not provide a valid opinion regarding whether the adopted congressional-district plan unduly divides governmental units by considering only county splits without also looking at the divisions of townships and municipalities as well. Moreover, petitioners failed to submit Dr. Imai's maps into evidence. For all his report shows, the 5,000 simulated plans may have minimized the division of counties at the expense of unduly splitting other governmental units. His opinion in this regard, then, carries little weight.

**{¶ 211}** Petitioners' evidence, then, does not support their claim that the General Assembly unduly split governmental units.

**{¶ 212}** But even if this court could consider only county splits in gauging the congressional-district plan's compliance with Section 1(C)(3)(b), the majority's analysis is nonetheless unpersuasive.

**{¶ 213}** To start, the majority states that "[t]he enacted plan splits Hamilton County into three districts for no apparent reason other than to confer an undue partisan advantage on the Republican party." Majority opinion at ¶ 84. However, that statement fails to acknowledge that the General Assembly had to contend with other mandatory provisions of Article XIX in exercising the discretion conferred by Section 2(B)(5) to decide which counties to split. Most prominently, Hamilton County's population (830,639 as of the most recent federal decennial census) is too large to be contained in a single district, so it had to be divided at least once. At the same time, though, Cincinnati's population of 309,317 meant that Section 2(B)(4)(b) prohibited the General Assembly from splitting the city into separate districts. In addition, Article XIX, Section 2(B)(8) required the General Assembly to "attempt to include at least one whole county in each congressional district." The General Assembly complied with these mandatory provisions by placing all of Cincinnati in a district that included all of Warren County, and the majority points to no evidence showing that it was possible to split Hamilton County only once while also keeping Cincinnati intact and attempting to have a whole county within that congressional district.

***40 {¶ 214}** A similar analysis applies to Summit County. With a population of 540,428 as of the 2020 federal decennial census, Summit County was not populated enough to make up its own district. And because Akron has a population greater than 100,000, Section 2(B)(4)(b) prohibited the General Assembly from splitting the city into separate districts. The congressional-district plan keeps Akron intact while placing it with all of Medina County, allowing the General Assembly to comply with Section 2(B)(8)'s requirement to attempt to have a whole county in each district.

**{¶ 215}** Other requirements limited the General Assembly's choices of how to draw districts containing Columbus and Cleveland. Based on their respective populations of 1,323,807 and 1,264,817, Franklin County and Cuyahoga County were too populous to occupy only one district and therefore had to be divided at least once. At the same time, Columbus had too great a population to be placed undivided into a single district. Further, Section 2(B)(4)(a) required the General Assembly to "attempt to include a significant portion" of the city of Columbus in a single district, and Section 2(B)(4)(b) prohibited the General Assembly from splitting Cleveland into separate districts. The General Assembly complied with these provisions. Further, the decision to split Cleveland into three districts is supported by Section 2(B)(7), which expressly permits congressional districts to share portions of the territory of more than one county when the county's population exceeds 400,000.

**{¶ 216}** For these reasons, it is manifest that the General Assembly's congressional-district plan does not unduly divide governmental units and that it complies with Section 2(B)(5) by splitting fewer than five counties twice. That the General Assembly could have made other choices does not make the statewide division of governmental units excessive or unreasonable, and consideration of partisan fairness and compactness are irrelevant to this analysis. The plan splits the bare minimum number of counties. The number of divisions is comparable to other plans presented to the General Assembly

as well as to Dr. Chen's 1,000 simulated plans. Further, the majority's focus on only 4 counties out of 88 (not to mention all the townships and municipal corporations it does not consider) shows that the number of divisions of governmental units was neither excessive nor unreasonable. Consequently, the enacted plan does not violate Article XIX, Section 1(C)(3)(b).

**D. Remedy**

**{¶ 217}** The majority offers barely a word about the remedy for its discovered constitutional violation other than to say that the entire enacted plan is invalid. Here is what the Constitution dictates must happen next: the General Assembly "shall remedy any legal defects in the previous plan identified by the court." Article XIX, Section 3(B)(1). But critically, the new plan "shall include no changes to the previous plan other than those made in order to remedy those defects." Section 3(B)(1). That is, the new plan must look *exactly like* the enacted plan, save for the adjustments to specific "legal defects * * * identified by the court."

**{¶ 218}** We don't envy the legislature's task here. Despite ordaining that the entire map is unconstitutional, the majority has provided little guidance that will assist the legislature in remedying the majority's perceived defects. We simply note the limited leeway that the Constitution affords map-drawers on remand.

**III. CONCLUSION**

**{¶ 219}** Because we cannot say that the General Assembly's congressional-district plan unduly favors a political party or unduly splits governmental units, we must respectfully dissent. The majority reaches a contrary result by employing a proportional-representation measuring stick that springs not from Article XIX but from its own policy preferences. In doing so, it treads far beyond the power that it is afforded by the Ohio Constitution.

**All Citations**

--- N.E.3d ----, 2022 WL 129092, 2022-Ohio-89

Footnotes

1 In contrast, if the General Assembly passes a ten-year plan by the affirmative vote of at least three-fifths of the members of each house of the General Assembly, including at least one-third of the members of the two largest political parties, "[e]very congressional district shall be compact." Ohio Constitution, Article XIX, Section 2(B)(2).

2 Although the parties refer to themselves as relators and respondents, these actions were not brought in the name of the state. *See* R.C. 2731.04; S.Ct.Prac.R. 12.03 (the party filing an action in mandamus, prohibition, procedendo, or quo warranto is referred to as a "relator"). Therefore, this opinion refers to the parties bringing the actions as "petitioners."

3 The 12 voters in case No. 2021-1428 are Regina C. Adams, Bria Bennett, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Carrie Kubicki, Dana Miller, Meryl Neiman, Holly Oyster, Constance Rubin, Solveig Spjeldnes, and Everett Totty.

4 The eight voters in case No. 2021-1449 are Bette Evanshine, Janice Patterson, Barbara Brothers, John Fitzpatrick, Janet Underwood, Stephanie White, Renee Ruchotzke, and Tiffany Rumbalski.

5 Article XI, Section 6(B) of the Ohio Constitution requires the Ohio Redistricting Commission to attempt to draw a General Assembly–district plan in which "[t]he statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio."

6 Dr. Imai does not believe that the FEDEA dataset will accurately predict the partisan leaning of the districts in the enacted plan. He used that dataset only because DiRossi and others used it for predicting the partisan outcome of the enacted plan. Dr. Imai avers that the FEDEA dataset, if anything, *undercounts* the number of likely Republican seats.

7 The dissenting justices assert that they are unable to evaluate the simulated maps because they were not part of the record. However, Dr. Imai and Dr. Chen submitted expert affidavits extensively describing their methodology, data sources, and conclusions based on the 6,000 simulated plans reviewed, and they also submitted as exhibits examples

and data referenced in the affidavits. We find that this evidence in the record sufficiently supports the conclusions cited herein.

8 A "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in other districts; a "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each. *See Rucho*, 588 U.S. at ——, 139 S.Ct. at 2492, 204 L.Ed.2d 931.

9 The dissent has chosen to use the unprecedented format of a "joint dissent." This authorship label has never been used by this court. Its use now, without explanation by the dissent, is unusual and inexplicable.

10 The majority says the joint authorship of a dissent is "unusual and inexplicable." Majority opinion at ¶ 70, fn. 9. It's not. *See, e.g.*, *Natl. Fedn. of Indep. Business v. Dept. of Labor, Occupational Safety & Health Administration*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, Slip Opinion, 2022 WL 120952, *8 (2022) (joint dissent of Breyer, Sotomayor, and Kagan, JJ.).

11 These figures derive from the measure provided in Article XI, Section 6(B).

12 Two congressmen currently live in the new District 1, but Congressman Brad Wenstrup has announced that he will contend for the District 2 seat. No Democratic congressmen were double bunked.

13 *See* https://www.toledoblade.com/State/2014/08/06/Ohio-candidate-lacked-driver-s-licensefor-decade.html (accessed Jan. 12, 2022) [https://perma.cc/S7HM-YWVW].

14 *See* https://www.ohiosos.gov/elections/election-results-and-data/2014-elections-results/?__cf_chl_jschl_tk__=5BNyaJhQ5eJBu.i7qqj_uZJzFJrSNgYduJ.hClWxzvA-1641919620-0-gaNycGzNCP0 (accessed Jan. 12, 2022).

15 The majority does not address the treatment of incumbents, so neither do we.

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|---|---|---|
| KATHRYN SZELIGA, et al., | * | IN THE |
| *Plaintiffs* | * | CIRCUIT COURT |
| v. | * | FOR |
| LINDA LAMONE, et al., | * | ANNE ARUNDEL COUNTY |
| *Defendants* | * | CASE NO.: C-02-CV-21-001816 |

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|---|---|---|
| NEIL PARROTT, et al., | * | IN THE |
| *Plaintiffs* | * | CIRCUIT COURT |
| v. | * | FOR |
| LINDA LAMONE, et al., | * | ANNE ARUNDEL COUNTY |
| *Defendants* | * | CASE NO.: C-02-CV-21-001773 |

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**MEMORANDUM OPINION AND ORDER**

**Introduction**

Partisan gerrymandering refers to the drawing of districting lines to favor the political party in power, and "[p]artisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence." *Rucho v. Common Cause*, — U.S. —,—, 139 S. Ct. 2484, 2499 (2019).[1] *Rucho* is pivotal for the discussion of why this trial court and, potentially, the Court of Appeals[2] are

[1] Gerrymandering based on race is not an issue in this case, so that statutes such as the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified, as amended, at 52 U.S.C. § 10101, *et seq.*), and cases solely addressing this conundrum are not implicated directly.

(continued . . . )

grappling with the issue of the constitutionality of the 2021 Congressional map, because the Supreme Court demurred in the case from addressing, on the basis of the "political question" doctrine, the lawfulness of partisan gerrymandering. *Id.* at —, 2506–07. Chief Justice Roberts, the author of *Rucho*, suggested, however, that, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at —, 2507.

*Background*

Two consolidated cases in issue in the instant case are constitutional challenges to the Maryland Congressional Districting Plan enacted in 2021, hereinafter referred to as "the 2021 Plan." In their Complaint, the 1773 Plaintiffs[3] allege violations of Section 4 of Article III of the Maryland Constitution, which provides:

> Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions[,]

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(. . . continued)

[2] A direct appeal to the Court of Appeals is available pursuant to Section 12–203 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.), which provides:

> (a) *In general.* — A proceeding under this subtitle shall be conducted in accordance with the Maryland Rules, except that:
>
> (1) the proceeding shall be heard and decided without a jury and as expeditiously as the circumstances require;
>
> (2) on the request of a party or sua sponte, the chief administrative judge of the circuit court may assign the case to a three-judge panel of circuit court judges; and
>
> (3) an appeal shall be taken directly to the Court of Appeals within 5 days of the date of the decision of the circuit court.
>
> (b) *Expedited appeal.* — The Court of Appeals shall give priority to hear and decide an appeal brought under subsection (a)(3) of this section as expeditiously as the circumstances require.

[3] The named Plaintiffs in the consolidated action, Case No. C-02-CV-21-001773, are Neil Parrott, Ray Serrano, Carol Swigar, Douglas Raaum, Ronald Shapiro, Deanna Mobley, Glen Glass, Allen Furth, Jeff Warner, Jim Nealis, Dr. Antonio Campbell, and Sallie Taylor; hereinafter "the 1773 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

MD. CONST. art. III, § 4, as well as Article 7 of the Maryland Declaration of Rights, which declares:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

MD. CONST. DECL. OF RTS. art. 7. The 1816 Plaintiffs[4] also allege violations of Article 7, but also add Article 24 of the Declaration of Rights, which provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land[,]

MD. CONST. DECL. OF RTS. art. 24, as well as Article 40, which declares:

> That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege[,]

MD. CONST. DECL. OF RTS. art. 40, and Section 7 of Article I of the Maryland Constitution, which provides:

> The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.

MD. CONST. art. I, § 7.

[4] The named Plaintiffs in Case No. C-02-CV-21-001816 are Kathryn Szeliga, Christopher T. Adams, James Warner, Martin Lewis, Janet Moye Cornick, Rickey Agyekum, Maria Isabel Icaza, Luanne Ruddell, and Michelle Kordell; hereinafter "the 1816 Plaintiffs." Standing of all of the Plaintiffs has been conceded by the State.

Defendants in both actions are Linda H. Lamone, the Maryland State Administrator of Elections; William G. Voelp, the Chairman of the Maryland State Board of Elections; and the Maryland State Board of Elections, which is identified as the administrative agency charged with "ensur[ing] compliance with the requirements of Maryland and federal election laws by all persons involved in the election process."[5]

*Case No. C-02-CV-21-001816*

On December 23, 2021, the 1816 Plaintiffs filed their Complaint for Declaratory and Injunctive Relief. On January 20, 2022, the Democratic Congressional Campaign Committee ("DCCC") filed a Motion to Intervene in the matter, along with its proposed Answer to the Plaintiffs' Complaint. On February 2, 2022, the Defendants filed their Motion to Dismiss or, in the Alternative, for Summary Judgment.[6] The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 3, 2022 and subsequently filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, on February 11, 2022. In the meantime, the Defendants also filed their response to the DCCC's Motion to Intervene. The Court heard argument on the Defendants' Motion to Dismiss on February 16, 2022 and held the matter *sub curia*. Simultaneously, the Court issued its Memorandum Opinion and Order denying the DCCC's Motion to Intervene.

Several days later, on February 22, 2022, the Court issued a Consolidation Order, which consolidated Case No. C-02-CV-21-001816 with another similar case, Case No. C-02-CV-

[5] *About SBE*, THE STATE BD. OF ELECTIONS, https://perma.cc/9GUT-X5KM (last visited March 23, 2022).

[6] It should be noted that the Defendants have asserted that both Case No. C-02-CV-21-001816 and Case No. C-02-CV-21-001773 are non-justiciable "political questions." The Defendants, however, conceded that should the standards in Article III, Section 4 apply to Congressional redistricting, the matter is justiciable.

21001773, and identified Case No. C-02-CV-21-001816 as the "lead" case. On the same day, the Court denied three requests for special admission of out-of-state attorneys on behalf of the DCCC. On February 23, 2022, the Court ultimately issued its Order disposing of the Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, and dismissed Count II: Violation of Purity of Elections, with prejudice. The counts that remained included Counts I, III, and IV of the 1816 Complaint, which involved violations of Articles 7 (Free Elections), 24 (Equal Protection), and 40 (Freedom of Speech) of the Maryland Declaration of Rights, respectively. The 1816 Plaintiffs ask for a declaration that the 2021 Plan is unconstitutional under Articles 7, 24, and 40 of Maryland's Declaration of Rights and Section 7 of Article I of the Maryland Constitution. Additionally, Plaintiffs seek to permanently enjoin the use of the 2021 Plan and ask for an order to postpone the filing deadline for candidates to declare their intention to compete in 2022 Congressional primary elections until a new district map is prepared.

*Case No. C-02-CV-21-001773*

On December 21, 2021, the 1773 Plaintiffs filed their Complaint for Declaratory and Other Relief Regarding the Redistricting of Maryland's Congressional Districts. On January 20, 2022, the DCCC filed a Motion to Intervene in the matter, along with its proposed Motion to Dismiss the Plaintiffs' Complaint. The Plaintiffs filed their Opposition to the DCCC's Motion to Intervene on February 4, 2022. Subsequently, on February 11, 2022, the Plaintiffs filed their Opposition to the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, in related Case No. C-02-CV-21-001816. On February 15, 2022, the DCCC filed its Reply in Support of its Motion to Intervene. Several days later, on February 19, 2022, the Defendants filed a Motion to Dismiss the Complaint. The Plaintiffs filed their Opposition to the Motion to

Dismiss on February 20, 2022. On February 22, 2022, the Court issued a Consolidation Order (referenced above) and denied the DCCC's Motion to Intervene and the three requests for special admission of out-of-state attorneys on behalf of the DCCC. A hearing on the Defendants' Motion to Dismiss took place on February 23, 2022. Under this Court's February 23rd Order, which dismissed Count II of the 1816 Complaint, both counts in the 1773 Complaint remained.

The 1773 Plaintiffs ask for a declaration that the 2021 Plan is unlawful, as well as a permanent injunction against its use in Congressional elections. Additionally, the 1773 Plaintiffs ask the Court to order a new map be prepared before the 2022 Congressional primaries or, in the alternative, order that an alternative Congressional district map, which was prepared by the Governor's Maryland Citizens Redistricting Commission,[7] be used for the 2022 Congressional elections.

The parties submitted proposed findings of fact prior to trial on March 11, 2022. Simultaneously, the 1816 and 1773 Plaintiffs submitted a Joint Motion in Limine as to exclude portions of testimony from Defendants' experts, Dr. Allan J. Lichtman and Mr. John T. Willis. During the first day of trial on March 15, 2022, the parties submitted Stipulations of Fact and the Court admitted the stipulations as Exhibit 1. The Court then placed, on the record, an agreement between the parties about relevant judicial admissions by the Defendants relative to the Defendants' Answer. On the last day of trial on March 18, 2022, the State submitted a stipulation

[7] The Maryland Citizens Redistricting Commission was established by Governor Lawrence J. Hogan, Jr., in January of 2021. Exec. Order No. 01.01.2021.02 (Jan. 12, 2021). The Commission, pursuant to the Order, was tasked with preparing plans for the state's Congressional districts and its state legislative districts, which would be submitted by the Governor to the General Assembly. *Id.* The Commission submitted its Final Report to the Governor in January 2022. *Final Report of the Maryland Citizens Redistricting Commission*, MD. CITIZENS REDISTRICTING COMM'N (Jan. 2022), https://perma.cc/UUX5-6J72.

that the 2021 Plan did, in fact, pair Congressmen Andy Harris and Congressmen Kweisi Mfume in the same district – the Seventh Congressional District.[8]

With respect to the Plaintiffs' Motion in Limine, which raised the issue of a *Daubert* challenge as well as alleged late disclosure by the Defendants' experts as to various opinions, the trial judge heard argument during trial and ruled that the allegations regarding late disclosure were denied. With respect to the *Daubert* motion regarding the States' expert witnesses, it was eventually withdrawn by the Plaintiffs on March 18, 2022.

In addition, the Defendants moved to strike three questions asked by the trial judge of Dr. Thomas L. Brunell, after cross examination and before re-direct and re-cross examination, and the responses thereto. After a hearing in open court on March 18, 2022, the judge denied the motion to strike the three questions of Dr. Brunell and his responses thereto.

*The Motion to Dismiss*

In evaluating the Constitutional claims posited in Case Nos. C-02-CV-21-001816 and C02-CV-21-001773, the trial court has been guided in its efforts by the words of Chief Judge Robert M. Bell, when he wrote in 2002, that courts "do not tread unreservedly into this 'political thicket'; rather, we proceed in the knowledge that judicial intervention . . . is wholly unavoidable." *In re Legislative Districting of State*, 370 Md. 312, 353 (2002). Chief Judge Bell recognized that when the political branches of government are exercising their duty to prepare a lawful redistricting plan, politics and political decisions will impact the process. *Id.* at 354; *id.* at 321 ("[I]n preparing the redistricting lines . . . the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they

[8] *See* Stipulation No. 60, *infra* p. 57.

may pursue a wide range of objectives[.]"). Yet, the consideration of political objectives "does not necessarily render the process, or the result of the process, unconstitutional; rather, that will be the result only when the product of the politics or the political considerations runs afoul of constitutional mandates." *Id.* (internal citations omitted).

In considering whether the various counts of the Complaints survived the Motion to Dismiss, the trial court applied the following standard of review[9]:

"Dismissal is proper only if the facts alleged fail to state a cause of action." *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 249 (1994). Under Maryland Rule 2-303(b), a complaint must state those facts "necessary to show the pleader's entitlement to relief." In considering a motion to dismiss for failure to state a cause of action pursuant to Maryland Rule 2-322(b)(2), a trial court must assume the truth of all well-pleaded relevant and material facts in the complaint, as well as all inferences that reasonably can be drawn therefrom. *Stone v. Chicago Title Ins. Co.*, 330 Md. 329, 333 (1993); *Odyniec v. Schneider*, 322 Md. 520, 525 (1991). Whether to grant a motion to dismiss "depends solely on the adequacy of the plaintiff's complaint." *Green v. H & R Block, Inc.*, 355 Md. 488, 501 (1999).

