

**IN THE SUPREME COURT OF OHIO**

BRIA BENNETT, *et al.*,

:

*Relators,*

:

:

Case No. 2021-1198

v.

:

:

OHIO REDISTRICTING  
COMMISSION, *et al.*,

:

*Respondents.*

:

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BRIEF *AMICUS CURIAE* OF THE CITY OF CINCINNATI  
IN SUPPORT OF RELATORS

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## **INTEREST OF AMICUS CURIAE CITY OF CINCINNATI**

The City of Cincinnati (“City”) is a charter municipal corporation empowered by the Ohio Constitution to “exercise all powers of local self-government.” Article XVIII, Section 3, Ohio Constitution. Cincinnati residents rely on the City to provide critical services and infrastructure, promote economic development, and maintain safe and healthy neighborhoods. Each of these functions requires decisive—and sometimes creative—exercise of the City’s constitutional home rule authority. All are directly impacted by the ongoing COVID-19 pandemic.

Unfortunately, Cincinnati is also home to several of the most aggressively gerrymandered districts in the state of Ohio. In each of these areas, Cincinnati residents find that their vote counts for less than it should—all because they live in a ‘packed’ or ‘cracked’ district designed to yield victory to a specific party. Article XI, Section 6 of the Ohio Constitution, makes a promise to all Ohioans: that whether or not their representative in the General Assembly shares their political views, the partisan composition of the Assembly as a whole will mirror statewide voter preferences. *See* Article XI, Section 6 (“The statewide proportion of districts whose voters \* \* \* favor each political party *shall* correspond closely to the statewide preferences of the voters of Ohio.”) (emphasis added). When that promise is broken, all Ohioans suffer—but voters in gerrymandered districts suffer most. These voters, Cincinnati voters, are denied an equal voice in state politics.

The City faces an acute, dual harm from violations of Article XI, Section 6. Partisan gerrymandering not only disenfranchises our residents, but undermines the home rule authority granted by Article XVIII, Section 3. Deprived of the opportunity to participate equally in state elections, Cincinnati residents often turn to their local government for help—only to find that the City’s law-making ability is hamstrung through serial preemption by a non-representative state

legislature. Enforcement of the bipartisan redistricting requirements in Article XI, Section 6 is critical to reassert balance between state and local governmental authority and to ensure that urban voters have an equal voice in our democracy. This *amicus curiae* brief in support of Relators thus urges the Court to declare the maps at issue in this case (the “Enacted Maps”) unconstitutional.

### **STATEMENT OF THE CASE AND THE FACTS**

In the past two decades, the issue of partisan gerrymandering has stormed to the forefront of the American political stage. Gerrymandering is not a new feature of American politics, but the rise of big data and new technology now allows mapmakers to curate the outcome of future elections with unprecedented accuracy. See Brennan Center for Justice, *Gerrymandering Explained*, <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> (accessed October 22, 2021). Even a single gerrymandered seat in a state legislature produces a quantifiable policy skew in favor of the advantaged party. See Caughey, Tausanovitch, and Warshaw, *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, *Election Law Journal: Rules, Politics, and Policy* 16, no. 4, 453-469, 461 (December 2017). Each additional, gerrymandered seat pushes the ideological composition of the legislature further away from the state median voter, with a direct impact on legislative policy that persists long after any one election. *Id.* at 461, 468.

Ohio voters have made their view of partisan gerrymandering abundantly clear. In 2015, a resounding 71 percent of voters passed “Issue 1,” mandating a bipartisan, public process for drawing legislative districts. The resulting constitutional amendment, Article XI, Section 6, requires that Ohio’s legislative districts be drawn so that “the statewide proportion of districts” whose voters “favor each political party [ ] correspond[s] closely to the statewide preferences of the voters of Ohio.” By requiring district maps to mirror statewide preferences, Article XI, Section



6 essentially sets a constitutional ceiling on partisanship. It makes a promise to every Ohioan that, whether or not their individual legislator aligns with their political views, the partisan composition of the General Assembly will not deviate too far from that of the state.