> "[I]n considering the legal sufficiency of [a] complaint to allege a cause of action . . . we must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings." Mere conclusory charges that are not factual allegations may not be considered. Moreover, in determining whether a petitioner has alleged claims upon which relief can be granted, "[t]here is ... a big difference between that which is necessary to prove the [commission] and that which is necessary merely to allege [its commission][.]"

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[9] The trial court did not apply the "plausibility" standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), commonly referred to as "the *Twombly-Iqbal* standard," which may be considered a more intense standard of review. The State disavowed that it was positing its application.

*Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 121-22 (2007) (quoting *Sharrow v. State Farm Mutual Ins. Co.*, 306 Md. 754, 768, 770 (1986)) (alterations in original).

There are no provisions in the Maryland Constitution explicitly addressing Congressional districting. The only statutes in Maryland that bear on Congressional redistricting include Section 8–701 through 8–709 of the Election Law Article of the Maryland Code. Section 8–701 states that Maryland's population count is to be used to create Congressional districts, that the State of Maryland shall be divided into eight Congressional districts, and that the description of Congressional districts include certain boundaries and geographic references.[10] Sections 8–702 through 8–709 identify the respective counties included within each of the eight Congressional districts according to the current Congressional map in effect.[11] None of the statutory provisions includes standards or criteria by which Congressional districting maps must be drawn.[12]

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[10] Section 8-701 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.) provides:

> (c) *Boundaries and geographic references.* — (1) The descriptions of congressional districts in this subtitle include the references indicated.
>
> (2) (i) The references to:
>
> 1. election districts and wards are to the geographical boundaries of the election districts and wards as they existed on April 1, 2020; and
>
> 2. precincts are to the geographical boundaries of the precincts as reviewed and certified by the local boards or their designees, before they were reported to the U.S. Bureau of the Census as part of the 2020 census redistricting data program and as those precinct lines are specifically indicated in the P.L. 94-171 data or shown on the P.L. 94171 census block maps provided by the U.S. Bureau of the Census and as reviewed and corrected by the Maryland Department of Planning.
>
> (ii) Where precincts are split between congressional districts, census tract and block numbers, as indicated in P.L. 94-171 data or shown on the P.L. 94-171 census block maps provided by the U.S. Bureau of the Census and referred to in this subtitle, are used to define the boundaries of congressional districts.

[11] MD. CODE ANN., ELEC. LAW §§ 8-701 through 8-709.

[12] During the hearing on the State's Motion to Dismiss, the Court asked the parties to provide supplemental briefings regarding the significance, or not, of two historical laws, which prescribed the application of the (continued . . . )

In ruling on the Defendants' Motion to Dismiss the Complaints, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the 1773 Complaint stated a claim upon which relief can be granted. Article III, Section 4, of the Maryland Constitution does embody standards by which the 2021 Congressional Plan can be evaluated to determine whether unlawful partisan gerrymandering has occurred. The standards of Article III, Section 4 are applicable to the evaluation of the 2021 Plan based upon the interpretation of the Section's language, purpose, and legislative intent.

With respect to the 1773 Complaint and the 1816 Complaint, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that can reasonably be drawn

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(. . . continued)
"constitution and laws of this state for the election of delegates to the house of delegates," to Congressional elections. The first law, enacted in 1788, in relevant part, provided:

> And be it enacted, That the election of representatives for this state, to serve in the congress of the United States, shall be made by the citizens of this state qualified to vote for members of the house of delegates, on the first Wednesday of January next, at the places in the city of Annapolis and Baltimore-town, and in the several counties of this state, prescribed by the constitution and laws of this state for the election of delegates to the house of delegates[.]

1788 Laws of Maryland, Chapter X, Section III (Vol. 204, p. 318). The second law, enacted in 1843, provided:

> Sec. 5. And be it enacted, That the regular election of representatives to Congress from this State, shall be made by the citizens of this State, qualified to vote for members to the House of delegates, and each citizen entitled as aforesaid, shall vote by ballot, on the first Wednesday in October, in the year eighteen hundred and forty-five, and on the same day in every second year thereafter, at the places in the city of Baltimore, and in the city of Annapolis, and in the several counties, and Howard District of this State, as prescribed by the constitution and laws of this State, for the election of members to the house of delegates.
>
> 1843 Laws of Maryland, Chapter XVI, Section 5 (Vol. 595, p. 13).

The parties' responses, collectively, indicated that they ascribed little or no significance to the language, which suggested that the first Congressional elections in Maryland were conducted via the application of election rules prescribed, in part, in the State Constitution.

therefrom and determined that the strictures of Article III, Section 4 are, alternatively, applicable to the 2021 Plan because of the free elections clause, MD. CONST. DECL. OF RTS. art. 7, as well as with respect to the 1816 Complaint, the equal protection clause, MD. CONST. DECL. OF RTS. art. 24; each, individually, provide a nexus to Article III, Section 4 to determine the lawfulness of the 2021 Plan.[13]

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[13] The trial court ultimately dismissed with prejudice Section 7 of Article I of the Maryland Constitution. Article I, Section 7 provides that, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." The 1816 Plaintiffs argued that this provision was violated because the General Assembly failed to pass laws concerning elections that are fair and even-handed, and that are designed to eliminate corruption. *1816 Compl.* ¶ 66. The State took the position that Section 7 of Article 1 was not intended to restrain acts of the General Assembly, but rather, that the provision acted as "an exclusive mandate directed to the General Assembly to establish the mechanics of administering elections in a manner that ensures that those who are entitled to vote are able to do so, free of corruption or fraud." *1816 Mot. Dismiss* at 31.

The term "purity" in the Section is undefined and therefore, ambiguous. No case referring to the Section has defined what purity means. *Cnty. Council for Montgomery Cnty. v. Montgomery Ass'n, Inc.*, 274 Md. 52 (1975); *Anderson v. Baker*, 23 Md. 531 (1865) (concurring opinion); *see also Hanrahan v. Alterman*, 41 Md. App. 71 (1979); *Hennegan v. Geartner*, 186 Md. 551 (1946); *Smith v. Higinbothom*, 187 Md. 115 (1946); *Kenneweg v. Allegany Cnty. Comm'rs*, 102 Md. 119 (1905). When asked at oral argument to give the term a meaning applicable to elections, Counsel for the 1773 Plaintiffs could only say "purity means purity."

The phrase "purity" of elections was added to the Maryland Constitution of 1864, where the explicit language directed the General Assembly to preserve the "purity of elections." MD. CONST. of 1864, art. III, § 41 (directing the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters"). The provision focused on voter registration, with the purpose of excluding ineligible voters from the election process.

The language of what is now Article I, Section 7, has changed since its enactment in the Maryland Constitution of 1864. Article III, § 41 of the Constitution of 1864, in whole, directed the General Assembly to "pass laws for the preservation of the purity of elections by the registration of voters, and by such other means as may be deemed expedient, and to make effective the provisions of the Constitution disfranchising certain persons, or disqualifying them from holding office." Article III, § 41, was renumbered in the 1867 amendment, to Article III, Section 42, which provided, [t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." MD. CONST. of 1867, art. III, § 42. Article III, § 42, was, again, renumbered and amended by Chapter 681, Acts of 1977, ratified Nov. 7, 1978, to Article I, § 7, which now provides, "[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections." MD. CONST. art. 1, § 7.

Cases interpreting Article I, Section 7, have applied the Section to the registration of voters, *Anderson*, 23 Md. at 586 (concurring opinion), improper financial campaigns contributions, *Cnty. Council for Montgomery Cnty.*, 274 Md. at 60–65; *see also Higinbothom*, 187 Md. at 130 ("The Corrupt Practices Act is a remedial measure and should be liberally construed in the public interest to carry out its purpose of preserving the purity of elections.").

From its legislative history, the language of "purity of elections" referred to questions involving the *individual* candidate and the *individual* voter. The only assumption tendered by the 1816 Plaintiffs to support that partisan gerrymandering affected the "purity" of elections was that such gerrymandering was *ipso facto* corrupt.

(continued . . . )

With respect to the 1816 Complaint, alternatively, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the Complaint stated a cause of action under each of the equal protection clause, MD. CONST. DECL. OF RTS. art. 24, and the free speech clause, MD. CONST. DECL. OF RTS. art. 40, which subjects the 2021 Plan to strict scrutiny by this Court.

Alternatively, with respect to the 1773 and 1816 Complaints, this Court assumed the truth of all the well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that both Complaints stated a cause of action under the entirety of the Maryland Constitution and Declaration of Rights to determine the lawfulness of the 2021 Plan.

**The Provisions in the Maryland Constitution and Declaration of Rights**

In reviewing whether political considerations have run afoul of constitutional mandates in the instant case, we must undertake the task of constitutional interpretation. "Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument's drafters and the public that adopted it." *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 53 (2013) (citing *Fish Mkt. Nominee Corp. V. G.A.A., Inc.*, 337 Md. 1, 8–9 (1994)). We first look to the natural and ordinary meaning of the provision's language. *Id.* If the provision is clear and unambiguous, the Court will not infer the meaning from sources outside the Constitution itself. *Id.* "[O]ccasionally we see fit to examine extrinsic sources of legislative intent merely as a check of our reading of a statute's plain language," including "archival legislative history." *Phillips v. State*, 451 Md. 180, 196–97 (2017). Archival legislative history

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That assumption has not been borne out by review of over 200 cases addressing partisan gerrymandering, none of which characterized the practice as "corrupt."

includes legislative journals, committee reports, fiscal notes, amendments accepted or rejected, the text and fate of similar measures presented in earlier sessions, testimony and comments offered to the committees that considered the bill, and debate on the floor of the two Houses (or the Convention). *State v. Phillips*, 457 Md. 481, 488 (2018).

The rules of statutory construction are well known. Yet, when applying the rules of statutory construction to the interpretation of constitutional provisions, the approach is more nuanced. That approach was described in *Johns Hopkins Univ. v. Williams*, 199 Md. 382 (1952):

> [C]ourts may consider the mischief at which the provision was aimed, the remedy, the temper and spirit of the people at the time it was framed, the common usage well known to the people, and the history of the growth or evolution of the particular provision under consideration. In aid of an inquiry into the true meaning of the language used, weight may also be given to long continued contemporaneous construction by officials charged with the administration of the government, and especially by the Legislature.

*Id.* at 386–87.

To construe a constitution, "a constitution is to be interpreted by the spirit which vivifies, and not by the letter which killeth." *Snyder ex rel. Snyder*, 435 Md. at 55 (quoting *Bernstein v. State*, 422 Md. 36, 56 (2011)). Similarly, we do not read the constitution as a series of independent parts; rather, constitutional provisions are construed as part of the constitution as a whole. *Id.* Further, if a constitutional provision has been amended, the amendments "bear on the proper construction of the provision as it currently exists," and in such a situation, 'the intent of the amenders … may become paramount." *Norino Properties, LLC v. Balsamo*, 253 Md. App. 226, (2021) (quoting *Phillips*, 457 Md. at 489). We keep in mind that the courts shall construe a constitutional provision in such a manner that accomplishes in our modern society the purpose for which the provisions were adopted by the drafter, and in doing so, the provisions "will be

given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee." *Bernstein v. State*, 422 Md. 36, 57 (2011) (quoting *Johns Hopkins Univ.*, 199 Md. at 386).

We recognize that "a legislative districting plan is entitled to a presumption of validity" but "that the presumption "may be overcome when compelling evidence demonstrates that the plan has subordinated mandatory constitutional requirements to substantial improper alternative considerations."" *In re Legislative Districting of State*, 370 Md. at 373 (quoting *Legislative Redistricting Cases*, 331 Md. 574, 614 (1993)).

*Article III, Section 4 of the Maryland Constitution*

Article III, Section 4 of the Maryland Constitution provides:

> Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

MD. CONST. art. III, § 4. The 1773 Plaintiffs assert a direct claim under Article III, Section 4, of the Maryland Constitution and urge that the plain meaning of the term "legislative district" corresponds to any legislative district in the State, which must be subject to the standards of adjoining territory, compactness, and equal population with due regard given to natural boundaries of political subdivisions. The 1773 Plaintiffs allege the new Congressional districts under the 2021 Plan violate the requirements of Article III, Section 4. *1773 Compl.* ¶¶ 93– 97.[14]

Defendants claim that the text of Article III, Section 4, is limited to State legislative districting because the term "legislative districts" refers "unambiguously to State legislative districts" whenever it appears in other provisions of the Constitution, and that when Congress is referred to the "c" is capitalized. *1773 Defs.' Mot. Dismiss* at 2. The Defendants argue that although a 1967 constitutional convention proposed a draft that included Constitutional standards for both state districts and Congressional districting, the voters rejected the draft and that the General Assembly drew the current Article III, Section 4 without reference to Congressional redistricting to enable the 1969 amendments to the Constitution to be adopted. *1816 Defs.' Mot. Dismiss* at 19–22.

[14] The 1816 Plaintiffs do not assert a claim under Article III, Section 4, of the Maryland Constitution. *1816 Opp'n Mot. Dismiss* at 10 n.3.

The term "legislative district" is the gravamen of analysis. There is no definition of the term "legislative district" in the Maryland Constitution or Declaration of Rights. Absent a definition, in light of the differing ways the term could be applied, *i.e.*, as State legislative districts and/or Congressional districts, the language is ambiguous.[15]

The "compactness" requirement was added to then extant Article III, Section 4, by the General Assembly in 1969 and ratified by the voters in 1970 (the "1970 Amendment"), as part of a series of amendments to the entirety of Article III. *See* 1969 Md. Laws ch. 785, ratified Nov. 3, 1970 (proposing the repeal of MD. CONST., art. III, §§ 2, 4, 5, and 6, and replacement with new §§ 2 through 6). Its framers recognized that "compactness requirement in state constitutions is intended to prevent political gerrymandering." *Matter of Legislative Districting of State* ("*1984 Legislative Districting*"), 299 Md. 658, 687 (1984). Prior to this amendment, Article III, Section 4 required districts to be "as near as may be, of equal population" and "always consist of contiguous territory," and only applied to the "existing Legislative Districts of the City of Baltimore." MD. CONST. art. III, § 4 (1969).[16]

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[15] The State has posited the importance of the exclusion of the word "Congress" in Article III, Section 4 to specifically include reference to Congressional districts. Neither the word Congress nor State, General Assembly, Senate, or House of Delegates appears in Article III, Section 4, unlike other Constitutional provisions or importantly, in Section 4 itself. *See, e.g.*, MD. CONST. art. I, § 6 (using the term "Congress"); art. III, § 10 (using the term "Congress"); art. IV, § 5 (using the term "Congress"); art. XI-A, § 1 (using the term "congressional election"); art. XVII, § 1 (using the term "congressional elections"); art. III, § 3 (using the terms "State," "Senate" and "House of Delegates"); art. III, § 5 (using the terms "State," "General Assembly," "Senate," and "House of Delegates"); art. III, § 6 (using the terms "General Assembly" and "delegate"); art. III, § 13(b) (using the terms "Legislative" and "Delegate district"); and art. XIV, § 2 (using the terms "General Assembly," and "Legislative District of the City of Baltimore").

[16] Prior to 1966, Baltimore City was the only jurisdiction in the State in which Delegates were elected to represent discreet legislative districts; Delegates representing other counties were elected by the voters of those counties at large. *See* MD. CONST. art. III, § 5 (1965) ("The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the Legislative Districts of Baltimore City, respectively . . . ."); 1965 Md. Laws special session, chs. 2, 3 (requiring the first time that counties allocated more than eight delegates be divided

(continued . . . )

The present complete version of Article III, Section 4 was enacted in 1972 and ratified by the voters on November 7, 1972. In enacting the present version in 1972, the General Assembly "is presumed to have full knowledge of prior and existing law on the subject of a statute it passes." *Id.*; *see also Bowers v. State*, 283 Md. 115, 127 (1978) ("[T]he Legislature is presumed to have had full knowledge and information as to prior and existing law on the subject of a statute it has enacted."); *Harden v. Mass Transit Admin.*, 277 Md. 399, 406-07 (1976) ("The General Assembly is presumed to have had, and acted with respect to, full knowledge and information as to prior and existing law and legislation on the subject of the statute and the policy of the prior law.").[17] With respect to this knowledge, it is clear that they were aware of

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into districts). The "contiguity" or "equal population" requirements of the early Article III, § 4, did not apply to any "legislative district" outside of Baltimore City.

[17] The State agreed during oral argument on the Motion to Dismiss that cases of the Supreme Court in the 1960s regarding redistricting informed the adoption of the present version of Article III, Section 4:

> THE COURT: In doing research on Article III, Section 4, of the Maryland Constitution, it has come to the Court's attention that one of the reasons for enacting this provision was the Legislature's knowledge—which we presume—of the Supreme Court's cases. That is my understanding, is it yours?
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> MR. TRENTO, ON BEHALF OF THE STATE: Yes, Your Honor, the Supreme Court's cases were in the front and center of the minds of the 1967 Constitutional Convention. In that Convention, the sweep of amendments to Article III, Sections 3 through 6, were expressly undertaken to address the Supreme Court jurisprudence from the 1960s.

*Mot. Dismiss Hearing*, 02/23/2022. In the 1967 Constitutional Convention, the Supreme Court cases referencing legislative redistricting were prominent. The delegates in the Proceedings and the Debates of the 1967 Constitutional Convention referenced prior Supreme Court jurisprudence on numerous occasions: *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, *Debates* 412, 3255; 104 MD. STATE ARCHIVES 2267, 10853. During the 1967 Constitutional Convention, Delegate John W. White, in response to a question regarding his intent regarding a provision stated:

> DELEGATE WHITE: What I am trying to do is to have all of Maryland line up with the position of the Supreme Court of the United States, which has said that one person should have one vote.

*Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES 7879,

(continued . . .)

*Baker v. Carr*, 369 U.S. 186 (1962), involving state legislative districts,[18] as well as *Wesberry v. Sanders*, 376 U.S. 1 (1964), a Congressional districting case.[19]

With reference to Supreme Court jurisprudence that is the context of the 1967 to 1972 Amendments to Article III, Section 4, one early case—*Baker v. Carr*—involved the apportionment of the Tennessee legislature. The federal district court dismissed the complaint in apparent reliance on the legal process theory of political justiciability, but the Supreme Court reversed. *Baker v. Carr*, 179 F. Supp. 824, 828 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962). Importantly, the Supreme Court's decision only dealt with procedural issues: jurisdiction, standing, and justiciability. *Baker*, 369 U.S. at 198–237. It held by a 6–2 vote that the court had jurisdiction, plaintiffs had standing, and the challenge to apportionment did not present a nonjusticiable "political question." *Id.* at 204, 206, 209.

The Supreme Court, thereafter, confronted the apportionment of Congressional districts in *Wesberry v. Sanders* in 1964 and held that Congressional apportionment cases were justiciable, noting that there is nothing providing "support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6–7. The Court ultimately applied the "one-person, one-vote" rule to apportionment of

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https://perma.cc/JG3T-KV3J (last visited March 23, 2022). During the Proceedings and Debates of the 1967 Constitutional Convention, the delegates proposed constitutional amendments regarding Congressional districting, however, the amendments failed subsequent enactment and were, ultimately, not included in the adopted 1970 and 1972 versions of Article III, Section 4.

[18] *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, *Debates* 412, 499.

[19] *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES 10863–64.

Congressional districts, explaining that "the [Constitutional] command that representatives be chosen by people of the several states means that as nearly as practicable one man's vote in a Congressional election is to be worth as much as another's." *Id.* at 7–8. The Court believed that "a vote worth more in one district that in another would run . . . counter to our fundamental ideas of democratic government." *Id.* at 8. The opinion rested on the interpretation of the Elections Clause in Article I, Section 4 of the Constitution. *Id.* at 6–7.

On April 7, 1969, another Congressional districting case was decided. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), a decision involving Congressional districting in Missouri, the Supreme Court held that the "as nearly as practicable" standard "requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Kirkpatrick*, 394 U.S. at 530–31.

The context, therefore, of the 1967 through 1972 amending process of Article III, Section 4, was the Supreme Court cases in which state legislative districts, but also Congressional districts, were decided.

The State posits, however, that the Legislature really intended on omitting Congressional districts in the later versions of Article III, Section 4 enacted in 1969 and 1972 because an earlier version from 1967 of Section 4 included a specific reference to Congressional districts, *see* PROPOSED CONST. OF 1967–68, §§ 3.05, 3.07, 3.08, 605 MD. STATE ARCHIVES 9–10, and another section that had a specific reference to the State, *see* PROPOSED CONST. OF 1967–68, § 3.04, 605 MD. STATE ARCHIVES 9. The failed passage of the earlier draft Constitution, which included these phrases, however, does not have any bearing on the analysis of what the Legislature

intended in adopting the 1970 or 1972 versions of Article III, Section 4, because "[f]ailed efforts to amend a proposed bill, however, are not conclusive proof usually of legislative will. . . . This is because there can be a myriad of reasons that could explain the Legislature's decision not to incorporate a proposed amendment." *Antonio v. SSA Sec., Inc.*, 442 Md. 67, 87 (2015). Most importantly, "[i]f the framers desired" to exclude Congressional redistricting from Article III, Section 4, "they knew how to do so." *Schisler v. State*, 394 Md. 519, 594–95 (2006).[20]

The Legislature, keenly aware of its ability to restrict or expand the application of Article III, Section 4, chose not to explicitly exclude Congressional districts from the purview of Article III, Section 4, nor just reference State legislative districts. As a result, "legislative districts" includes Congressional districts. A claim, thus, has been stated under Article III, Section 4.

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[20] Interestingly, the early language in a bill introduced in 1972 included the words Senators and Delegates to alter Article III, Section 4:

> Each legislative district shall consist of adjoining territory and shall be compact in form. The ratio of the number of Senators to population shall be substantially the same in each legislative district; the ratio of the number of Delegates to population shall be substantially the same in each legislative district. Nothing herein shall be construed to require the election of only one Delegate from each legislative district.

*Amendments to Maryland Constitutions*, 380 MD. STATE ARCHIVES, 489. The final adopted version contained no mention of, nor reference to, "Senator" or "Delegate."

*Nexus Between Articles 7 and 24 of the Declaration of Rights and Article III, Section 4 of the Constitution*

The standards of Article III, Section 4 are also applicable on an alternate basis, to evaluate the constitutionality of the 2021 Plan because the Free Elections Clause, Article 7 of the Maryland Declaration of Rights, which has been alleged in the 1773 and 1816 Complaints, as well as the Equal Protection Clause, Article 24 of the Maryland Declaration of Rights, as averred in the 1816 Complaint, each implicate the use of the Section 4 criteria. Assuming either clause is applicable,[21] its application to the lawfulness of the 2021 Plan can only be made manifest by use of the standards in Article III, Section 4.

The methodology of drawing a nexus between a "standards" clause and its facilitating constitutional provision is exactly what Judge John C. Eldridge, writing on behalf of the Court, did in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), between the Free Elections Clause and Section 1 of Article I of the Constitution[22] as well as the Equal Protection Clause and Section 2 of Article I of the Constitution.[23]

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[21] The applicability of the Free Elections Clause and the Equal Protection Clause will be addressed separately, *infra*.

[22] Article I, Section 1 of the Maryland Constitution, provides:

> All elections shall be by ballot. Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State.

[23] Article I, Section 2 of the Maryland Constitution, provides:

> Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter

(continued . . . )

*Green Party* involved the constitutional validity of various provisions of the Election Code which governed the method by which a party, other than a "principal political party," could nominate a candidate for a Congressional seat. *Id.* at 140. The Green Party, however, had been notified that the name of its candidate could not be placed on the ballot because the Board of Elections was unable to verify a number of signatures on the nominating petition and, as a result, the petition contained less than the number required to vote. *Id.* at 137. The Board posited a number of reasons for denying the adequacy of the number of signatures, but the seminal reason addressed in the opinion was that many of the petition signatures were those who appeared on an inactive voter registry, which did not qualify them to sign a petition as a "registered voter" pursuant to Section 1–101(gg) of the Election Code.

In addressing whether the Free Elections Clause was violated by the provision regarding an inactive voter registry, Judge Eldridge applied the standards in Article I, Section 2 of the Constitution, which, he explained, "contemplates a *single* registry for a particular area, containing the names of *all* qualified voters[.]" *Id.* at 142. (italics in original). Remarking that the statute created a class of "second class" citizens comprised of inactive voters, Judge Eldridge determined that Article 7 had been violated. *Id.* at 150. In so doing, his determination was premised on a line of cases in which adherence with the strictures of the Free Elections Clause was informed by standards set forth in Constitutional Clauses. *Id.* at 144 (citing *Gisriel v. Ocean*

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( . . . continued)

> held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

*City Bd. of Supervisors of Elections*, 345 Md. 477 (1997) (rejecting provision in an Ocean City Charter that failure to vote in two previous elections rendered a person unqualified to vote in municipal elections, based on Sections 1 and 4 of Article of the Constitution and Article 7 of the Declaration of Rights); *State Admin. Bd. of Election Laws v. Bd. of Supervisors of Balt. City*, 342 Md. 586 (1996) (holding that "having voted frequently in the past is not a qualification for voting," under Article I, Section 1 of the Constitution and Article 7 of the Declaration of Rights); *Jackson v. Norris*, 173 Md. 579 (1937) (recognizing nexus between the Free Elections Clause and the mandate in Section 1 of Article 1 of the Constitution, that "elections shall be by ballot")). Judge Eldridge also utilized the standards in Section 1 of Article I to determine that a registry of inactive voters was "flatly inconsistent" with Article 24 of the Declaration of Rights, the Equal Protection Clause.[24] *Id.* at 150.

It is clear, then, that our Free Elections Clause, as well as the Equal Protection Clause implicate the use of standards contained in the Constitution in order to determine a violation of each. So is the case in their application in the instant case, in which implementation of their provisions can be determined in reference to Article III, Section 4.[25]

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[24] As discussed, *infra*, Judge Eldridge also utilized the Equal Protection Clause, Article 24, to evaluate whether the requirement that the Green Party, as a non-principle party, was constitutionally required to submit not only 10,000 signatures on a petition to be recognized as a political party and then provide a second petition to nominate its candidate.

[25] The Supreme Court of Pennsylvania, in *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1 (2018), utilized a framework similar to that implemented in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), when it looked to standards delineated in Article 2, Section 16 of its Constitution – defining criteria to be used in drawing state legislative districts – in order to measure Congressional District Plan, which had been enacted by its Legislature, complied with the Free Elections Clause contained in Pennsylvania's Declaration of Rights.

*Article 7 of the Maryland Declaration of Rights*

Article 7 of the Maryland Declaration of Rights, entitled "Elections to be free and frequent; right of suffrage," provides:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The 1816 Plaintiffs assert that the 2021 Plan violates the Free Elections Clause in several ways, including that the 2021 Plan "unlawfully seeks to predetermine outcomes in Maryland's congressional districts." They also allege that the 2021 Plan violates Article 7, because it is not based upon "well-established traditions in Maryland for forming congressional districts[,]" including compactness, adjoining territory, and respect for natural and political boundaries. They specifically allege that the boundary of the First Congressional District, which they aver is the only district in which a Republican is the incumbent, was redrawn "to make even that district a likely Democratic seat." As a result, they allege that "the citizens of Maryland, including Plaintiffs, with a right to an equally effective power to select the congressional representative of their choice," have been deprived of their right to elections, which are "free." They contend that Article 7 "prohibits the State from rigging elections in favor of one political party[,]" and conclude that, "any election that is poisoned by political gerrymandering and the intentional dilution of votes on a partisan basis is not free."

The 1773 Plaintiffs assert that the 2021 Plan "subordinate[s]" the requirement, under Article 7 of the Declaration of Rights, that elections be "free and frequent" to "improper considerations," namely the manipulation of Congressional district boundaries so that they will

be unable "to cast a meaningful and effective vote for the candidates they prefer." Additionally, these Plaintiffs allege that Congressional district boundaries that are not based on criteria, such as compactness and the minimization of crossing political boundaries, result in elections that are inherently not "free" and, therefore, violate Article 7.

The State, conversely, argued that the 2021 Congressional Plan does not violate the Free Elections Clause of Article 7, because that Section applies only to state elections. The State observes that the capitalization of "L" in "Legislature," is a direct reference to the General Assembly. Additionally, the State asserts that the legislative history of Article 7, particularly surrounding debates regarding the frequency of elections, indicates that the Free Elections Clause could not apply to federal elections, "for which the State is powerless to control the frequency."

With respect to the use of a capital "L" in "Legislature," in the Free Elections Clause, as reflecting only a reference to the state legislature, the State's contention is belied by its own language. Article 7, as it was originally adopted in 1776, was meant to secure a right of participation:

> That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The language of Article 7 enunciated a foundational right to vote for the only entity for which the citizens of Maryland in 1776 had a participatory ability to elect through voting, the Legislature. The reference to "Legislature," then, refers to the only entity for which there was any accountability through suffrage.

The purpose of the Free Elections Clause relative to partisanship, as alleged in the complaints, heretofore has not been the subject of judicial scrutiny. During the Constitutional Convention of 1864, however, proposals to amend Article I of the Constitution, to create a registry of voters whereby voters would be required to pledge a loyalty oath as a prerequisite to voting were hotly debated and the effect of "partisan oppression" on free elections was explored. Proponents of the amendments sought to exclude supporters of the Confederacy, who, by the terms of the oath, would be disqualified from voting. *Proceedings and Debates of the 1864 Constitutional Convention*, Volume 1 at 1332. Those opposed to the loyalty oath argued that it would be counter to the purpose of "free elections." *Id.* at 1332. One delegate noted that the loyalty oath presupposed that,

> there are now in the State of Maryland enjoying the right of suffrage under the present constitution, ten distinct classes of persons who deserve to be disfranchised from hereafter exercising that right. They . . . are to be under a government by others, in which they are to have no voice, in which they are not to be allowed to participate in any shape or form.

*Id.* In the same debate, another delegate, Mr. Fendall Marbury, decried the imposition of a loyalty oath as a means of oppression, in contravention to the right to participate in free elections:

> The right of free election lies at the very foundation of republican government. It is the very essence of the constitution. To violate that right, and much more to transfer it to any other set of men, is a step leading immediately to the dissolution of all government. The people of Maryland have always in times past, guarded with more than vestal care this fundamental principle of self-government. By constitutional provisions and legislative enactments, they have sought to provide against every conceivable effort that might be made to suppress the voice of the people. They have spurned the idea of excluding any one on account of his religious or political opinions. Is it not unwise and impolitic to depart from this established policy of the State, by introducing words into our

> constitution which are calculated to revive and foster that spirit of crimination and recrimination already existing to an alarming extent between parties in this State? The word loyal has come to be, of late, a word susceptible of such various construction, and has so often been prostituted by the minions of power, to accomplish partizan ends. That to incorporate it into the constitution would be nothing more nor less than creating an engine of oppression, to be used by whatever party might hold for a time the reins of power.

*Id.* at 1334. Thus, inhibiting the creation of an "engine of oppression" "to accomplish party ends" by "whatever party might hold for a time the reins of power" to "suppress the voice of the people" was a purpose of the Free Elections Clause.

Our jurisprudence in Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State. In *Jackson v. Norris*, 173 Md. 579 (1937), the Court of Appeals considered whether automated voting machines, which used ballots that restricted the choice of voters to candidates whose names were printed on the ballot, violated the Free Elections Clause. In resolving the applicability of the Free Elections Clause, the Court explained that legislative acts that were "a material impairment of an elector's right to vote[,]" were to be deemed unconstitutional. *Id.* at 585. The Court held that the ballots were violative of the Free Elections Clause, because they constrained the ability of voters to cast their vote for the candidate of their choice and, by extension infringed upon voters' right to participate in free elections. *Id.* at 603.

The pivotal goal of the Free Elections Clause, to protect the right of political participation in Congressional elections, was emphasized in *Green Party*, 377 Md. at 127, which concerned an attempt by the Green Party to get a candidate on the ballot for election to Congress, in the state's first congressional district, as discussed, *supra*. In that case, Article 7 was held to protect the right of all qualified voters within the state to sign nominating petitions in support of minor party

candidates for office, regardless of whether they had been classified as "inactive voters." In this regard, the decision in *Green Party* recognized that the Free Elections Clause afforded a greater protection of the citizens of Maryland in a Congressional election context, than is provided under the Federal Constitution, in the First, Fifth, Ninth, and Fourteenth Amendments, which also had been alleged in the Complaint. *Green Party*, 377 Md. at 150.[26]

Clearly, the 1773 and 1816 Complaints, with respect to Article 7 of the Declaration of Rights, the Free Elections Clause, have stated a cause of action and survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

[26] In interpreting similar phraseology that "Elections shall be free and equal," the Supreme Court of Pennsylvania, in *League of Women Voters of Pa.*, determined that the state's Free Elections Clause required that "each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives." 645 Pa. at 117. The Court concluded that, in order to comply with the strictures of the Free Elections Clause, Congressional district maps be drawn in order to "provide[] the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so." *Id.*

*Article 24 of the Maryland Declaration of Rights, Equal Protection*

Article 24 of the Maryland Declaration of Rights, entitled "Due process," provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Although Article 24 does not contain language of "equal protection," the Court of Appeals has long held that "equal protection" is embodied in it: "we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights. *Att'y Gen. of Md. v. Waldron*, 289 Md. 683 (1981); *Bd. of Supervisors of Elections of Prince George's Cnty. v. Goodsell*, 284 Md. 279, 293 n.7 (1979) ("[W]e have regularly proceeded upon the assumption that the principle of equal protection of the laws is included in Art. [24] of the Declaration of Rights.").

The 1816 Plaintiffs assert that the 2021 Plan violates Article 24 by unconstitutionally discriminating against Republican voters, including Plaintiffs, and infringing on their fundamental right to vote. Specifically, these Plaintiffs assert that the 2021 Plan intentionally discriminates against Plaintiffs by diluting the weight of their votes based on party affiliation and depriving them of the opportunity for full and effective participation in the election of their Congressional representatives. These Plaintiffs add that the 2021 Plan unconstitutionally degrades Plaintiffs' influence on the political process and infringes on their fundamental right to have their votes count fully. The State, in response, asserts that the Plaintiffs have offered no basis for an interpretation broader than that by the Supreme Court of the Fourteenth Amendment

in *Rucho*. The State posits, though, that the scope of equal protection in Maryland is the same as that which is embodied in the federal constitution in the Fourteenth Amendment.

The essence of equal protection is that "all persons who are in like circumstances are treated the same under the laws." *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 640 (1983). The treatment of similarly situated people under the law, clearly, cannot be denied in Maryland, in derogation of the Fourteenth Amendment; it also is clear that Maryland can afford greater protection to its citizens under Article 24 of the Declaration of Rights. In this regard, we need only look at various cases of the Court of Appeals in which the Court was clear that Article 24 and the equal protection clause of the Fourteenth Amendment are "independent and capable of divergent application." *Waldron*, 289 Md. at 704; *see also Md. Aggregates Ass'n, Inc. v. State*, 337 Md. 658, 671 n.8 (1995) (explaining the relationship between applications of equal protection guarantees under the Fourteenth Amendment and Article 24 of the Declaration of Rights); *Verzi v. Balt. Cnty.*, 333 Md. 411, 417 (1994) (stating that "'a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.'" (quoting *Waldron*, 289 Md. at 715)); *Hornbeck*, 295 Md. at 640 (stating that "the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other.").

Notably, in *In re 2012 Legislative Districting*, 436 Md. 121 (2013), Chief Judge M. Bell, writing for the Court of Appeals, assumed that Article 24 could embody a greater right than is afforded under the Fourteenth Amendment when he said: "The potential violation of Article 24 of the Maryland Declaration of Rights is not discussed at length in this case because the petitioners do not assert any greater right under Article 24 than is accorded under both the

Federal right and the population equality provision of Article III, § 4 of the Maryland Constitution." *Id.* at 159 n.25.

The State, however, during argument regarding the Motion to Dismiss, attempted to distinguish what the Court of Appeals said in Footnote 25 in the 2012 redistricting case, by urging that the pivotal quote was addressing only a racial gerrymandering issue, rather than partisan gerrymandering. It is notable, however, that in deriving the notion that Article 24 could embody a greater breadth of protection than is afforded by the Fourteenth Amendment, the Court of Appeals cited to *Md. Aggregates Ass'n*, *supra*, (quoting *Murphy v. Edmonds*, 325 Md. 342, 354–55 (1992)), neither of which involved any racial differentiation.

Obviously, it cannot be lost to anyone that Article 24 was assumed to be applicable in a redistricting context in the 2012 redistricting case. *Id.* Article 24, moreover, has also been applied in various election and voting right contexts prior to 2012. *See Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 686 (2007) (Presidential elections); *DuBois v. City of College Park*, 286 Md. 677 (1980) (election for City Council); *Goodsell*, 284 Md. at 281 (election for County Executive).

Moreover, in *Green Party*, which is of particular significance to the instant case, Judge John C. Eldridge, writing for the Court, addressed whether a statutory scheme comported with equal protection under Article 24 and analyzed the issue using two distinct approaches, both of which are applicable in the instant case.

In 2000, the Maryland Green Party sought to place its candidate on the ballot for the U.S. House of Representatives seat in Maryland's first congressional district. *Green Party*, 377 Md. at 136. The Green Party needed initially to be recognized as a political party within the state,

which, pursuant to Section 4–102 of the Election Code, required it to submit a petition to the State Board of Elections that included "the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the 1st day of the month in which the petition is submitted." *Id.* at 135–36. In August of 2000, the Green Party's petition was accepted, and it became "a statutorily-recognized 'political party[.]'" *Id.* at 135 n.3 (quoting Section 1–101(aa) of the Election Code).

In order to nominate a candidate, however, the Green Party was then required to submit a second petition to the Board of Elections, which, pursuant to Section 5–703(e) of the Election Code, was to be accompanied by signatures of "not less 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought[.]" *Id.* at 137 n.6. "On August 7, 2000, the [Green Party] submitted a timely nominating petition containing 4,214 signatures of voters purporting to be registered in Maryland's first congressional district," *id.* at 137, but the petition was rejected by the Board of Elections. Alleging that "it could verify only 3,081 valid signatures, fewer than the 3,411 required by Maryland's 1% nomination petition requirement," the Board reasoned that "many signatures were 'inactive' voters" and ineligible to sign nominating petitions. *Id.* The basis for the Board's rationale was that, under the provisions of Section 3–504 of Election Code, if a sample ballot, which "the local boards customarily mail out . . . to registered voters prior to an election[,]" were "returned by the postal service" and the voter then "fail[ed] to respond to [a] confirmation notice," the voter's name would be placed on "the 'inactive voter' registration list." *Id.* at 147. Persons on the inactive voter list, pursuant to Sections 3–504(f)(4) of the Election Code, would "not be counted as part of the registry [of voters]," and under Section 3–504(f)(5), their

signatures were not to "be counted . . . for official administrative purposes as petition signature verification[.]" *Id.* at 150.