The gerrymandered maps adopted by the General Assembly and at issue here fall far short of the proportional fairness mandated by Article XI, Section 6. As drawn, these maps produce a gross deviation between the projected composition of the General Assembly—where Republicans would obtain 67 percent of seats in both houses—and the actual partisan preferences of Ohio voters (split 54 percent Republican and 46 percent Democrat over the last 10 years). Relator’s Complaint outlines at length the brazen political manipulation and faux statistical reasoning that produced these unconstitutional maps. To avoid redundancy, this amicus brief focuses on two different, intertwined consequences of partisan gerrymandering: the systemic underrepresentation of Ohio municipalities, and the resulting erosion of constitutional home rule via preemption.

### **ARGUMENT**

Residents of the ‘packed’ and ‘cracked’ districts in Ohio’s urban areas suffer twin harms: disenfranchisement at the state level compounded by anti-democratic preemption of local lawmaking power. This Court should honor the intentions of the more than two million Ohio voters who passed Article XI, Section 6, and declare the Enacted Maps unconstitutional.

#### **A. The Enacted Maps ‘pack’ and ‘crack’ Cincinnati residents into non-competitive districts, distorting the link between voters and their state lawmakers.**

In Cincinnati—and across the state and nation—partisan gerrymandering operates through the practice of ‘packing’ and ‘cracking’ districts to make a map more favorable to the advantaged party. ‘Packed’ districts are packed full of voters from the disadvantaged party—far more than the disadvantaged party needs to win. This surplus of disadvantaged-party voters ensures that many disadvantaged-party votes are ‘wasted,’ i.e., expended on a race where they have no impact.

‘Cracked’ districts, in contrast, purposefully break up disadvantaged-party voting blocks into multiple different districts. By splitting up groups of voters (like specific neighborhoods or religious groups) who are likely to vote for the disadvantaged party, mapmakers ensure that these groups cannot muster enough votes to win any one district. *See, e.g.,* Brennan Center for Justice, *Gerrymandering Explained*, <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> (accessed October 22, 2021).

Highly-populated urban areas are particularly vulnerable to ‘packing’ and ‘cracking,’ and Cincinnati is no exception. *See* Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm. & Mary L. Rev. 2115, 2126 (2018); Evidence of Bennett Relators, Expert Affidavit of Dr. Jonathan Rodden, Case No. 2021-1198, ¶¶ 63-77 (describing how the Ohio Redistricting Commission exploited Ohio’s political geography to create gerrymandered districts in and around urban centers). It is thus no surprise that the enacted maps for Hamilton County and Montgomery County provide some of the worst examples of gerrymandering in the state. The enacted maps ‘pack’ Hamilton County House Districts 24 and 25 with likely Democratic voters, ensuring that adjacent Districts 27, 29, and 30 all lean safely Republican. *See* Exhibit 1 to the Complaint, Affidavit of Michael S. Latner, ¶ 33, *Ohio Organizing Collaborative, et. al. vs. Ohio Redistricting Commission*, Case No. 2021-1210. Montgomery County House District 38 is likewise ‘packed’ with Democrats, with the result that adjoining House districts 35 and 39 are safely Republican. *Id.*

A comparison between the enacted maps and the Citizens’ Redistricting Commission ‘Unity Map’ shows the stark consequences of gerrymandering for representation in and around Cincinnati. Under the neutral map, Republicans could expect to win one seat in Hamilton County and two in Montgomery County. But under the Enacted Maps, Republicans are projected to win

three of seven seats in and around Hamilton County, and could win four of five in Montgomery County. *Id.* See also Evidence of Bennett Relators, Expert Affidavit of Dr. Jonathan Rodden, *Bria Bennett, et. al, v. Ohio Redistricting Commission, et. al.*, Case No. 2021-1198, ¶¶ 75-80 (describing the Ohio Redistricting Commission’s manipulation of Cincinnati-area district boundaries to extract additional Republican seats).

Partisan gerrymandering is also deeply entwined with race. Data analysis shows that when mapmakers pack Black voters into a few, specific districts, they produce a quantifiable advantage for Republican candidates across the state. See Stephanopoulos at 2132, 2146-2147. This contemptible strategy is borne out in the Enacted Maps. ‘Packed’ Hamilton County House Districts 24 and 25 include 41 percent and 52 percent voting age Black residents, respectively, and are guaranteed to produce a surplus of ‘wasted’ Black votes. See Complaint, *Ohio Organizing Collaborative, et. al., v. Ohio Redistricting Commission*, Case No. 2021-1210, ¶ 69. Further analysis shows that where mapmakers could not ‘pack’ Black Cincinnati voters, they ‘cracked’ Black communities instead. Suburban Black communities outside of Cincinnati (and Dayton, for that matter) were split and scattered “across majority-Republican districts that were largely exurban and even rural.” Evidence of Bennett Relators, Expert Affidavit of Dr. Jonathan Rodden, *Bria Bennett, et. al, v. Ohio Redistricting Commission, et. al.*, Case No. 2021-1198, ¶ 102. Whether or not mapmakers explicitly considered racial data when drawing the Enacted Maps, the result is the same: Black Cincinnatians are systemically disenfranchised by gerrymandered voting districts.

The democratic harm yielded by this design cannot be overstated. The “basic aim of legislative apportionment” is to achieve “fair and effective representation for all citizens.” *Reynolds v. Sims*, 377 U.S. 533, 565-566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). See *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 62 (McGee Brown, J.,

dissenting). The Redistricting Commission’s blatant disregard for Article XI, Section 6, undercuts any sense of partisan fairness in Ohio state politics. And worse yet, the voters know it. All three Complaints filed against the Redistricting Commission articulate the sense of hopelessness and disenfranchisement felt by Democratic voters in Ohio, who know full well that the Enacted Maps are designed to keep their ideas and priorities off the legislative table. *See* Complaint, *Ohio Organizing Collaborative, et. al., v. Ohio Redistricting Commission, et. al.*, Case No. 2021-1210, ¶¶ 11, 17, 23; Complaint, *League of Women Voters of Ohio, et. al., v. Ohio Redistricting Commission, et. al.*, Case No. 2021-1193, ¶¶ 17, 24; Complaint, *Bria Bennett, et. al., v. Ohio Redistricting Commission, et. al.*, Case No. 2021-1198, ¶¶ 103, 105, 107. The Enacted Maps pave a sure path to increasing partisan polarization and voter apathy—the very outcomes that Article XI, Section 6 is designed to combat.

**B. Partisan gerrymandering undermines constitutional home rule and democratic norms throughout the state.**

More than a century ago, the Ohio Constitutional Convention endowed Ohio municipalities with the power of home rule. *See* Ohio Constitution, Article XVIII, Section 3. Ohio municipalities, like Cincinnati, “have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws.” *Id.* The Ohio Constitution allows for one exception to municipal home rule, namely, that “general laws” of the state of Ohio preempt conflicting exercises of local police power. *See State ex rel. Morrison v. Beck Energy Corp.*, 143 Ohio St.3d 271, 2015-Ohio-485, 37 N.E.3d 128, ¶ 15. Through this clear—but limited—preemption authority, the General Assembly can ensure that municipal policy does not contravene statewide public policy.

Preemption is a perfectly legitimate feature of the democratic process—if the legislative body enacting the preemption is representative of statewide voter preferences. And in Ohio, the

Redistricting Commission is constitutionally required to draw maps in which “the proportion of districts whose voters . . . favor each political party [ ] correspond[s] closely to the statewide preferences of the voters of Ohio.” Article XI, Section 6(B). The interplay between Article XVIII, Section 3 and Article XI, Section 6 should guarantee that when the Ohio General Assembly preempts municipal lawmaking authority, it does so for the right reason: to enact uniform laws reflective of statewide needs and policy preferences.