In addressing the constitutionality of Section 3–504 of the Election Code, which established an inactive voter registry, which essentially disenfranchised voters, Judge Eldridge applied the standards of Section 2 of Article I of the Constitution, which required:

> Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

In applying the standards of Section 2, Judge Eldridge declared Section 3–504 of the Election Code unconstitutional, because that Section "create[d] a group of 'second-class citizens' comprised of persons who are 'inactive' voters and thus not eligible to sign petitions[,]" and was "flatly inconsistent with Article 24 of the Declaration of Rights. *Id.* at 150. In explaining how the inactive voter list failed to comport with the Constitutional standards, Judge Eldridge explained that Section 2 of Article I, which instructs the General Assembly to create a uniform registry of voters,

> contemplates a single registry for a particular area containing the names of all qualified voters, leaving the General Assembly no discretion to decide who may or may not be listed therein, no discretion to create a second registry for inactive voters, and no authority to decree that an "inactive" voter is not a "registered voter" with the rights of a registered voter.

*Id.* at 143. A nexus between the Equal Protection Clause and a standards clause, therefore, was established.

Judge Eldridge, thereafter, explored another methodology to apply equal protection to evaluate Green Party's claim that the required submission of two petitions in order to nominate its candidate violated Article 24, because it treated principal political parties differently from minor political parties. *Id.* at 159. The Green Party had argued that "once a group has submitted the required 10,000 signatures to receive official recognition as a political party , . . . no further showing of support should be necessary for the name of a minor political party's candidate to be on the ballot." *Id.* at 153. The Board of Elections countered that the second petition was necessary to ensure that a minor party had "a significant modicum of public support," in order to prevent "frivolous" candidates from appearing on ballots. *Id.* at 153–54.

In addressing the question, Judge Eldridge approached the issue through the strict scrutiny lens and required the State to present a compelling interest. In so doing, he determined that the requirement that the Green Party submit one petition to form a political party and then a second petition to nominate a candidate, "discriminates against minor political parties in violation of the equal protection component of Article 24[.]" *Id.* at 156–57. Having identified the two-petition requirement as discriminatory, Judge Eldridge considered "the extent and nature of the impact on voters, examined in a realistic light," in order to determine the appropriate standard of review of the five-year registration requirement. *Id.* at 163 (quoting *Goodsell*, 284 Md. at 288). He then determined that, "the double petitioning requirement set forth by the Maryland Election Code denies ballot access to a significant number of minor political party candidates. On that basis, the challenged statutory provisions' impact on voters is substantial." *Id.*

Clearly, the 1816 Complaint, with respect to the equal protection principles embodied within Article 24 of the Declaration of Rights, has stated a cause of action to survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

*Article 40 of the Maryland Declaration of Rights*

The 1816 Plaintiffs' cause of action under Article 40 of the Maryland Declaration of Rights survived the Motion to Dismiss. Article 40, which pertains to freedom of speech and freedom of the press, provides:

> That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

MD. CONST. DECL. OF RTS. art. 40.

In their Complaint, the 1816 Plaintiffs allege that the 2021 Plan violates Article 40 by "burdening protected speech based on political viewpoint." Specifically, they allege, the 2021 Plan benefits certain preferred speakers (Democratic voters), while targeting certain disfavored voters (e.g., Republican voters, including Plaintiffs) because of disagreement on the part of the 2021 Plan's drafters with views Republicans express when they vote. *1816 Compl.* at ¶ 79. Plaintiffs aver that the 2021 Plan subjects Republican voters, including them, to disfavored treatment by "cracking"[27] them into specific congressional districts to dilute Republican votes and ensure that they are not able to elect a candidate who shares their views. *1816 Compl.* at ¶ 80. Therefore, Plaintiffs contend that the 2021 Plan has the effect of suppressing their political views and expressions and retaliates against them based on their political speech. *Id.* at ¶ 81.

Defendants argued in their Motion to Dismiss that the Plaintiffs' claims under Article 40 purport to "parrot" free speech claims that are the same as those offered under the First Amendment to the United States Constitution, which the Supreme Court has rejected in the

[27] "A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others." *Rucho v. Common Cause*, ____ U.S. ____, ____, 139 S. Ct. 2484, 2492 (2019).

redistricting context. *See Rucho*, 139 S. Ct. at 2506–07. Defendants further assert that the because the Maryland Court of Appeals has generally treated the rights enshrined under Articles 40 as "coextensive" with its federal counterpart and has specifically adhered to Supreme Court guidance regarding partisan gerrymandering claims, the free speech cause of action should have been dismissed. *1816 Mot. Dismiss* at 3; *see generally 1816 Mot. Dismiss*, Section III.C.

Article 40 of the Maryland Declaration of Rights adopted in 1776, preceded its federal counterpart, adopted in 1788, thereby contributing to the foundations of the latter. Article 40 of Maryland's Declaration of Rights has been generally regarded as coextensive with the First Amendment, but the Court of Appeals has recognized that Article 40 can have independent and divergent application and interpretation. *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621 (2002) ("Many provisions of the Maryland Constitution . . . do have counterparts in the United States Constitution. We have often commented that such state constitutional provisions are *in pari materia* with their federal counterparts or are the equivalent of federal constitutional provisions or generally should be interpreted in the same manner as federal provisions. Nevertheless, we have also emphasized that, simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does not mean that the provision will always be interpreted or applied in the same manner as its federal counterpart."); *see also State v. Brookins*, 380 Md. 345, 350 n. 2 (2004) ("While Article 40 is often treated *in pari materia* with the First Amendment, and while the legal effect of the two provisions is substantially the same, that does not mean that the Maryland provision will always be interpreted or applied in the same manner as its federal counterpart." (citing *Dua*, 370 Md. at 621)). The Court of Appeals has not shied away from "departing from the United States Supreme Court's

analysis of the parallel federal right" when necessary "[to] ensure[] that the rights provided by Maryland law are fully protected." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 550 (2013).

A violation of the free speech provision of Article 40 is implicated when there is interference with a citizen's right to vote, which is a fundamental right. *Hornbeck*, 295 Md. at 641 (explaining that the right to vote is a fundamental right). We apply strict scrutiny when a legislative enactment infringes upon or interferes with personal rights or interests deemed to be "fundamental." *Id.* at 641. When a legislative act, such as the 2021 Plan, creates Congressional districts that dilute the influence of certain voters based upon their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here a fundamental right. As a result, this Court, under Article 40, will apply strict scrutiny to the 2021 Plan.

*Fundamental Principles Underlying the Maryland Constitution and the Declaration of Rights*

The final basis upon which the Plaintiffs have stated a cause of action on which relief can be granted is through the lens of the entirety of our Constitution and Declaration of Rights, which provides a framework to determine the lawfulness of the 2021 Plan based upon their fundamental principles.[28] *Snyder ex rel. Snyder*, 435 Md. at 55 ("In construing a constitution, we have stated 'that a constitution is to be interpreted by the spirit which vivifies[.]'" (quoting *Bernstein*, 422 Md. at 56)).

Plaintiffs argue that partisan gerrymandering is inconsistent with the principles embodied by the Free Elections Clause, the Equal Protection Clause, and the Free Speech Clause of the Declaration of Rights, because it usurps the power of the people to choose those who represent them in government and puts that power solely within the purview of the Legislature. *1816 Compl.* ¶ 2 ("Indeed, the 2021 Plan defies the fundamental democratic principle that voters should choose their representatives, not the other way around."). They posit that usurping the power of voters to elect members of Congress violates the general principles upon which the structure of Maryland's Government and its Constitution were founded.

In response, Defendants posit that judicially manageable standards do not exist under the Maryland Constitution, and further, applicable statutes adjudicating claims regarding Congressional districts do not exist in Maryland. *1816 Mot. Dismiss* at 3. As a result, Defendants

[28] *Whittington v. Polk*, 1 H. & J. 236, 241 (Md. Gen. 1802), in dictum, established in Maryland the idea of judicial review – that the courts are the primary interpreters and enforcers of the constitution. The General Court of Maryland explained that if an act of the Legislature is repugnant to the constitution, the courts have the power, and it is their duty, so to declare it. *Id.* The General Court realized that the "power of determining finally on the validity of the acts of the legislature cannot reside with the legislature . . . [because] they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other." *Id.* at 243.

argue that Plaintiffs cannot seek relief under the Maryland Constitution or Declaration of Rights. *Id.* at 45. Instead, the State argues, either Congress or the General Assembly must decide to impose statutory restrictions or adopt constitutional amendments to regulate Congressional districting. *Id.* Until congressional or state action is taken, Defendants aver that Plaintiffs will continue to lack a remedy under the Maryland Constitution or Declaration of Rights. *Id.*

The Constitution and Declaration of Rights must be read together to determine the organic law of Maryland. The courts understood this rule of construction early on, explaining that "[t]he Declaration of Rights and the Constitution compose our form of government, and must be interpreted as one instrument." *Anderson v. Baker*, 23 Md. 531, 612–13 (1865). Specifically, the court in *Anderson* explained that, "[t]he Declaration of Rights is an enumeration of abstract principles, (or designed to be so,) and the Constitution the practical application of those principles, modified by the exigencies of the time or circumstances of the country." *Id.* at 627; *see also Bandel v. Isaac*, 13 Md. 202, 202–03 (1859) ("In construing a constitution, the courts must consider the circumstances attending its adoption, and what appears to have been the understanding of those who adopted it[.]"); *and Whittington v. Polk*, 1 H & J 236, 242 (1802) (stating that, "[t]he bill of rights and form of government compose the constitution of Maryland").

More recently, the Court of Appeals has confirmed this rule of construction. In *State v. Smith*, 305 Md. 489 (1986), the court reiterated that it "bear[s] in mind that the Declaration of Rights is not to be construed by itself, according to its literal meaning; it and the Constitution compose our form of government, and they must be interpreted as one instrument." *Id.* at 511

(explaining that the Declaration of Rights announces principles on which the form of government, established by the Constitution, is based).

While it is established that the Declaration of Rights and Constitution, together, form the organic law of our State, *Whittington*, 1 H & J at 242, the analysis then requires a review of the text, nature, and history of both documents. The text of the Maryland Constitution recognizes that "all Government of right originates from the people . . . and [is] instituted solely for the good of the whole; and [that citizens] have, at all times, the inalienable right to alter, reform, or abolish their Form of Government in such manner as they may deem expedient." MD. CONST. DECL. OF RTS. art. 1. Its purpose "is to declare general rules and principles and leave to the Legislature the duty of preserving or enforcing them, by appropriate legislation and penalties." *Bandel*, 13 Md. at 203. Moreover, it is well understood that the rights secured under the Maryland Declaration of Rights are regarded as very precious ones, to be safeguarded by the courts with all the power and authority at their command. *Bass v. State*, 182 Md. 496, 502 (1943). The framers ensured that the Declaration of Rights would be regarded as precious by enacting subsequent constitutional provisions to safeguard those rights. In that vein, the foundational significance of the right of suffrage is memorialized in the first Article of the Constitution, which pertains to the "Elective Franchise," MD. CONST. art. I, and Article I of the Declaration of Rights, which locates the source of all "Government" in the people. MD. CONST. DECL. OF RTS. art. 1.

Popular sovereignty dictates that the "Government" of the people which "derives from them," is properly channeled when our democratic process functions to reflect the will of the people. Although the Maryland Declaration of Rights, like the Constitution, is silent with respect to the right of its citizens to challenge the primacy of political considerations in drawing

legislative districts, the Declaration of Rights does memorialize that the people are guaranteed the right to wield their power through the elective franchise, thereby safeguarding the sacred principle that the government is, at all times, for the people and by the people. MD. CONST. DECL. OF RTS. arts. 1, 7. Specifically, recognizing that the government is for the people and by the people, Article I of the Constitution describes the process of electing persons to represent them in government, which is also embodied in the principles expressed through the Free Elections Clause in Article 7.

Under the principle of popular sovereignty, we bear in mind that the Constitution as a whole "is the fundamental, extraordinary act by which the people establish the procedure and mechanism of their government." *Bd. of Supervisors of Elections for Anne Arundel Cnty. v. Att'y Gen.*, 246 Md. 417, 429 (1967); *Whittington*, 1 H & J at 242 ("This compact [the Constitution] is founded on the principle that the people being the source of power, all government of right originates from them.").

The second principle—avoiding extravagant or undue extension of power by the Legislature—was an important limitation on the Legislature, the only entity for which the Maryland citizens could vote in 1776. It is stated that "[t]he Declaration of Rights is a guide to the several departments of government, in questions of doubt as to the meaning of the Constitution, and "a guard against any extravagant or undue extension of power[.]" *Anderson*, 23 Md. at 628. The limitation on "extravagant or undue extension of power" is coextensive with the principle of popular sovereignty. For this purpose, "courts have [the] power and duty to determine [the] constitutionality of legislation." *Curran v. Price*, 334 Md. 149, 159 (1994).

In Maryland, we have long understood that "[t]he elective franchise is the highest right of the citizen, and the spirit of our institution requires that every opportunity should be afforded to its fair and free exercise." *Kemp v. Owens*, 76 Md. 235, 241 (1892). In *Kemp*, the Court of Appeals characterized the right to vote as "one of the primal rights of citizenship," *id.*, as it did in *Nader for President 2004*: "the right of suffrage" guaranteed by our Constitution "is one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society." 399 Md. at 686. To safeguard the Legislature from exerting extravagant or undue extension of power, each citizen of this State is afforded the opportunity to vote and hold the Legislature accountable. MD. CONST. DECL. OF RTS. arts. 7, 24, 40. Similarly, the judicial branch of government has a responsibility to limit the Legislature from exerting extravagant or undue extension of power by enforcing the standards of legislative districting outlined in Article III, Section 4 of the Maryland Constitution and by the avoidance of extreme partisan gerrymandering.

Therefore, assuming the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom, the Plaintiffs have stated a cause of action under the fundamental principles of the Maryland Constitution and Declaration of Rights of popular sovereignty and avoiding extravagant and undue exercise of power by the Legislature.

## Findings of Fact

*Stipulations and Judicial Admissions*[29]

1. Plaintiffs are qualified, registered voters in Maryland.

[29] Where stipulations and admissions have overlapped, the trial judge has avoided duplication by adopting the more comprehensive of the two.

2. Plaintiffs in *Szeliga v. Lamone* ("No. 1816") are:

a. Kathryn Szeliga is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Ms. Szeliga currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2011. She is a Republican elected official who represents Maryland citizens in Baltimore and Hartford Counties. She resides in District 7 of the 2021 Plan.

b. Christopher T. Adams is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Mr. Adams currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2015. Mr. Adams is a Republican elected official who represents Maryland citizens in Caroline, Dorchester, Talbot, and Wicomico Counties. He resides in District 1 of the 2021 Plan.

c. James Warner is a citizen of the United States and a resident of and registered voter in Maryland. Mr. Warner is a decorated combat veteran and former prisoner of war. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

d. Martin Lewis is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for

Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

e. Janet Moye Cornick is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 3 of the 2021 Plan.

f. Ricky Agyekum is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 4 of the 2021 Plan.

g. Maria Isabel Icaza is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 5 of the 2021 Plan.

h. Luanne Ruddell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She currently serves as Chair of the Garrett County Republican Central Committee and President of the Garrett County Republican Women's Club. Additionally, she serves on the Rules Committee for the Maryland Republican Party and is a member of the Maryland Republican Women and the National Republican Women's organizations. She resides in District 6 of the 2021 Plan.

i. Michelle Kordell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 8 of the 2021 Plan.

3. Plaintiffs in *Parrott v. Lamone* ("No. 1773") are:

a. Plaintiff Neil Parrott is a citizen of Maryland, is registered to vote as a Republican, and resides in the Sixth Congressional District of the new Plan. Mr. Parrott has registered to run for Congress in 2022 in that district. Mr. Parrott is currently a member of the Maryland House of Delegates.

b. Plaintiff Ray Serrano is a citizen of Maryland, is registered to vote as a Republican, and resides in the Third Congressional District of the new Plan.

c. Plaintiff Carol Swigar is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

d. Plaintiff Douglas Raaum is a citizen of Maryland, is registered to vote as aRepublican, and resides in the First Congressional District of the new Plan.

e. Plaintiff Ronald Shapiro is a citizen of Maryland, is registered to vote as a Republican, and resides in the Second Congressional District of the new Plan.

f. Plaintiff Deanna Mobley is a citizen of Maryland, is registered to vote as aRepublican, and resides in the Fourth Congressional District of the new Plan.

g. Plaintiff Glen Glass is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

h. Plaintiff Allen Furth is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan.

i. Plaintiff Jeff Warner is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan. Mr. Warner intends to run for Congress in 2022 in that district.

j. Plaintiff Jim Nealis is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fifth Congressional District of the new Plan.

k. Plaintiff Dr. Antonio Campbell is a citizen of Maryland, is registered to voteas a Republican, and resides in the Seventh Congressional District of the new Plan.

l. Plaintiff Sallie Taylor is a citizen of Maryland, is registered to vote as a Republican, and resides in the Eight Congressional District of the new Plan.

4. Linda H. Lamone is the Maryland State Administrator of Elections.

5. William G. Voelp is the chairman of the Maryland State Board of Elections.

6. The Maryland State Board of Elections is charged with ensuring compliance with the Election Law Article of the Maryland Code and any applicable federal law by all persons involved in the election process. It is the State agency responsible for administering state and federal elections in the State Maryland.

7. Every 10 years, states redraw legislative and congressional district lines following completion of the decennial United States census. Redistricting is necessary to ensure that districts are equally populated and may also be required to comply with other applicable federal and state constitutions and voting laws.

8. The United States Constitution provides that, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. It also states that, "[t]he Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* § 4, cl. 1. The United States Constitution thus assigns to state legislatures primary responsibility for apportionment of their federal congressional districts, but this responsibility may be supplanted or confined by Congress at any time.

9. Maryland has eight congressional districts.

10. The General Assembly enacts maps for these districts by ordinary statute. While the General Assembly's congressional maps are subject to gubernatorial veto, the General Assembly can, as with any ordinary statute, override a veto.

11. In 2011, following the 2010 decennial census, Maryland's General Assembly undertook to redraw the lines of Maryland's eight congressional districts.

12. To carry out the redistricting process, then-Governor Martin O'Malley appointed the Governor's Redistricting Advisory Committee ("GRAC") in July 2011 by Executive Order. The GRAC was charged with holding public hearings around the State and drafting redistricting plans for the Governor's consideration to set the boundaries of the State's 47 legislative districts and 8 congressional districts following the 2010 Census.

13. To carry out the redistricting process, Governor O'Malley appointed the GRAC to hold public hearings and recommended a redistricting plan. As part of a collaborative approach to developing a congressional map in 2011, Governor O'Malley asked Rep. Steny Hoyer to propose a consensus congressional map among Maryland's congressional delegation.

14. Democratic members of Maryland's congressional delegation, including Representative Hoyer, were involved in developing a consensus map to provide Governor O'Malley in order to assist with the process of developing a new congressional map for Maryland.

15. The GRAC held 12 public hearings around the State in the summer of 2011 and received approximately 350 comments from members of the public concerning congressional and legislative redistricting in the State. Approximately 1,000 Marylanders attended the hearings, which were held in Washington, Frederick, Prince George's, Montgomery, Charles, Harford, Baltimore, Anne Arundel, Howard, Wicomico, and Talbot Counties, and Baltimore City.

16. The GRAC solicited submissions of alternative plans for congressional redistricting prepared by third parties for its consideration. The GRAC also solicited public comment on the proposed congressional plan that it adopted.

17. The GRAC prepared a draft plan using a computer software program called Maptitude for Redistricting Version 6.0.

18. GRAC adopted a proposed congressional redistricting plan and made public its proposed plan on October 4, 2011. No Republican member of the GRAC voted for the congressional redistricting plan that was adopted.

19. The GRAC plan altered the boundaries of district 6 by removing territory in, among other counties, Frederick County, and adding territory in Montgomery County.

20. On October 15, 2011, Governor O'Malley announced that he was submitting a plan that was substantially similar to the plan approved by the GRAC to the General Assembly.

21. One perceived consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from District 6.

22. On October 17, 2011, the Senate President introduced the Governor's proposal as Senate Bill 1 at a special session and it was signed into law on October 20, 2011 with only minor

adjustments (the "2011 Plan"). No Republican member of the General Assembly voted in favor of the 2011 Plan.

23. The 2011 Plan was petitioned to referendum by Maryland voters at the general election of November 6, 2012, pursuant to Article XVI of the Maryland Constitution.