But when the Ohio Redistricting Commission flouts the requirements of Article XI, Section 6, this constitutional interplay breaks down. The Enacted Maps ensure that the partisan composition of the General Assembly will *not* reflect statewide voter preferences—and the General Assembly, in turn, will have the incentive and ability to preempt even the most modest municipal law-making efforts. Urban residents, already disenfranchised from equal participation in state lawmaking, often turn to their local government for answers. When they do, they encounter yet another harm of gerrymandering: the erosion of home rule via aggressive (and sometimes abusive) state preemption.

**1. A gerrymandered legislature has every incentive to abuse its power of preemption. Experience shows that the Ohio General Assembly has done just that.**

The infamous 2016 “Petland Bill” (S.B. 331) provides a powerful example of how a gerrymandered General Assembly is tempted to abuse its power of preemption. Such legislation undermines not only the home rule authority embodied in Article XVIII, Section 3, but the legitimacy of preemption itself.

S.B. 331 began its life as a bill to regulate the sale of dogs from pet stores. It was passed by the Ohio Senate, but languished for months in the House Financing Committee. *See City of Cleveland v. State*, 8th Dist. Cuyahoga No. 106688, 2019-Ohio-315, ¶ 2. On December 7, 2016—just days before the close of the 2016 legislative session—the Committee added a litany of

preemptive measures to the bill. *Id.* at ¶ 3. Instead of regulating puppies, S.B. 331 now prohibited municipal governments from:

1. Raising the local minimum wage;
2. Setting local standards for fringe benefits or employee scheduling; and
3. Regulating small cell wireless.

The Ohio State Senate passed the bill on strictly party lines, and multiple local governments filed suit. *See City of Cincinnati v. State*, 2018-Ohio-4498, 121 N.E.3d 892 (1st Dist.); *City of Cleveland*, 8th Dist. Cuyahoga No 106688, 2019-Ohio-315. The Cuyahoga County Court of Common Pleas and the Hamilton County Court of Common Pleas soon declared the legislation unconstitutional on single-subject grounds, and portions of the bill were eventually repealed. *Id.*

S.B. 331 is instructive not because of its ultimate (un)constitutionality, but because of what it teaches us about how a non-representative legislature wields the preemption power. When the Ohio Redistricting Commission distorts the link between the General Assembly and Ohio voters through gerrymandering, it stifles an intended check on the legislature: the voters themselves. *See* Caughey, Tausanovitch, and Warshaw, *Partisan Gerrymandering* at 455-456. “[B]y biasing the relationship between votes and seats, [gerrymandering] undermines congruence with voters’ preferences, skewing the ideological composition of the legislature and the ideological character of policymaking away from the preferences of the median voter (and thus from a majority of the electorate).” *Id.* at 456. The General Assembly is then free to transform a bill about puppies into sweeping preemption of local minimum wage, employee scheduling, and small cell wireless regulations—with no meaningful feedback from the urban voters it impacts most. This “new preemption” works to “silence[] the voices of people of color, working-class people, and LGBTQ+ people and their allies.” Bean & Strano, *Punching Down: How States are Suppressing Local*

*Democracy*, 27, [https://d1y8sb8igg2f8e.cloudfront.net/documents/Punching\\_Down\\_2019-07-11\\_205724.pdf](https://d1y8sb8igg2f8e.cloudfront.net/documents/Punching_Down_2019-07-11_205724.pdf) (accessed October 22, 2021).

Even though the undemocratic and absurd preemption of S.B. 331 was corrected by the courts, Ohio municipalities were harmed by being forced to direct their limited resources to filing the lawsuits in the first instance. All Ohioans were harmed by General Assembly’s decision to waste its time and taxpayer dollars passing clearly unconstitutional legislation. This type of abuse of the preemption power distracts from the statewide issues—like education or healthcare—that preemption is actually supposed to address. It “nullifies the results of local elections” by ensuring that local policymakers, once seated, have little practical ability to legislate in the areas that voters care about most. *Id.* The resulting disenfranchisement bleeds through all levels of government, and bodes ill for the future of local political involvement and policy innovation in Ohio.