24. On September 6, 2012, the Circuit Court for Anne Arundel County rejected contentions that the ballot language for the referendum question was misleading or insufficiently infmmative. *See Parrott, et al. v. McDonough, et al.*, No. 02-C-12-172298 (Cir. Ct. for Anne Arundel Cnty.) (the "Referendum Litigation"). On September 7, 2012, the Court of Appeals denied a petition for certiorari by the plaintiffs in that case.

25. The 2011 Plan was approved by the voters in that referendum. The language of the question on the ballot for the referendum stated:

> *Question 5*
> *Referendum Petition*
> *(Ch. 1 of the 2011 Special Session)*
> *Congressional Districting Plan*
>
> Establishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.
>
> **For the Referred Law**
> _ **Against the Referred Law**

26. On July 23, 2014, the Court of Special Appeals affirmed the ruling of the Circuit Court in the Referendum Litigation in an unpublished opinion. *See Parrott, et al. v. McDonough, et al.*, No. 1445, Sept. Tenn 2012 (Md. App. July 23, 2014). A true and

accurate copy of the unpublished opinion in that case is attached hereto as Exhibit XII.[30] On October 22, 2014, the Court of Appeals denied a petition for certiorari by the appellants in that case. *See Parrott, et al. v. McDonough, et al.*, No. 382, Sept. Tenn 2014 (Md. Oct. 22, 2014).

27. Republican Roscoe G. Bartlett won election as United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over his Democratic challenger: 1992 (8.3%); 1994 (31.9%); 1996 (13.7%); 1998 (26.8%); 2000 (21.4%); 2002 (32.3%); 2004 (40.0%); 2006 (20.5%); 2008 (19.0%); 2010 (28.2%).

28. Democrats Goodloe E. Byron (1970-1976) and Beverly Byron (1978-1990) won election United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over their respective Republican challenger: 1970 (3.3%); 1972 (29.4%); 1974 (41.6%); 1976 (41.6%); 1978 (79.4%); 1980 (39.8%); 1982 (48.8%); 1984(30.2%); 1986(44.4%); 1988(50.7%); 1990(30.7%). *See Election Statistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/98LQ-8VXK.

29. The congressional districts created through the 2011 Plan were used in the 2012-2020 congressional elections. Since 2012, a Democrat has held District 6 and Maryland's congressional delegation has always included 7 Democrats and 1 Republican. The margins of vict01y for the Democrat in District 6 (John Delaney from 2012-2016; David Trone in 2018-2020) have been: 2012 (20.9%); 2014 (1.5%); 2016 (15.9%); 2018 (21.0%);

[30] The identification of exhibits attached to this Court's Opinion has been changed from alphabetical identifications, which were previously labeled by the parties in these stipulations, to roman numeral identifications, so as to avoid any confusion between the exhibits admitted at trial and the exhibits attached to this Opinion.

2020 (19.6%). *See ElectionStatistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/98LQ-8VXK.

30. Maryland Governor Larry Hogan signed an executive order on August 6, 2015, which created the Maryland Redistricting Refo1m Commission. A true and accurate copy of the August 6, 2015 executive order is attached hereto as Exhibit I.

31. The Commission was comprised of seven members appointed by the (Republican) Governor, two members appointed by the (Republican) minority leaders in the Maryland Legislature, and two members appointed by the (Democratic) majority leaders in the Maryland Legislature. The Governor's appointees consisted of three Republicans, three Democrats, and one not affiliated with any party. The Legislature's appointments consisted of two Democrats and two Republicans.

32. After several months of soliciting input from citizens and legislators across the State, the Commission observed that Maryland's constitution and laws offer no criteria or guidelines for congressional redistricting, and that the Maryland Constitution is otherwise silent on congressional districting. The Commission recommended, among other things, that districting criteria should include compactness, contiguity, congruence, substantially equal population, and compliance with the Voting Rights Act and other applicable federal laws. The Commission also recommended the creation of an independent redistricting body, whose members would be selected by a panel of officials drawn from independent branches of government such as the judiciary, charged with reapportioning the state's districts every ten years after the decennial census. A true and accurate copy of the Commission's Final Report is attached hereto as Exhibit X.

33. During each regular session of the General Assembly between 2016 and 2020, Governor Hogan caused one or more legislative bills to be introduced that would have established a processes by which State legislative and congressional maps were created in the first instance by a purportedly independent and bipartisan commission, and ultimately by the Court of Appeals in the event that the commission-proposed maps were not approved by the General Assembly or were vetoed by the Governor. These bills were House Bill 458 and Senate Bill 380 introduced in the 2016 regular session of the General Assembly, House Bill 385 and Senate Bill 252 introduced in the 2017 regular session, House Bill 356 and Senate Bill 307 in the 2018 regular session, House Bills 43 and 44 and Senate Bills 90 and 91 in the 2019 regular session, and House Bills 43 and 90 and Senate Bills 266 and 284 in the 2020 regular session. None of these bills was voted out of committee.

34. On January 12, 2021, Governor Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (MCRC) for the purposes of redrawing the state's congressional and legislative districting maps based on newly released census data. The MCRC was comprised of nine Maryland registered voter citizens, three Republicans, three Democrats, and three registered with neither party. Governor Hogan's Executive Order directed the MCRC to prepare maps that, among other things: respect natural boundaries and the geographic integrity and continuity of any municipal corporation, county, or other political subdivision to the extent practicable; and be geographically compact and include nearby areas of population to the extent practicable. A true and accurate copy of the January 12, 2021 Executive Order is attached heretoas Exhibit XI.

35. Over the course of the following months, the MCRC held over 30 public meetingswith a total of more than 4,000 attendees from around the State. The Commission

provided a public online application portal for citizens to prepare and submit maps, and it received a total of 86 maps for consideration.

36. After receiving public input and deliberating, on November 5, 2021, the MCRC recommended a congressional redistricting map to Governor Hogan.

37. On November 5, 2021, Governor Hogan accepted the MCRC's proposed final map and issued an order transmitting the maps to the Maryland General Assembly for adoption at a special session on December 6, 2021.

38. In July 2021, following the 2020 decennial census, Bill Ferguson, President of the Maryland Senate, and Adrienne A. Jones, Speaker of the Maryland House of Delegates, formed the General Assembly's Legislative Redistricting Advisory Commission (the "LRAC"). The LRAC was charged with redrawing Maryland's congressional and state legislative maps.

39. The LRAC included Senator Ferguson, Delegate Jones, Senator Melony Griffith, and Delegate Eric G. Luedtke, all of whom are Democratic members of Maryland's General Assembly. Two Republicans, Senator Bryan W. Simonaire and Delegate Jason C. Buckel, also, were appointed to the LRAC by Senator Ferguson and Delegate Jones. Karl S. Aro, who is not a member of Maryland's General Assembly, was appointed as Chair of the LRAC by Senator Ferguson and Delegate Jones. Mr. Aro previously served as Executive Director of the non-partisan Department of Legislative Services for 18 years until his retirement in 2015, and was appointed by the Court of Appeals to assist in preparing a remedial redistricting plan that complied with state and federal law in 2002.

40. The LRAC held 16 public hearings across Maryland. At the hearings, the LRAC received testimony and comments from numerous citizens.

41. One of the themes that emerged from the public testimony and comments was that Maryland's citizens wanted congressional maps that were not gerrymandered. Other citizens indicated in these comments or public testimony that they did not want to be moved from their current districts. Still others advocated for the creation of majority-Democratic districts in every district of the State. And others requested that districts be drawn so as to eliminate the likelihood that a current incumbent might be reelected.

42. At the conclusion of the public hearings, the Department of Legislative Services ("DLS") was directed to produce maps for the LRAC's consideration.

43. On November 9, 2021, the LRAC issued four maps for public review and comment.

44. In a cover message releasing the maps, Chair Aro wrote: "These Congressional map concepts below reflect much of the specific testimony we've heard, and to the extent practicable, keep Marylanders in their existing districts. Portions of these districts have remained intact for at least 30 years and reflect a commitment to following the Voting Rights Act, protecting existing communities of interest, and utilizing existing natural and political boundaries. It is our sincere intention to dramatically improve upon our current map while keeping many of the bonds that have been forged over 30 years or more of shared representation and coordination."

45. On November 23, 2021, the LRAC chose a final map to submit to the General Assembly for approval (the "2021 Plan"). Neither Republican member of the LRAC supported the 2021 Plan.

46. On November 23, 2021, by a strict party-line vote, the LRAC chose a final map to submit to the General Assembly for approval, referred to as the 2021 Plan. Neither Republican

member of the LRAC supported the 2021 Plan. Senator Simonaire uttered the statement during the LRAC hearing on November 23, 2021, "[o]nce again, I've seen politics overshadow the will of the people."

47. A true and accurate copy of the 2021 Plan is attached as Exhibit I.

48. On December 7, 2021, the Maryland House of Delegates voted to reject an amendment that would have substituted the MCRC's map for the 2021 Plan. Two Democrats joined all of the Republicans in voting to substitute the MCRC's map for the Plan. No Republican member voted against the amendment.

49. On December 8, 2021, the General Assembly enacted the 2021 Plan. One Democratic member voted against the 2021 Plan. No Republican member voted to approve the 2021 Plan.

50. On December 8, 2021, the General Assembly enacted the 2021 Plan on a strict party-line vote. Not a single Republican member of the General Assembly voted to approve the 2021 Plan.

51. According to the Princeton Gerrymandering Project, Democrats now have an estimated vote-share advantage in every single Maryland congressional district.

52. On December 9, 2021, Governor Hogan vetoed the 2021 Plan.

53. On December 9, 2021, the General Assembly overrode Governor Hogan's veto, thus adopting the 2021 Plan into law. One Democratic member of the General Assembly voted against overriding Governor Hogan's veto, while no Republican member of the General Assembly voted in favor of override.

54. After passage of the 2021 Plan, Senator Ferguson and Delegate Jones issued a joint statement emphasizing that the 2021 Plan "keep[s] a significant portion of Marylanders in their current districts, ensuring continuity of representation."

55. Under Maryland's 2021 adopted congressional plan, portions of Anne Arundel County are in Districts 1, 2, and 4, and that District 1 includes population residing on the Eastern Shore and in Anne Arundel County.

56. Under Maryland's 2021 adopted congressional plan, portions of Baltimore City are in Districts 2, 3, and 7.

57. Under Maryland's 2021 adopted congressional plan, portions of Baltimore County are in Districts 2, 3, and 7.

58. Under Maryland's 2021 adopted congressional plan, portions of Montgomery County are in Districts 3, 4, 6, and 8.

59. Under Maryland's 2021 adopted congressional plan, nine counties have population assigned to more than one congressional district.

60. Congressmen Andy Harris, who currently represents the First Congressional District under the Enacted Plan and represented the First Congressional District under the 2011 Plan, was in the Seventh Congressional District, which is the District represented by Kweisi Mfume. Since that time, according to the Board of Elections' registration records, in early February 2022, Congressmen Harris registered to vote at a residence in Cambridge, Maryland, in the First Congressional District, which is on the Eastern Shore at a residence or place where Congressmen Harris has owned since 2009.

61. Exhibit II reports the adjusted population of Maryland's eight congressional districts following the 2010 census under Maryland's 2002 redistricting map. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit II are a true and accurate representation of data derived from government sources.

62. Exhibit III reports the adjusted population of Maryland's eight congressional districts following the 2020 census under the 2011 Plan and under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit III are a true and accurate representation of data derived from government sources.

63. Exhibit IV reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2010. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit IV are a true and accurate representation of data derived from government sources.

64. Exhibit V reports the number of eligible active voters and the respective political-party affiliations of those eligible active voters in each of Maryland's eight congressional districts on October 21, 2012. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit V are a true and accurate representation of data derived from government sources.

65. Exhibit VI reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2020. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VI are a true and accurate representation of data derived from government sources.

66. Exhibit VII reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VII are a true and accurate representation of data derived from government sources.

67. Exhibit VIII depicts Maryland's eight congressional districts under the 2011 Plan. The parties stipulate that the matters of fact asserted, stated or depicted in Exhibit VIII are a true and accurate representation of data derived from government sources.

*Findings Derived by the Trial Judge from Testimony and Other Evidence Adduced at Trial*

Mr. Sean Trende

68. Mr. Sean Trende testified and was qualified as an expert witness in political science, including elections, redistricting, including congressional redistricting, drawing redistricting maps, and analyzing redistricting.

69. Mr. Trende was asked to analyze the Congressional districts adopted by the Maryland Legislature in the recent rounds of redistricting and opine as to whether traditional redistricting criteria was [subordinated] for partisan considerations.[31]

70. Mr. Trende's opinions and conclusions were rendered to a reasonable degree of scientific certainty typical to his field.

71. In deriving his opinions, Mr. Trende conducted a three-part analysis; the first part analyzed traditional redistricting criteria in Maryland, with specific reference to the compactness

[31] The transcript stated, "whether traditional redistricting criteria was coordinated for partisan considerations," however, the trial judge recalls the correct verbiage was "whether traditional redistricting criteria was *subordinated* for partisan considerations." March 15, 2022, A.M. Tr. 45: 2–7.

of the maps with a comparison to other maps that had been drawn both in Maryland and across the country; he then examined the number of county splits, "the number of times the counties were split up by the maps" and finally, he then conducted a "qualitative assessment" to see how precincts were divided.

72. In the first part, Mr. Trende conducted a simulation analysis. In doing so, he "used the same techniques that were used in Ohio and in North Carolina" and "similar to that which has been used in Pennsylvania." The purpose of Mr. Trende's analysis was to analyze "partisan bias of the Maryland 2021 congressional districts."

73. Mr. Trende's methodology relied on "shape files."

74. In analyzing the shape files, he used "widely used statistical programming software called R."

75. Mr. Trende also conducted an analysis of the county splits for Maryland utilizing the "R" software.

76. Based upon his analysis of the county splits, referring to Exhibit 2-A, Mr. Trende found that the 1972 Congressional map included 8 splits.

77. In 1982, there were 10 county splits in the Congressional map.

78. In 1992, there were 13 county splits in the Congressional map.

79. In 2002, there were 21 county splits in the Congressional map.

80. In 2012, there were 21 county splits in the Congressional map.

81. In the 2021 Plan, there are 17 county splits.

82. The 2021 Plan has a historically high number of county splits compared to other Congressional plans, except the 2011 Map.

83. Mr. Trende testified that "you really only need 7 county splits in a map with 8 districts."

84. With respect to "compactness" of the 2021 Plan, Mr. Trende used four of the "most common compactness metrics": the Reock score; the Polsby-Popper score; the Inverse Schwartzberg score; and the Convex Hull score; the lower the score the less compact a Congressional plan is.

85. The four scores were presented to strengthen his presentation as well as to present a different "aspect" of compactness.

86. Exhibits 4-A, 4-B, 4-C, and 4-D reflect the bases for Mr. Trende's compactness analyses, which included scores for all of Maryland's congressional districts dating back to 1788.

87. Exhibit 5 reflects the analysis of the four scores using a scale of 0 to 1, where "1 is a perfectly compact district, and 0 is a perfectly non-compact score."

88. There is no "magic number" that reflects whether a district is not compact. Comparisons to historical data supported Mr. Trende's conclusion that the 2021 Plan is "an outlier."

89. Based upon Mr. Trende's testimony, the Court finds that for "much of Maryland's history, including for a large portion of the post-*Baker v. Carr* history, Maryland had reasonably compact districts that showed a similar degree of compactness from cycle to cycle."

90. The Court also finds, based upon Mr. Trende's analysis that by Maryland's historic standards, the 2021 Congressional lines are "quite non-compact" regardless of which of the four metrics is used or analyzed.

91. Mr. Trende also analyzed the 2021 Plan with reference to every district in the United States going back to 1972, which is represented by Exhibits 6-A, 6-B, 6-C, and 6-D.

92. Mr. Trende testified that there are a limited number of maps for other states that have lower Reock scores than the 2021 Plan (*see* Exhibit 6-A).

93. Mr. Trende also testified with reference to Exhibit 6-B that there are only "six maps that have ever been drawn in the last 50 years with worse average Polsby-Popper scores than the current Maryland maps."

94. Mr. Trende further testified with reference to Exhibit 6-C that the 2021 Plan reflects one of the "worst Inverse Schwartzberg score[] in the last 50 years in the United States."

95. With reference to Exhibit 6-D, Mr. Trende testified that it scored, under the Convex Hull analysis, "very poorly relative to anything that's been drawn in the United States in the last 50 years."

96. Mr. Trende testified relative to compactness in the 2002 and 2012 Congressional plans in comparison to the 2021 Plan and concluded that the 2021 Plan is not compact.

97. Mr. Trende testified that relative to Exhibits 7-A, 7-B, 7-C, and 7-D, that the first Congressional district under the 2021 Plan "lower[ed] the Republican vote share in the First" and "[left] the democratic districts or precincts on the bay." He concluded that the "Democrats have an increased chance of winning this district in a normal or good democratic year."

98. As to Exhibits 8-A, 8-B, 8-C, and 8-D, he concluded that "almost all of the Republican precincts were placed into District 3 or District 7," while "[a]lmost all of the democratic precincts were placed into District 1."

99. Mr. Trende then presented a simulation approach to redistricting utilizing "R" software. The simulation package was dependent on the work of Dr. Imai using an approach that samples maps drawn without respect to politics. In each of Mr. Trende's simulations he used 250,000 maps all suppressing politics and utilizing two minority/majority districts mandated by the Voting Rights Act; he discarded duplicative maps and arrived at between 30,000 to 90,000 maps to be sampled for each simulation.

100. He then fed various "political data" into the program to measure partisanship.

101. Mr. Trende's simulations relied upon the correlations between vote shares and Presidential data, because he testified that Presidential data is the most predictive in analyzing election outcomes. Mr. Trende further testified that he used other elections at the Presidential, senatorial, and gubernatorial levels to check his simulation results.

102. In the first set of 250,000 maps, Mr. Trende depended upon population parity or equality and contiguity as well as a "very, very light compactness parameter." Other traditional redistricting criteria was not considered.

103. The second set of 250,000 maps depended on a "modest compactness criteria," "drawing without any political information."

104. The third set of 250,000 maps added respect for county subdivisions.

105. The three analyses are represented in Exhibits 9-A, 9-B, and 9-C.

106. In every one of the maps from which Mr. Trende drew his opinions, there are at least "two majority/minority districts to comport with the Voting Rights Act."

107. With respect to the first set of maps drawn with very little regard to compactness but regard given to contiguity and equal population, 14,000 of the maps have seven districts that

were won by President Joseph Biden and only 4.4% have eight districts won by President Joseph Biden. Mr. Trende concluded that "it is exceedingly unlikely that if you were drawing by chance, you would end up with a map where President Joe Biden carried all eight districts."

108. With respect to the application of compactness and contiguity as well as equal population, he concluded that the 2021 Plan would result in eight districts won by President Biden, which he concluded was "an extremely improbable outcome if you really were drawing – just caring about traditional redistricting criteria and weren't subordinating those considerations for partisanship."

109. With respect to Exhibit 9-C, which reflects maps drawn with consideration of population equality, contiguity, compactness, and respect for county lines, Mr. Trende testified that "you almost never produce eight districts that Joe Biden carries." Specifically, Mr. Trende found that of the 95,000 maps that survived the initial sort, 134 of them, or .14%, produced eight districts that President Biden won.

110. Mr. Trende then presented data dependent on box plots, which are reflected in Exhibits 10-A, 10-B, 10-C, 10-D, and 10-E. On the basis of his box plot analysis, Mr. Trende concluded that, "[p]olitics almost certainly played a role" in the 2021 Plan. He also concluded that, "there is a pattern that appears again and again and again, which is heavily democratic districts are made more Republican but still safely democratic. And that, in turn, allows otherwise Republican competitive districts to be drawn out of that Republican competitive range into an area where Democrats are almost guaranteed to have seven districts, have a great shot at winning that eighth District [that being, the First Congressional District]."

111. With respect to his final analysis, he utilized a "Gerrymandering Index," which is "a number that summarizes, on average, how far the deviations are from what . . . would [be] expect[ed] for a map drawn without respect to politics."

112. Mr. Trende relied Dr. Imai's work in his paper on the Sequential Monte Carlo methods.[32]

113. Exhibits 11-A, 11-B, and 11-C, illustrate Mr. Trende's conclusions with respect to the Gerrymandering Index. Lower scores are indicative of greater gerrymandering.

114. Mr. Trende concludes that the 2021 Plan is an outlier with respect to the Gerrymandering Index. In fact, he concludes with respect to Exhibit 11-A, which included considerations regarding contiguity and equal population, that "it's exceedingly unlikely" that a map would result that would have a larger Gerrymandering Index, because there were only 97 maps of the 31, 316 maps that were consulted that would have a larger gerrymandering index.

115. With respect to Exhibit 11-B in which compact districts are drawn, Mr. Trende concluded that there were only 102 maps with larger gerrymandering indexes than the 2021 Plan: "[i]t's exceedingly unlikely if you were really drawing without respect to partisanship, just trying to draw compact maps that are contiguous and equipopulous, its exceedingly unlikely you would get something like this."

116. The final Gerrymandering Index Exhibit, 11-C, reflects compact plans that are contiguous and of equal population and respect county lines (with due consideration to the Voting Rights Act: two majority/minority districts).

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[32] Kosuke Imai & Cory McCartan, *Sequential Monte Carlo for Sampling Balanced and Compact Redistricting Plans*, HARV. UNIV. 6–17 (Aug. 10, 2021), available at: https://perma.cc/Z2DT-A2RW.

117. On the basis of Exhibit 11-C, Mr. Trende concludes that the 2021 Plan is a "gross outlier," such that of the 95,000 maps under considerations, only one map had a Gerrymandering Index larger than the 2021 Plan.

118. Utilizing the Gerrymandering Index, Mr. Trende concluded that "it's just extraordinarily unlikely you would get a map that looks like the enacted plan."

119. Mr. Trende ultimately concluded that "the far more likely thing that we would accept in social science is given all this data is that partisan considerations predominated in the drawing of this map and that as was the case in Pennsylvania, North Carolina, and Ohio and other states where this type of analysis was conducted, traditional redistricting criteria were subordinated to these partisan considerations."

120. Mr. Trende also concluded that the 2021 Plan has a very high Gerrymandering Index and the same pattern of districts being drawn up in heavily Republican areas made more Democratic, as well as districts drawn down into the Democratic areas made more Republican, even when three majority/minority districts under the Voting Rights Act are conceded in the 2021 Plan.

121. Ultimately, Mr. Trende concludes that the 2021 Plan was drawn with partisanship as a predominant intent, to the exclusion of traditional redistricting criteria.

122. Mr. Trende had no opinion with respect to the Maryland Citizens Redistricting Commission ("MCRC") Plan.

123. Mr. Trende's simulations did not account for communities of interest and "double bunking of incumbents" into a single district.

124. Mr. Trende did not consider in his simulations the effect of Governor Hogan's victories in 2014 and 2018.

125. Mr. Trende did not account for unusually strong Congressional candidates running in an election using the 2021 Plan.

126. Mr. Trende used voting patterns rather than registration patterns in his analyses of the 2021 Plan.

127. Mr. Trende testified that the absolute minimum number of county splits in a map with eight congressional districts is seven splits.

128. Mr. Trende, when asked to defined an "outlier," explained that it "means a map that would have a less than 5% chance of being drawn without respect to politics" and that with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier."

129. Mr. Trende testified within his expertise to a reasonable degree of scientific, professional certainty, that under any definition of extreme gerrymandering, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know, with compactness and respect for county lines, .00001 percent. That's extreme."

130. Mr. Trende further opined that the 2021 Plan reflects "the surgical carving out of Republican and Democratic precincts" and that "there are a lot of individual things that tell an extreme-gerrymandering story," and "when you put them all together, it's just really hard to deny it."

131. Mr. Trende further stated that the 2021 Plan was drawn "with an intent to hurt the Republican party's chances of letting anyone in Congress."

132. Mr. Trende testified that the 2021 Plan "dilutes and diminishes the ability of Republicans to elect candidates of choice."

133. Mr. Trende also testified that among the implications of an extreme partisan gerrymandering, that it "becomes harder for political parties to recruit candidates to run for office, because who wants to raise all that money and then be guaranteed to lose in your district."

134. Mr. Trende did not conduct an efficiency gap analysis in this case.

Dr. Thomas L. Brunell

135. Dr. Brunell testified and was qualified as an expert in political science, including partisan gerrymandering, identifying partisan gerrymandering, and redistricting.

136. Dr. Brunell was asked to examine two Congressional districting maps for the State of Maryland: the 2021 Plan and the MCRC Plan and compare them using metrics for partisan gerrymandering.

137. In his comparison, he looked at city and county splits and compared the outcomes to proportionality regarding the relationship between the statewide vote for each party and the total number of seats in Congress for each party. He also looked at compactness and calculated the efficiency gap regarding statewide elections during the last ten years for both the 2021 Plan and the MCRC Plan.

138. Dr. Brunell testified that the MCRC Map is more compact on average than the eight districts for the 2021 Plan. He testified that the average compactness score using the Polsby-Popper index was lower for the 2021 Plan than the MCRC Plan. Dr. Brunnell also

concluded that in comparison to 29 states, the 2021 Plan had a Reock score that was higher than only two other states, Illinois and Idaho. He also concluded that only Illinois and Oregon had a lower Polsby-Popper score than Maryland with respect to the 2021 Plan.

139. Dr. Brunell utilized the actual number of voters in his analysis rather than voter registration.

140. Dr. Brunell testified that with respect to the 2016 Presidential election, similar to the 2012 Presidential election, the Democratic candidate received 64% of the statewide vote in Maryland and the Democrats carried seven of the eight Congressional districts in Maryland under the 2021 Plan. Using the 2020 Presidential data in evaluating the 2021 Plan, Democrats would carry all eight of the Congressional districts under the 2021 Plan. Using the 2012 Senate candidate data in evaluating the 2021 Plan, the Democrats would carry all eight Congressional districts. Using the 2016 Senate elections in evaluating the 2021 Plan, he testified that the Democrats would carry seven of the eight districts. Using the 2018 Senate elections data, the Democrats under the 2021 Plan would carry all eight districts. Using the 2014 and 2018 gubernatorial elections, he concluded that the Democrats would carry three of the eight seats in the Congressional elections under the 2021 Plan.

141. Dr. Brunell conducted an efficiency test to determine wasted votes, *i.e.*, those cast for the losing party and those cast for the winning party above the number of votes necessary to win.

142. In order to determine the efficiency gap, he added all the wasted votes for both parties in the same district to get a measure of who is wasting more votes at a higher rate.

143. A lower number of votes wasted reflects less likelihood of partisan gerrymandering.

144. Dr. Brunell testified that just considering the efficiency gap would not be enough to find that a map is gerrymandered. Dr. Brunell testified that one would need to look at "the totality of the circumstances, use different measures, different metrics, to see if they're telling you the same thing [or] different things."

145. Dr. Brunell testified that by using an efficiency gap measure, there was a bias in favor of the Republicans in the MCRC Plan, although that bias was not significant.

146. Dr. Brunell testified that there were many more county segments and county splits in the 2021 Plan than in the MCRC Plan.

147. Dr. Brunell testified that redrawing electoral districts "is a complex process with dozens of competing factors that need to be taken into account, . . . like compactness, contiguity, where incumbents live, national boundaries, municipal boundaries, county boundaries, and preserving the core confirmed districts."

148. Dr. Brunell only considered compactness of the districts in his analysis of the 2021 Plan.

149. Dr. Brunell did not take into consideration in his analysis the Voting Rights Act or incumbency bias. He testified he did assume population equality and contiguity having been met in the 2021 Plan.

Mr. John T. Willis

150. Mr. Willis testified and was qualified as an expert in Maryland political and election history and Maryland redistricting, including Congressional redistricting.

151. Mr. Willis was asked to evaluate the 2021 Plan and determine if it was consistent with redistricting in the course of Maryland history and to give his opinion as to its validity and whether it was based on reasonable factors.

152. Mr. Willis opined that Maryland's population over time has changed with an east-to-west migration, "in significant numbers."

153. Mr. Willis referred to a series of Maryland maps reflecting population migration every 50 years from 1800 to 2000, admitted into evidence as Exhibit H.

154. Exhibit H had been prepared by Mr. Willis in anticipation of the 2001 redistricting process.

155. Exhibit H shows population migration to the west in Maryland and towards the suburbs of the District of Columbia.

156. Mr. Willis testified regarding Defendants' Exhibit I, admitted into evidence, which reflects concentrations of population during the Fall of 2010.

157. He testified almost 70% of the Maryland population is "in a central core, which is roughly I-95 and the Beltway."

158. Mr. Willis also testified that geography impacts the redistricting process as well as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, and migration patterns.

159. With respect to Defendants' Exhibit J, Mr. Willis testified regarding the population changes from 2010 to 2020.

160. Mr. Willis further testified that each district in the 2021 Plan had to have a target population of 771,925.

161. Mr. Willis further testified that in Congressional redistricting the General Assembly starts with the map in existence to avoid disturbing existing governmental relationships.

162. Exhibit K includes all of the Congressional redistricting maps from 1789 to the present 2021 Plan, which includes a set of 17 maps. The last map—map 17—Mr. Willis testified that the district lines in the First District appeared to be based on reasonable factors and are consistent with the historical district lines enacted in Maryland. As the basis for his opinion, Mr. Willis explained that there has always been a population deficit in the First District which requires the boundary to cross over the Chesapeake Bay or to cross north over the Susquehanna River in Harford County and that there have been more crossings over the Chesapeake Bay historically than into Harford County.

163. Mr. Willis further testified regarding regional and county-based population changes over the decades in Maryland since 1790, on a decade basis, reflected in Exhibit L. He testified that the district lines in the Second Congressional District appear to be based upon reasonable factors and are consistent with historical district lines enacted in Maryland and reflects migration patterns relative to Baltimore City.

164. Mr. Willis further testified about the district lines for the Third Congressional District, which he opined were based on reasonable factors and consistent with historical district lines enacted in Maryland.

165. With respect to the liens of the Fourth Congressional District, Mr. Willis testified that the district lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. He testified that the Fourth District is also what is known as a "Voting Rights Act District."

166. With respect to the district lines of the Fifth Congressional District, he opined that the lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. The district lines are also based on major employment centers and major public institutions.

167. With respect to the district lines of the Sixth Congressional District, following the Potomac River, Mr. Willis testified that the lines reflect commercial and family connections tying the area together since the State was founded. On that basis, he testified that the lines of the Sixth District appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

168. Mr. Willis testified that the Seventh Congressional District is another "Voting Rights Act district."

169. Mr. Willis then testified about the Eighth Congressional District, the lines of which appear to be based on reasonable factors and consistent with historical district lines enacted in Maryland. Mr. Willis attributes the lines to traffic patterns along what is basically State Route 97.

170. He finally testified that the all the district lines as they are drawn in the 2021 Plan appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

171. Mr. Willis testified that for every election prior to 2002 in Congressional District 2, a Republican candidate won the Congressional seat. A Republican candidate also won every election in Congress in District 8 from 1992 to 2000, that being Congresswoman Constance Morella. Thereafter, from 2002 to 2010, no Republican candidate won a Congressional election in District 8. He then testified that in District 2, a Democratic candidate has won the Congressional election every single year since the 2002 map was drawn, *i.e.*, Congressman C.A. Dutch Ruppersberger.

172. Mr. Willis further testified with respect to the First Congressional District that as a result of a Federal Court decision, District 1 included all of the Eastern Shore and Cecil County as well as St. Mary's County, Calvert County, and part of Anne Arundel County.

173. As a result of the redistricting plan from 2002 to 2010, District 1 was drawn a different way, which included all of the Eastern Shore counties and an area across the Bay Bridge into Anne Arundel County, as well as parts of Harford and Baltimore County.

174. Mr. Willis characterized the Congressional map from 2002 to 2010 as "fraught with politics to favor some candidates over another."

175. He testified that since the Federal Court ordered the drawing of the Congressional districts in Maryland, the First Congressional District has crossed the Chesapeake Bay in southern Maryland, has crossed the Chesapeake Bay in northern Maryland, as well as crossed parts of Cecil, Harford, Baltimore, and Carroll County.

176. Mr. Willis testified that from the 1842 until the 2012 Congressional maps, Frederick County was linked in its entirety with the westernmost counties of Maryland, as well as in the Federal District Court redistricting map.

177. During the Court's questioning, Mr. Willis testified that the biggest "driver" in the redistricting process is populations shifts with gains in population in places like Prince George's County for example, and loss of population, for example, in Baltimore City.

178. He also testified about other factors affecting the redistricting process such as "transportation patterns," preservation of land, federal installations, state institutions, major employment centers, prior history, election history, as well as ballot questions that "show voter attitude." He further testified that incumbency protection might be a factor as well as political considerations.

Dr. Allan J. Lichtman

179. Dr. Allan J. Lichtman testified and was qualified as an expert in statistical historical methodology, American political history, American politics, voting rights, and partisan redistricting.

180. Dr. Lichtman testified that "politics inevitably comes into play" in the redistricting process and that the balance in democratic government is "between political values and other considerations" to include "public policy, preserving the cores of existing districts, avoiding the pairing of incumbents, looking at communities of interest, shapes of the districts, and a balance between political considerations."

181. Dr. Lichtman testified that, "[w]hen you're involved with legislative bodies, it's inevitably a process of negotiation, log rolling, compromise."

182. Dr. Lichtman denied as unrealistic comparing the 2021 Plan with "ensembles of plans with zero – the politics totally taken out."

183. Dr. Lichtman's test of the 2021 Plan, according to his testimony, evaluates whether the 2021 Plan was "a partisan gerrymander based on the balance of party power in the state." His conclusions were that the likely partisan alignment of the 2021 Plan was "status quo, 7 likely Democratic wins, 1 likely Republican win"; that there could be Democratic districts in jeopardy in 2022 because "2022 is a midterm with a Democratic President." In doing his analysis, he looked at other states which were "actually mostly Republican states, where the lead party got 60% or more of the Presidential vote," which he termed are "unbalanced political states." According to Dr. Lichtman, he looked at "gerrymandering" in multiple ways, "all based on real-world considerations, not the formation of abstract models."

184. Using an "S-curve" representation in Exhibit N, he determined that a party with 60% of the vote-share would win all of the Congressional districts. He continued in his testimony to discuss how he determined that the Democratic advantage under the 2021 Plan was likely a 7-to-1 advantage based upon the Cook's Partisan Voter Index ("PVI"), referring to Exhibit R.

185. Dr. Lichtman posited through Exhibit T that traditionally there are many midterm losses by the party of the President.

186. Dr. Lichtman testified that the Democrats could have drawn a stronger First Congressional District for themselves in the 2021 Map than they did to ensure a Republican defeat.

187. Dr. Lichtman testified pursuant to Exhibit U that the Democratic advantage in Maryland in federal elections is in the mid to upper 60% range so that the Democratic seat-share in a "fair" plan would exceed 80% of the seats.

188. With reference to Exhibit V, Dr. Lichtman presented a "trend line" from which he concluded that Maryland's enacted plan was not a partisan gerrymander because a 7-to-1 seat share was not commensurate with the Presidential vote for the Democratic party in 2020. He concluded that based on the trend line, "you would expect Maryland to be close to 100% of the [Congressional] seats."

189. Utilizing Exhibit W, he testified regarding "unbalanced states" in which the lead party secured more than 64.2% of the vote in the 2020 Presidential election. He included that the Democrats were performing below expectation in terms of its share of Congressional seats.

190. Dr. Lichtman testified that, in his opinion, "empirically, Maryland's Congressional seat allocation under the 2021 Plan is exactly what you would expect, assuming a 7-to-1 seat share."

191. He also testified that the Governor's plan, otherwise referred to as the MCRC Plan, is indicative of a gerrymander by "packing Democrats." He also concluded it was a gerrymander because it paired two or more incumbents of the opposition party, which he believed to be indicative of a gerrymander as reflected by Exhibit Z.

192. He testified that when you pair incumbents, "you are forcing them to rescramble and figure out how to rearrange their next election."

193. He also testified that the MCRC Plan also "dismantled the core of the existing districts and disrupted incumbency advantage again and the balance between representatives and the represented," referring to Exhibit AA.

194. Referring to Exhibit AB, he concluded that the MCRC Plan unduly packed Democrats, because in the MCRC Plan, there would be six Democratic districts over 70% and four Democratic districts close to or over 80%.

195. He testified further that the MCRC Plan is a "packed gerrymander." He testified that the Governor's Commission developing the plan was "extraordinarily under representative of Democrats" and that the Commission was appointed by a partisan elected official. He also testified that the Governor's instructions in developing the plan helps explain "why it turns out to be a Republican-packed gerrymander and a paired gerrymander"; "no attention was given to incumbency whatsoever." Instructions included considerations to include compactness and political subdivisions which he concludes "automatically" plays into, what he calls, partisan clustering. He also testified that the Governor's Secretary of Planning, Edward Johnson, sat in on deliberations while "there was no comparable Democratic representative sitting in."

196. Dr. Lichtman was critical of every one of Mr. Trende's simulation analyses because each one presumed "zero politics." Dr. Lichtman opined that "when state legislative body creates a plan, political considerations are one element to be balanced with a whole host of other elements and the process of negotiation, bartering, and trading that goes on in the legislative process and a demonstration that politics is not zero, is by not any stretch equivalent to a demonstration that the plan is a partisan gerrymander." He continued in his criticism of Mr. Trende's analysis that Mr. Trende did not provide "an absolute standard" and no comparative state-to-state standard. He testified in criticism of Mr. Trende's simulations not only based on "zero politics," but also because Mr. Trende's simulations did not consider "where to place historic landmarks, historic buildings, deciding how to deal with parks or airports or large open

spaces of water." He concluded that Mr. Trende's analysis was deficient because "you can't measure gerrymandering relative to zero politics, you can't measure gerrymandering without a standard, and you can't measure gerrymandering when comparing it to unrealistic simulated plans that don't consider much of the factors that routinely go into redistricting."

197. Dr. Lichtman attributed the problems of Republicans across the Congressional districts "not [to] the plan," but rather "the problem is that they are simply not getting enough votes, an absolutely critical distinction in assessing a gerrymander," based upon his review of Governor Hogan's two victories in 2014 and 2018 and the Republican vote-share in the 2014 Attorney General's race.

198. Dr. Lichtman concluded, in criticism of Mr. Trende's simulation analyses, that, "[a] supposed neutral plan based upon zero politics and supposedly neutral principles when applied in the real world into a place like Maryland, in fact, as demonstrated by this chart, produces extreme packing to the detriment of Democratic voters in the State of Maryland. Votes are extremely wasted for Democrats in at least half and maybe even more than half of the districts."

199. Dr. Lichtman, with respect to the 2021 Plan, does not dispute Mr. Trende's use of the four scores beginning with the Reock score, but opines that the scores of compactness reflect an improvement in compactness from the 2012 plan to the 2021 Plan. He then explains that the county splits decreased from the 2012 plan to the 2021 Plan, specifically, from 21 to 17 splits in the latter.

200. Dr. Lichtman further concluded, using the PVI, that the 2021 Plan "may not even be 7–1 in the real world." It may be "6–2, or even 5–3."

201. Dr. Lichtman later concludes that the very structure of the 2021 Plan "pretty much assures that Republicans are going to win two districts and that Democrats have wasted huge numbers of votes in the other districts."

202. In criticizing Dr. Brunell's analysis, he concludes that the 2021 Plan is not a gerrymander "just like [the] 2002 and 2012 plans were not gerrymanders."

203. Ultimately, Dr. Lichtman testified that "through multiple analyses -- affirmative analyses in [his] own report and scrutiny of the analyses of experts for the plaintiffs, it's clear that the Democrats did not operate to create a partisan gerrymander in their favor," and that "[t]he Governor's Commission plan is a partisan gerrymander that favors Republicans."