**2. Even when the legislative process is not abused, systemic preemption by a gerrymandered legislature results in the anti-democratic erosion of home rule.**

Of course, rarely are exercises of the General Assembly’s preemption power as abusive as the Petland Bill. Preemption can—and should—be used as a tool to resolve intra-state conflict and effect uniform regulatory frameworks for complex issues and industries. But as the partisan composition of the General Assembly skews ever further from that of Ohioans statewide, preemption can be used for a far less legitimate purpose: to undermine and erode municipal home rule.

The sheer scope of policy areas where the Ohio General Assembly has forbidden local law-making is startling. In the last fifteen years, the General Assembly has banned Ohio municipalities from regulating:

- Red light cameras. *See* Former R.C. 4511.093, 4511.0912, 4511.095.
- Mobile homes. *See* R.C. 4781.52

- Casinos. *See* R.C. 3772.26.
- Natural gas hookups. *See* R.C. 4933.41.
- Hazardous waste disposal. *See* R.C. 3734.05(E).
- Oil and gas drilling. *See* R.C. 1509.02.
- Employee wages. *See* R.C. 4111.02.
- Small cell wireless. *See* R.C. Chapter 4939.
- Firearm licensing. *See* R.C. 9.68.
- Firearm transportation and storage by municipal employees. *See* R.C. 2923.1210.
- Fringe benefits and sick leave, including COVID-19 sick leave. *See* R.C. 4113.85.
- Public health protection, including COVID-19 quarantine and isolation orders. *See* R.C. 3701.13(B)

Just last week, the General Assembly evinced its intention to continue this aggressive preemption of local lawmaking. Proposed S.B. 185 would ban local governments, “as part of any statutorily authorized response to any disaster, war, act of terrorism, riot, civil disorder, public health crisis, or emergency,” from “prohibit[ing], regulat[ing], or curtail[ing] the otherwise lawful possession, carrying, display, sale, transportation, transfer, [or] defensive use” of “*any deadly weapon.*” *See Sub. S.B. No. 185, As Passed By Senate*, [https://search-prod.lis.state.oh.us/solarapi/v1/general\\_assembly\\_134/bills/sb185/PS/02/sb185\\_02\\_PS?format=pdf](https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb185/PS/02/sb185_02_PS?format=pdf) (accessed October 22, 2021) (emphasis added). It is difficult to imagine a more direct attack on municipal police power.



The question here is not whether these specific exercises of preemption are constitutional. Some are, and some are not.<sup>1</sup> Rather, in the context of gerrymandering, the question is whether serial preemption of municipal lawmaking can be considered even remotely *democratic*. Where district maps are drawn specifically to devalue the votes of urban residents, the answer is clearly ‘no.’ The democratic legitimacy of preemption rests on the assumption that the General Assembly will accurately represent statewide interests. The Enacted Maps make a mockery of this premise, and of the more than two million Ohio voters who passed Article XI, Section 6. Should this Court allow the Enacted Maps to stand, the continued erosion of municipal home rule through anti-democratic preemption is inevitable. This outcome respects neither the text nor the spirit of the Ohio Constitution.

### **CONCLUSION**

Ohio municipalities are endowed by Ohio’s constitution with the power “to exercise all powers of local self-government.” This mandate rings hollow when a gerrymandered legislature systemically undermines local government authority. Gerrymandering suppresses the voice of Cincinnati residents twice-over: first when maps are drawn to systemically ‘waste’ their votes, and then again when the gerrymandered legislature preempts local action on the issues closest to voters’ hearts.

In Ohio, bipartisan redistricting is no longer an issue of politics or policy. It is a matter of constitutional law. The City urges this Court to enforce the bipartisan redistricting requirements of Article XI, Section 6 and declare the Enacted Maps unconstitutional.

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<sup>1</sup> See, e.g., *City of Dayton v. State*, 151 Ohio St.3d 168, 2017-Ohio-6909, 87 N.E.3d 176, ¶ 1 (holding former R.C. 4511.093(B)(1), R.C. 4511.0912, and R.C. 4511.095, preempting municipal use of red light cameras, unconstitutional).

Respectfully submitted,

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