204. On cross-examination, Dr. Lichtman testified that non-compactness of Congressional districts could be, and it could not be, an indicator of partisan gerrymandering and concluded that "certainly nothing about compactness or municipal splits or county splits proves that a plan is not fair on a partisan basis, but they can be indicators."

205. On cross-examination, Dr. Lichtman acknowledged that for the past ten years, even when a midterm election occurred during the Democratic presidency of Barack Obama, the Maryland Delegation has been 7–1 Democratic/Republican, so that the Democrats did not lose any seats in any midterm elections, and prior to that, for a number of years, the outcome of Maryland's Congressional elections had been 6–2 Democratic/Republican, year after year.

206. Dr. Lichtman, during cross-examination, further stated that he had "checked the addresses of the incumbents to make sure there was not an unfair double bunking, which [Mr. Trende] meant the pairing of incumbents in the same districts" and indicated that he did not see any pairings in the 2021 Plan.

207. Dr. Lichtman, during cross-examination, concluded that if the General Assembly was "intent upon destroying a Republican district, they could have done so and didn't," which he concludes was a deliberate decision by Democratic leaders, including the Senate President, Bill Ferguson." He further concluded that the General Assembly "created a district that Andy Harris is overwhelmingly likely to win in the crucial first election under the redistricting plan."

208. Finally, Dr. Lichtman stated that he had not seen evidence that the General Assembly bumped "Andy Harris into the Seventh District with Kweisi Mfume."

209. On cross-examination, Dr. Lichtman reiterated that Mr. Trende's simulations "do not account for all traditional redistricting ideas. A whole host of them – and we've gone over that numerous times – are left out," and that Mr. Trende's simulation resulted in an "extraordinarily high degree of packing, which wastes large numbers of Democratic votes to the detriment of Democrats in Maryland."

210. In response to questioning from the Court, based on his opinion to a reasonable degree of professional certainty as to whether the 2021 Plan comports with Article III, Section 4, of the Maryland Constitution, Dr. Lichtman testified that the 2021 Plan comported with Article III, Section 4 because the drafters "actually made the districts substantially more compact than they had been in 2012 and equally compact as they had been in 2002." In providing that opinion relative to compactness, Dr. Lichtman testified that "instead of distorting compactness and violating Section 4, they made their district substantially more compact and in line with what compactness had been over long periods of time." Dr. Lichtman acknowledged that historical compactness is not necessarily the measure of Article III, Section 4 compactness and reiterated that there is no objective standard by which to judge any of the measures utilized by Mr. Trende.

He reiterated that he was "not aware of any study which establishes, on an objective scientific basis, a line you can draw in one or more compactness measures, which would distinguish between compact and noncompact."

211. In response to the question of whether in his opinion, to a reasonable degree of professional, scientific certainty that the standards of due regard shall be given to the natural boundaries and the boundaries of political subdivisions was met, he acknowledged that he had not done any of his own individual research. He opined, however, that "there has not been the presentation of proof by plaintiffs' experts that it doesn't comply." He reiterated "Plaintiffs did not prove that the 2021 Plan violates the Constitution."

212. Dr. Lichtman opined that Article 7 of the Declaration of Rights, dealing with free and frequent elections, Article 24 of the Declaration of Rights, entitled Due Process, as well Article 40, the free speech clause, would not apply to districting because "none of them mentioned districting or anything like that." He further opined that the free and frequent elections clause "clearly was designed for legislative elections" and that based upon his delineation of its history, that the free speech clause did not apply at all.

213. Dr. Lichtman further opined that he did not think that Article III, Section 4 or any of the provisions in the Maryland Constitution or Declaration of Rights applied to Congressional gerrymandering, nevertheless, even assuming were the standards to apply, partisan considerations would not predominate.

**Application of the Law to the Findings of Fact**

Applying the law to the findings of fact adduced during a trial with a "battle of the experts" initially requires a trial judge to transparently reflect what weight was given to a particular opinion or sets of opinions and why. Each expert in the instant case was qualified as an expert in particular areas. The qualification of each witness, however, was only the beginning of the analysis.

Whether the expert's testimony was reliable and helpful to the trier of fact and law, the trial judge herein, informs the weight to be afforded to each of the opinions. Obviously, the newly adopted *Daubert* standard, under *Rochkind v. Stevenson*, 471 Md. 1 (2020), was a point of discussion with respect to the opinions of Mr. Willis and Dr. Lichtman, but that challenge was withdrawn in the end by the Plaintiffs, and the State did not mount a *Daubert* challenge at all. Beyond *Daubert*, then, the weight given to an expert's opinion depends on many factors including, as well as irrespective, of their qualifications, but based upon a consideration of all of the other evidence in the case, under Maryland Rule 5–702.

In the present case, the trial judge gave great weight to the testimony and evidence presented by and discussed by Sean Trende. His conclusions regarding extreme partisan gerrymandering in the 2021 Plan were undergirded with empirical data that could be reliably tested and validly replicated. He used multifaceted analyses in his studies of compactness and splits of counties and acknowledged the data that he did not consider, such as voter registration patterns, might have yielded additional data, although the reliance on such data had not been studied. He readily acknowledged that he was not yet a PhD, although that title was soon to come, and that he was being paid for his work by the Plaintiffs.

Importantly, although he testified that he was on the Republican side of a number of redistricting cases in which Republican plans had been challenged—*Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658 (N.C. Super. July 08, 2013); *Ohio A. Philip Randolph Inst. v. Smith*, 360 F. Supp. 3d 681 (S.D. Ohio 2018), *vacated sub nom. Ohio A. Philip Randolph Inst. v. Obhof*, 802 F. App'x 185 (6th Cir. 2020); *Whitford v. Nichol*, 151 F. Supp. 3d 918 (W.D. Wis. 2015); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); and *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, --- N.E.3d ---, 2022-Ohio-789 (2022)—he apparently learned what would be helpful to a court in evaluating a Congressional redistricting plan, because he clearly relied on methodologies that were persuasive in North Carolina, *Harper v. Hall*, 2022-NCSC-17, 868 S.E.2d 499 (2022), and Pennsylvania, *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 576 (2018).

The impeachment of Mr. Trende's presentation undertaken by Dr. Lichtman was unavailing, in large part, because of the bias that Dr. Lichtman portrayed against simulated maps utilizing "zero politics" and county splits that "happened" to be less in number than what had occurred in a map that had been the subject of criticism in 2012 at the Federal District Court level but not addressed in *Rucho* in 2019. Mr. Trende's presentation was an example of a deliberate, multifaceted, and reliable presentation that this fact finder found and determined to be very powerful.

Dr. Brunell's testimony and evidence in support was much less valuable and helpful to the trial judge, because to evaluate compactness, the efficiency gap, as presented, did not have the power that was portrayed in other cases. *See e.g.*, *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio) (finding that around 75% of historical efficiency

gaps around the country were between -10% and 10%, and only around 4% had an efficiency gap greater than 20% in either direction, and therefore, noting that several of Ohio's prior elections had efficiency gaps indicative of a plan that was a "historical outlier," including an efficiency gap of -22.4% in its 2012 election and an efficiency gap of -20% in its 2018 election, compared to efficiency gaps in 2014 and 2016 that were -9% and -8.7%, respectively). Dr. Brunell's presentation was murky and lacking in sufficient detail. He made no attempt to establish the interaction of an efficiency gap analysis with other types of testing for compactness and certainly, no basis to believe that allocating Republicans two of eight Congressional seats is appropriate, let alone reliable or valid.

The opinions of Mr. Willis, while of interest, to gain a perspective as to what legislators considered in 2002, 2012, and possibly may have considered in 2021 to draw the various Congressional boundaries, such as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, major employment centers, preservation of land, political considerations, and migration patterns, may in fact be "reasonable," but not, in any way, helpful in the determination of whether "constitutional guideposts" have been honored in the 2021 Plan. As Chief Judge Robert M. Bell from the Maryland Court of Appeals, in 2002 in *In re Legislative Districting of State*, eloquently stated in opinion regarding the influence of such criteria on Constitutional redistricting standards:

> Instead, however, the Legislature chose to mandate only that legislative districts consist of adjoining territory, be compact in form, and be of substantially equal population, and that due regard be given to natural boundaries and the boundaries of political subdivisions. That was a fundamental and deliberate political decision that, upon ratification by the People, became part of the organic

> law of the State. Along with the applicable federal requirements, adherence to those standards is the essential prerequisite of any redistricting plan.
>
> That is not to say that, in preparing the redistricting plans, the political branches, the Governor and General Assembly, may consider only the stated constitutional factors. On the contrary, because, in their hands, the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they may pursue a wide range of objectives. Thus, so long as the plan does not contravene the constitutional criteria, that it may have been formulated in an attempt to preserve communities of interest, to promote regionalism, to help or injure incumbents or political parties, or to achieve other social or political objectives, will not affect its validity.
>
> On the other hand, notwithstanding that there is necessary flexibility in how the constitutional criteria are applied – the districts need not be exactly equal in population or perfectly compact and they are not absolutely prohibited from crossing natural or political subdivision boundaries, since they must do so if necessary for population parity – those non-constitutional criteria cannot override the constitutional ones.

370 Md. at 321–22.

Finally, this trial judge gave little weight to the testimony of Dr. Allan J. Lichtman. Dr. Lichtman's presentation was dismissive of empirical studies presented by Mr. Trende because of their "zero politics" and disavowed their use because of their lack of absolute standards or comparative standards to guide what an outlier is. Juxtaposed against Mr. Trende's use of reliable valid measures that have been accepted in other state courts, such as simulations in North Carolina and Pennsylvania, Dr. Lichtman's own data urged the "realities" of Maryland politics, as he used a "predictive" model to address alleged Democratic concerns about losing not only one, but two or three seats in the midterm election in 2022, because of having a Democratic President in power; in fact the realities of Maryland politics, in the last ten years, under Republican as well as Democratic Presidents, as well as a Republican Governor, have been that the Congressional delegation has stayed essentially the same—7 Democrats to 1 Republican.

Dr. Lichtman's denial of the fact that the 2021 Plan, as enacted, actually "pitted" Congressman Andy Harris against Congressman Kweisi Mfume in the Seventh Congressional District when the 2021 Plan did so, reflects a lack of thoughtfulness and deliberativeness that a trial judge would expect of experts. The fact that only a short period of time was afforded for the development of Dr. Lichtman's report does not excuse that it would have taken a review of the 2021 Plan as enacted in December of 2021, rather than in February of 2022, to know that Congressman Harris had to move to Cambridge to reside in the First Congressional District to avoid being "paired" in the 2021 Plan with a Democratic Congressional incumbent in the Seventh Congressional District.

Finally, although a cold record does not always reflect the nuances of a witness's demeanor, it is apparent from the words Dr. Lichtman used that he was dismissive of the use of a normative or legal framework to evaluate the "structure," as he called it, of redistricting. He began his discussion by referring to legal "machinations" in referring to his testimony discussing a challenge by the plaintiffs in *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769 (2004) against the redistricting plan of Pennsylvania for Congress, and ended with what amounted to a refrain of an "apologist" of the work of politicians.

There is no question that map-making is an extremely difficult task, but like most of the complexities of the modern world, justifications of map-making must be evaluated by the application of principles—here, the organic law of our State, its Constitution and Declaration of Rights.

## Analysis and Conclusion

Application of the legal tenets that survived the Motion to Dismiss, as articulated heretofore, to the Joint Stipulations, Judicial Admissions and the stipulation orally presented by the State at the end of the trial, with consideration of the weight afforded to the evidence presented by the experts yields the conclusion that the 2021 Congressional Plan in Maryland is an "outlier," an extreme gerrymander that subordinates constitutional criteria to political considerations. In concluding that the 2021 Congressional Plan is unconstitutional under Article III, Section 4, either on its face or through a nexus to the Free Elections Clause, MD. CONST. DECL. OF RTS. art. 7, the trial judge recognized that the 2021 Plan embodies population equality as well as contiguity, as Dr. Brunell acknowledged. The substantial deviation from "compactness" as well as the failure to give "due regard" to "the boundaries of political subdivisions" as required by Article III, Section 4, are the bases for the constitutional failings of the 2021 Plan, which has been challenged in its entirety.

In evaluating the criteria of compactness required under Article III, Section 4, it is axiomatic that it and contiguity, but particularly compactness, "are intended to prevent political gerrymandering." *1984 Legislative Districting*, 299 Md. at 675 (citing *Schrage v. State Bd. of Elections*, 88 Ill.2d 87 (1981); *Preisler v. Doherty*, 365 Mo. 460 (1955); *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972); *Opinion to the Governor*, 101 R.I. 203 (1966)). With respect to compactness, while it is true that our cases do not "insist that the most geometrically compact district be drawn," *In re Legislative Districting of State*, 370 Md. at 361, we recognized that compactness must be evaluated by a court in light of all of the constitutional requirements to

determine if all of them "have been fairly considered and applied in view of all relevant considerations." *Id.* at 416.

The task of evaluating whether "compactness" and other constitutional requirements have been fairly considered by the Legislature is informed by the various analyses performed by Mr. Trende. Initially, by application of each of the four "most common compactness metrics," *i.e.*, the Reock score; the Polsby-Poppper score; the Inverse Schwartzberg score; and the Convex Hull score, the districts included in the 2021 Plan are "quite non-compact" compared to prior Maryland Congressional maps and to other Congressional maps in other states based upon a comparison of the scores achieved with reference to the four metrics. It is notable that the 2021 Plan reflects compact scores that range from a "limited" number of state maps worse than Maryland, to only six other maps with worse scores, to the worst Inverse Schwartzberg score in the last fifty years in the United States, to "very poorly relative to anything drawn in the last fifty years in the United States."

The simulations conducted by Mr. Trende, of the type already accepted in North Carolina and Pennsylvania, when infused with the same constitutional criteria as embodied in Article III, Section 4 and allowing for two Voter Rights districts, result in only .14% or 134 maps of the 95,000 reflected produce a victory for President Biden in all eight Congressional districts in Maryland, based upon predictive Presidential votes, as acknowledged by the experts. Importantly, Exhibit 11-C, the Gerrymandering Index exhibit, which embodies all of the constitutional mandates and two Voting Rights districts, reflects that the 2021 Congressional Plan is a "gross outlier", as Mr. Trende opined, "such that of the 95,000 maps under consideration, only one map had a Gerrymandering Index larger than the 2021 Plan. It is

extraordinarily unlikely that a map that looks like the 2021 Plan could be produced without extreme partisan gerrymandering." As a result, the notion that the 2021 Plan is compact is empirically extraordinarily unlikely, a conclusion that utilizes comparative metrics and data throughout the various states. The notion that a plan must pass an absolute standard, as Dr. Lichtman suggested, is without merit, for the test is whether the constitutional conditions, especially compactness, are met.

With respect to county splits, it is clear that the number of crossings over county lines are 17 in the 2021 Plan, which is a historically "high number" of splits since 1972, only less than the 21 splits in 2002 and 2012. The importance of the due regard to political subdivisions language is a reflection of the importance of counties in Maryland, as recognized in *Md. Comm. for Fair Representation v. Tawes*, 229 Md. 406 (1962):

> The counties of Maryland have always been an integral part of the state government. St. Mary's County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model of the English shire . . . Indeed, Kent County had been established by Claiborne before the landing of the Marylanders . . . We have noted that there were eighteen counties at the time of the adoption of the Constitution of 1776. They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. . . . While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

*Id.* at 411–12. In dissent in *Legislative Redistricting Cases*, 331 Md. 574 (1993), Judge Eldridge reiterated the pivotal governing function of counties:

> Unlike many other states, Maryland has a small number of basic political subdivisions: twenty-three counties and Baltimore City. Thus, "[t]he counties in Maryland occupy a far more important position than do similar political divisions in many other states of the union."
>
> The Maryland Constitution itself recognizes the critical importance of counties in the very structure of our government. See, e.g., Art. I, § 5; Art. III, §§ 45, 54; Art. IV, §§ 14, 19, 20, 21, 25, 26, 40, 41, 41B, 44, 45; Art. V, §§ 7, 11, 12; Art. VII, § 1; Art. XI; Art. XI–A; Art. XI–B; Art. XI–C; Art. XI–D; Art. XI–F; Art. XIV, § 2; Art. XV, § 2; Art. XVI, §§ 3, 4, 5; Art. XVII, §§ 1, 2, 3, 5, 6. After the State as a whole, the counties are the basic governing units in our political system. Maryland government is organized on a county-by-county basis. Numerous services and responsibilities are now, and historically have been, organized at the county level.
>
> The boundaries of political subdivisions are a significant concern in legislative redistricting for another reason: in Maryland, as in other States, many of the laws enacted by the General Assembly each year are public local laws, applicable to particular counties. *See Reynolds v. Sims*, 377 U.S. 533, 580–[]81, 84 S.Ct. 1362, 1391, 12 L.Ed.2d 506, 538 (1964) ("In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions").

*Id.* at 620–21.

Due regard for political subdivision lines is a mandatory consideration in evaluating compliance with constitutional redistricting, as Chief Judge Bell noted in the 2002 Legislative districting case, *In re Legislative Districting of State*, 370 Md. at 356, such that fracturing counties to the extent accomplished in the 2021 Plan does not even give lip service to the historical and constitutional significance of their role in the way Maryland is governed. To say that the 2021 Plan is four splits better than the 2002 and 2012 Plans (which have never been examined in a State court, let alone sanctioned), and so must be lawful, is a fictitious narrative, because it is inherently invalid; in 2002, Chief Judge Bell, writing on behalf of the Court, rejected similar justifications offered by the experts on behalf of the Defendants in this case. "There is simply an excessive number of political subdivision crossings in this redistricting plan .

. . ." The State has failed to meet its burden to rebut the proof adduced that the constitutional mandate that due regard to political subdivision lines was violated in the 2021 Plan.

To the extent that Dr. Lichtman and Mr. Willis discussed and prioritized a myriad of considerations that Dr. Lichtman called "political" and Mr. Willis called "reasonable factors," would require that this Court accept their implicit bias that constitutional mandates can be subordinated to politics and/or "reasonable factors." Again, Chief Judge Bell, more eloquently and precedentially than this judge could, addressed the same justifications offered by the State, then and now, when in 2002, he said,

> [b]ut neither discretion nor political considerations and judgments may be utilized in violation of constitutional standards. In other words, if in the exercise of discretion, political considerations and judgments result in a plan in which districts: are non-contiguous; are not compact; with substantially unequal populations; or with district lines that unnecessarily cross natural or political subdivision boundaries, that plan cannot be sustained. That a plan may have been the result of discretion, exercised by the one entrusted with the responsibility of generating the plan, will not save it. The constitution "trumps" political considerations. Politics or non-constitutional considerations never "trump" constitutional requirements.

*Id.* at 370.

Mr. Trende's analysis of the 2021 Plan with respect to its extreme nature and its status as an "outlier" reflects the realities of the 2021 Plan: an "outlier means a map that would have a less than five percent chance . . . of being drawn without respect to politics" and with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier," therefore, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know,

with compactness and respect for county lines, .00001 percent. That's extreme." This trial judge agrees; the 2021 Plan is an outlier and a product of extreme partisan gerrymandering.

With regard to the violations of the of the Articles of the Maryland Declaration of Rights, the 2021 Plan fails constitutional muster under each Article.

With regard to Article 7 of the Maryland Declaration of Rights, the 2021 Congressional Plan, the Plaintiffs, based upon the evidence adduced at trial, proved that the 2021 Plan was drawn with "partisanship as a predominant intent, to the exclusion of traditional redistricting criteria," *Findings of Fact*, *supra*, ¶ 121, accomplished by the party in power, to suppress the voice of Republican voters. The right for all votes of political participation in Congressional elections, as protected by Article 7, was violated by the 2021 Plan in its own right and as a nexus to the standards of Article III, Section 4.

Alternatively, Article 24, the Maryland Equal Protection Clause, applicable in redistricting cases, was violated under the 2021 Plan. The application of the Equal Protection Clause requires this Court to strictly scrutinize the 2021 Plan and balance what the State presented under a "compelling interest" standard. It is clear from Mr. Trende's testimony that Republican voters and candidates are substantially adversely impacted by the 2021 Plan. The State has not provided a "compelling state interest" to rationalize the adverse effect.

Alternatively, the same rationale holds true for the violation of Article 40 of the Maryland Declaration of Rights, the Free Speech Article, which requires a "strict scrutiny" analysis because a fundamental right is implicated, a citizen's right to vote. In many respects, all of the testimony in this case supports the notions that the voice of Republican voters was diluted

and their right to vote and be heard with the efficacy of a Democratic voter was diminished. No compelling reason for the dilution and diminution was ever adduced by the State.

Finally, with respect to the evaluation of the 2021 Plan through the lens of the Constitution and Declaration of Rights, it is axiomatic that popular sovereignty is the paramount consideration in a republican, democratic government. The limitation of the undue extension of power by any branch of government must be exercised to ensure that the will of the people is heard, no matter under which political placard those governing reside. The 2021 Congressional Plan is unconstitutional, and subverts that will of those governed.

As a result, this Court will enter declaratory judgment in favor of the Plaintiffs, declaring the 2021 Plan unconstitutional, and permanently enjoining its operation, and giving the General Assembly an opportunity to develop a new Congressional Plan that is constitutional. A separate declaratory judgment will be entered as of today's date.

3/25/2022
Date

LYNNE A. BATTAGLIA
Senior Judge

366 P.3d 665 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Scott ROEDER, Appellant,

v.

KANSAS DEPARTMENT OF CORRECTIONS, Appellee.

No. 113,239.
|
Feb. 12, 2016.

Appeal from Leavenworth District Court; DAN K. WILEY, Judge.

**Attorneys and Law Firms**

William K. Rork and Joseph T. Laski, of Rork Law Office, of Topeka, for appellant.

Sherri Price, legal counsel/special assistant attorney general, of Lansing Correctional Facility, for appellee.

Before BRUNS, P.J., McANANY, J., and JOHNSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Scott Roeder was convicted of murdering Dr. George Tiller of Wichita. Dr. Tiller had been the medical director of Women's Health Care Services which provided abortion services in Wichita. After Roeder's conviction, the former spokesperson for Women's Health Care Services began the process of reopening the clinic. At that point, Roeder was serving his sentence at the Lansing Correctional Facility, where he gave a telephone interview to pro-life activist Dave Leach. Leach was the publisher of a newsletter entitled *Prayer and Action News.*

Following Leach's telephone interview of Roeder, Leach placed the interview on YouTube. During the interview Leach asked Roeder about the reopening of Dr. Tiller's clinic. Roeder responded:

> " 'I guess I should have been putting some more thought into it. But it's a little bit death defying, you know, for someone to walk back in there. I think that woman's name is [name of former clinic spokesperson] ... and to walk in there and reopen a clinic, a murder mill, where a man was stopped, it's almost like putting a target on your back, saying, "well let's see if you can shoot me." But I have to go back to what Pastor Mike Bray said, "if 100 abortionists were shot, they would probably go out of business." I think 8 have been shot, so we got 92 to go. Maybe she'll be number nine. I don't know, but she's kind of painting a target on her[self].' "

The conversation was also recorded on the prison phone system. Andrew Lucht, a correctional specialist at Lansing, reviewed the recording and, as a result, prepared a disciplinary report charging Roeder with threatening or intimidating a person in violation of K.A .R. 44–12–306. In the hearing that followed, Roeder clarified that his statement " 'a man was stopped" ' was a reference to Dr. Tiller. Roeder admitted that he made the statements, but he claimed "I just didn't have intent behind the words."

The hearing officer concluded that Roeder knew the comments would be put on YouTube and that the comments could be seen by a reasonable person as an act of intimidation or a threat. The hearing officer found Roeder guilty of the disciplinary violation and imposed 45 days of segregation, 60 days of restricted privileges, and a $20 fine. Roeder appealed this decision to the Secretary of Corrections who approved the hearing officer's decision.

Roeder then filed a petition for a writ of habeas corpus. See K.S.A.2015 Supp. 601501. In his petition, Roeder argued that the sanctions imposed by the prison violated his due process rights and amounted to an unconstitutional restraint of his right to free speech under the First Amendment to the United States Constitution. Roeder also claimed that his statement did not constitute a violation of K.A.R. 44–12–306.

The district court issued a writ to the Kansas Department of Corrections, and the case proceeded to an evidentiary hearing. At the hearing Roeder argued K.A.R. 44–12306 was invalid both as applied and on its face because it was unconstitutionally vague and overbroad and infringed on his First Amendment right to free speech.

  

***2** Lucht and Roeder testified at the hearing. Roeder testified that Leach had been his friend for over 20 years. "I guess you would say since he was affiliated with the Pro–Life movement I knew him from the Pro–Life movement." Roeder was aware that Leach had published a lot about his case in his *Prayer and Action News* and he had "no problem" with Leach publishing the interview. In fact, Roeder observed that when it came to Leach publishing the interview, "I think anyone in their right mind could have figured that one out ."

The district court denied relief on Roeder's K.S.A. 60–1501 petition, ruling that enforcing K.A.R. 44–12–306 against Roeder did not infringe upon his First Amendment rights. The district court characterized Roeder's statement as indirect intimidation of the new clinic operator. The court reasoned:

> "Roeder could have easily chosen alternative language that would not have violated the regulation. For example, he could have stated an opinion regarding the reopening of the abortion clinic without mentioning [the new clinic operator] whatsoever. He could have refrained from stating that [the new clinic operator] was 'painting a target' on herself, or avoided any mention of potential violence against [the new clinic operator] whatsoever. He clearly could have refrained from stating 'we got 92 to go' which is the most threatening or intimidating of the statements made by Roeder. However, knowing that his words would be recorded and published, Roeder chose to specifically mention [the new clinic operator] in the context that she would invite violence upon herself if she opened the abortion clinic. Given Roeder's background, the purpose of his incarceration, and his actual knowledge that his statements would be recorded and widely disseminated, a reasonable person could interpret his statements as intended to intimidate [the new clinic operator]."

Roeder appeals, claiming the district court erred in denying relief on his K.S.A. 60–1501 petition.

Violations of First Amendment rights may be challenged in a habeas corpus proceeding. *Mahan v. Maschner,* 11 Kan.App.2d 178, 179, 717 P.2d 1059 (1986). With respect to the district court's decision denying relief on Roeder's K.S.A. 60–1501 petition, we review the district court's decision to determine if its factual findings are supported by substantial competent evidence and are sufficient to support the court's conclusions of law. We review de novo the district court's conclusions of law. *Rice v. State,* 278 Kan. 309, 320, 95 P.3d 994 (2004).

Administrative regulations are presumed to be valid, and one who challenges them has the burden of showing their invalidity. *Mitchell v. Petsmart, Inc.,* 291 Kan. 153, 168, 239 P.3d 51 (2010). With respect to Roeder's constitutional claim, we have unlimited review over the constitutionality of the challenged regulation. The reviewing court may grant relief if the regulation is unconstitutional on its face or as applied. *In re Property Valuation Appeals of Various Applicants,* 298 Kan. 439, 447, 313 P.3d 789 (2013).

***3** Roeder claims that as applied K.A.R. 44–12–306 is an impermissible viewpoint-discriminatory restriction on his right to free speech. The State contends that K.A.R. 4412–306 as applied is a valid restriction on Roeder's right to free speech because it is reasonably related to legitimate penological interests.

K.A.R. 44–12–306(a) provides that "[a]n inmate shall not threaten or intimidate, either directly or indirectly, any person or organization." K.A.R. 44–12–306(c) states that "[t]he subjective impression of the target of the alleged threat or intimidation shall not be a factor in proving a violation of subsection (a)."

Discrimination against speech based on its message is presumptively unconstitutional. *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). The burden rests on the government to justify restrictions placed on private speech. *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 816, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). But the constitutional rights of prisoners are more limited in scope than the constitutional rights of individuals in society at large. A prison inmate has only those First Amendment rights that are consistent with the inmate's status as a prisoner and consistent with the legitimate penological objectives of the penal institution. *Shaw v. Murphy,* 532 U.S. 223, 229, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001); *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); see *Washington v. Werholtz,* 40 Kan.App.2d 860, 197 P.3d 843 (2008), *rev. denied* 289 Kan. 1286 (2009). Prison officials are the primary arbiters of the problems that arise in prison management. *Shaw,* 532 U.S. at 230. Because the problems faced by prison officials " 'are complex and intractable' " and courts are particularly " 'ill equipped' " to deal with these problems, reviewing courts provide a level of deference to the judgments of prison officials in upholding the regulations against constitutional challenges. 532 U.S. at 229.

  

When a prisoner claims a prison regulation infringes on a constitutional right, we analyzes the validity of the regulation under the rational basis test to determine if it is " 'reasonably related to legitimate penological interests.' [Citation omitted.]" *Pool v. McKune,* 267 Kan. 797, 804, 987 P.2d 1073 (1999). In *Turner v. Safley,* 482 U.S. 78, 8991, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), the United States Supreme Court set forth four factors to consider in evaluating a regulation's reasonableness:

> "(1) whether a valid and rational connection exists between the regulation and a legitimate governmental interest, (2) whether an alternative means of exercising the constitutional right at issue remains available to inmates, (3) the impact of accommodation of the asserted right upon guards, other inmates, and the allocation of prison resources, and (4) the absence of ready alternatives to the course of action taken in the regulation. [Citations omitted.]" *Washington,* 40 Kan.App.2d at 863.

***4** If the regulation satisfies these factors, the regulation still fails if the connection between the regulation and the asserted goal is "arbitrary or irrational." 482 U.S. at 89–90.

Roeder focuses on the first *Turner* factor and claims that K.A .R. 44–12–306 does not reasonably relate to legitimate penological interests as applied to him.

The district court characterized the underlying penological interest as "[d]eterring crime and stopping criminal activity ... as well as maintaining internal security." Roeder concedes that preventing crime and maintaining internal security are legitimate governmental interests, but he contends the enforcement of the provision in this case was arbitrary and capricious because his statements to Leach were "merely commentary on a current event—the reopening of an abortion clinic—in which he speculated [the new clinic operator's] reopening of the clinic could invite violence."

We take from Roeder's argument that he makes no serious claim that the First Amendment protects as free speech threats and intimidation or the encouragement of others to commit murder. But he does claim that he did not encourage anyone to engage in unlawful or violent acts and that punishing him under K.A.R. 44–12–306 for expressing his personal opinions lacks any rational connection to the regulation's purpose of deterring criminal activity.

In considering this contention we cannot ignore the context of Roeder's remarks. Roeder and Leach had been friends for over 20 years based on their involvement in the pro-life movement and their roles as pro-life activists. Leach visited Roeder on a regular basis after Roeder was incarcerated and routinely reported on Roeder's case and published their conversations in his newsletter. Consistent with past conversations Roeder had with Leach, Roeder understood that the conversation was being recorded. He could reasonably anticipate that his remarks would be circulated among like-minded persons. A violation of K.A.R. 44–12–306 does not require a showing of the speaker's ability to carry out the threat. Here, Roeder knew he was speaking through Leach to persons who shared his penchant for ending abortions through criminal acts against abortion providers.

Roeder's murder of Dr. Tiller was only one of many violent acts against persons and facilities providing abortion services throughout this country. From 1977 to 2014 there were almost 7,000 attacks on abortion providers, including 8 murders, 17 attempted murders, 42 bombings, and 182 acts of arson (Kathy Pollitt—NY Times). Roeder was involved with a group of people associated with the pro-life movement that advocated violence as a method for closing clinics that provided abortions. His statement that 8 doctors had been killed and "we got 92 to go" encouraged the continued murdering of abortion providers and was designed to threaten and intimidate the new operator of Dr. Tiller's former clinic.

K.A.R. 44–12–306 serves a legitimate penological objective of preventing or deterring criminal activity. See *Pool,* 267 Kan. at 804. There is a valid, rational connection between the regulation restricting threatening or intimidating statements and behavior and a legitimate governmental interest.

***5** Roeder's reliance on *Elonis v. United States,* 575 U.S. ——, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015) is unfounded. *Elonis* dealt with the proof needed to establish a crime under 18 U.S.C. § 875(c) (2006). Here, we are dealing with a regulatory proceeding, not a charge of criminal conduct.

Roeder's statements to Leach were not subject to the constitutional protections of the First Amendment. Because there is no constitutional violation, Roeder fails to prove shocking and intolerable conduct or continuing mistreatment of a constitutional stature. See *Schuyler v. Roberts,* 285 Kan. 677, 679, 175 P.3d 259 (2008). Thus, the district court did not err in denying relief on Roeder's K.S.A. 60–1501 petition.

As a separate issue, Roeder challenges the sufficiency of the evidence against him, arguing that his statements did not constitute intimidation and that the district court improperly

  

upheld the hearing officer's finding that he violated K.A.R. 44–12–306. But to convict an inmate of a disciplinary violation, the hearing official need only find " 'some evidence" ' to support the offense. *Speed v. McKune,* 43 Kan.App.2d 444, Syl. ¶ 1, 225 P.3d 1199 (2010). On appeal, we review "the record to determine if there is any evidence that supports the conclusion reached" in the disciplinary proceeding. 43 Kan.App.2d 444, Syl. ¶ 1; see *Superintendent v.. Hill,* 472 U.S. 445, 455–56, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). In doing so, we do not reweigh the evidence or assess the credibility of the witnesses. Our role is merely to examine the record to determine if the evidence that supports the hearing officer's conclusion met this minimal evidentiary standard. *Anderson v. McKune,* 23 Kan.App.2d 803, 807–08, 937 P.2d 16, *rev. denied* 262 Kan. 959, *cert. denied* 522 U.S. 958 (1997). Roeder bears the burden of proving that prison officials failed to satisfy this minimal evidentiary requirement. See *Sammons v. Simmons,* 267 Kan. 155, 159, 976 P.2d 505 (1999).

K.A.R. 44–12–306 does not include a definition of intimidating. It does provide for an objective rather than subjective determination of whether a statement is intimidating. It specifically provides that "[t]he subjective impression of the target of the alleged threat or intimidation shall not be a factor in proving a violation of [this regulation]." K.A.R. 44–12–306(c). A panel of this court has determined that under K.A.R. 44–12–306 an inmate's actions are objectively threatening or intimidating if "a reasonable person of ordinary sensibilities would find them so." *Grossman v. Kansas Department of Corrections,* No. 106,916, 2012 WL 3171990, at *5 (Kan.App.2012) (unpublished opinion); see *State v. Phelps,* 266 Kan. 185, 196, 967 P.2d 304 (1998).

Roeder relies on *Phelps* which involved a criminal charge of aggravated intimidation of a witness against Fred Phelps who displayed a sign in the presence of the intended victim accusing him of being a " 'Fat, Ugly, Sodomite" ' and stating, " 'Gays are Worthy of Death." ' 266 Kan. at 186. At trial the victim acknowledged that Phelps did not say anything to him that was intimidating. On appeal, our Supreme Court concluded that these facts were insufficient to establish aggravated intimidation of a witness. 266 Kan. at 196–97.

***6** Phelps, for all his faults, was no murderer. There was no indication in the *Phelps* case that Phelps was linked to organizations that endorsed violence and whose members committed crimes of violence against their targets. The same cannot be said for Roeder. Roeder associated with groups that advocated violence against abortion providers. In speaking to Leach about the reopening of the Wichita clinic, remarks he anticipated would be circulated among like-minded individuals, Roeder referred with tacit approval to Bray's statement about ending the practice of abortion by killing those who performed them. Bray said, " 'If 100 abortionists were shot, they would probably go out of business.' " Roeder added his own observation: " 'I think 8 have been shot, so we got 92 to go. Maybe she'll be number nine. I don't know, but she's kind of painting a target on her[self].' " A reasonable person in the position of one who was reopening the clinic in Wichita would view Roeder's statements as threatening and intimidating. *Phelps* does not advance Roeder's argument.

Roeder also relies on *United States v. Dillard,* 989 F.Supp.2d 1169 (D.Kan.2013), *aff'd in part and rev'd in part* 795 F.3d 1191 (10th Cir.2015), a civil case alleging a violation of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a)(1) (2006). There, the defendant wrote to a Wichita physician and described the danger the physician would be placing herself in by offering abortion services. The defendant stated: " 'You will be checking under your car every day—because maybe today is the day someone places an explosive under it.' " 989 F.Supp.2d at 1171. The federal district court granted summary judgment in favor of the defendant. But on review, the Tenth Circuit Court of Appeals determined that there was a genuine issue of material fact as to whether the letter sent to the physician conveyed a true threat of violence. See *Dillard,* 795 F.3d at 1200–02. The Tenth Circuit placed emphasis on the context in which the comments were made, noting Dillard's friendship with Roeder:

> "The context in this case includes Wichita's past history of violence against abortion providers, the culmination of this violence in Dr. Tiller's murder less than two years before Defendant mailed her letter, Defendant's publicized friendship with Dr. Tiller's killer, and her reported admiration of his convictions. When viewed in this context, the letter's reference to someone placing an explosive under Dr. Means' car may reasonably be taken as a serious and likely threat of injury." 795 F.3d at 1201.

*Dillard* was a civil case which required a preponderance of evidence to support the government's position. In our present case, the evidence needed to support Roeder's disciplinary conviction was only some evidence. In Dillard, whether the defendant's statements violated the federal statute was to be decided by the jury. In our present case, the facts were decided by the prison hearing officer. The hearing officer

  

found that Roeder's statements violated the prison regulation. Viewed in context, there clearly was some evidence to support the hearing officer's finding that Roeder's statements were threatening and intimidating in violation of K.A.R. 44–12–306(a).

***7** Finally, Roeder claims that K.A.R. 44–12–306 is unconstitutionally vague and overbroad. In our unlimited review of this issue we conclude that this regulation is neither.

When, as here, a regulation is claimed to be unconstitutionally vague, we must determine (1) whether the regulation conveys a sufficiently definite warning and fair notice of the proscribed conduct in light of common understanding and practice and (2) whether the regulation adequately guards against arbitrary and discriminatory enforcement. See *Steffes v. City of Lawrence,* 284 Kan. 380, 389, 160 P.3d 843 (2007).

When, as here, a regulation is claimed to be unconstitutionally overbroad, we must determine (1) whether the protected activity is a significant part of the law's target and (2) whether there exists a satisfactory method of severing that law's constitutional from its unconstitutional applications. See *Dissmeyer v. State,* 292 Kan. 37, 40–41, 249 P.3d 444 (2011).

K.A.R. 44–12–306(a) provides that "[a]n inmate shall not threaten or intimidate, either directly or indirectly, any person or organization." This regulation is not vague. It uses words that are in common usage and understanding. The regulation conveys a definite warning and fair notice as to what conduct is prohibited. One need not guess as to the regulation's meaning. Roeder also faults the regulation because it does not contain a *mens rea* requirement. But Roeder was charged with a disciplinary violation, not a crime.

Roeder's final argument is that the regulation is overbroad because it criminalizes conduct that in some circumstances is constitutionally protected, such as free speech. In considering this argument we apply a common-sense approach in determining what conduct the regulation prohibits. See *State v. Wilson,* 267 Kan. 550, 556–58, 987 P.2d 1060 (1999). Here, the regulation does not infringe upon free speech rights. The attenuated free speech rights of prison inmates are not affected by K.A.R. 44–12–306. Inmates are free to express general opinions on political and social issues, including opinions on or comments about the reopening of an abortion clinic in Wichita. But the regulation does prohibit a prison inmate's threats and intimidation that arise directly or indirectly from endorsing, advocating, or encouraging the murder of a specific individual.

K.A.R. 44–12–306 restricts only behavior which is inconsistent with the limited rights of prison inmates and which is contrary to the legitimate penological objectives of the correction system. K.A .R. 44–12–306 is not unconstitutionally overbroad.

Affirmed.

**All Citations**

366 P.3d 665 (Table), 2016 WL 556281

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