

**SHOULD LEGISLATORS PICK THEIR VOTERS, OR SHOULD
VOTERS PICK THEIR LEGISLATORS? THE SUPREME COURT
OF OHIO INVALIDATES THE OHIO REDISTRICTING
COMMISSION’S GENERAL ASSEMBLY PLAN**

***LEAGUE OF WOMEN VOTERS OF OHIO V. OHIO
REDISTRICTING COMM’N*, 167 OHIO ST. 3D 255, 2022-OHIO-
65, 192 N.E.3D 379.**

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I. INTRODUCTION

In 2015, more than seventy percent of Ohioans voted to change the redistricting process.¹ While Ohioans voted to amend article XI of the Ohio Constitution and end the partisan process for drawing general assembly districts, the resulting process is even more partisan than before the amendment. Under the amendment to article XI of the Ohio Constitution, a seven-member redistricting commission (“Commission”)

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1. See *Ohio Bipartisan Redistricting Commission Amendment, Issue 1 (2015)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio_Issue_1_Redistricting_Commission_Amendment_\(2015\)](https://ballotpedia.org/Ohio_Issue_1_Redistricting_Commission_Amendment_(2015)) (last visited July 8, 2024).

would form and draw the boundaries of Ohio's ninety-nine House districts and thirty-three Senate districts. In *League of Women Voters of Ohio v. Ohio Redistricting Commission* ("*League I*"), the Supreme Court of Ohio invalidated the Ohio redistricting Commission's general assembly plan because it greatly favored one party and ordered the Commission to adopt a new plan.²

Over the course of the following year, the Supreme Court of Ohio would reject four more plans adopted by the Commission, finding the plans all failed to comply with article XI of the Ohio Constitution.³ The 2022 elections eventually proceeded using a plan invalidated by the Supreme Court of Ohio following an order from a federal court.⁴

This Comment will first examine the facts and procedural history of *League I*. Then, it will give background on redistricting, gerrymandering and relevant decisions regarding redistricting. Next, this Comment will examine the Supreme Court of Ohio's interpretation of the anti-gerrymandering language that is the heart of the 2015 amendments to article XI. Finally, this Comment will examine the effects this ruling has had on the redistricting process in Ohio and whether the amendment has achieved its intended goal of ending the partisan process for drawing Ohio House and Senate districts.

II. STATEMENT OF THE CASE

In November 2015, 71.5% of Ohio voters voted to amend the Ohio Constitution to change the process in which general assembly district lines are drawn.⁵ The ballot language voters approved provided that the new process would "[e]nd the partisan process for drawing Ohio House and Senate districts, and replace it with a bipartisan process with the

2. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (League I)*, 167 Ohio St. 3d 255, 2022-Ohio-65, 192 N.E.3d 379, at ¶ 2.

3. *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n (League II)*, 168 Ohio St. 3d 28, 2022-Ohio-342, 195 N.E.3d 974, at ¶ 3; *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (League III)*, 168 Ohio St. 3d 309, 2022-Ohio-789, 198 N.E.3d 812, at ¶ 2; *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (League IV)*, 168 Ohio St. 3d 374, 2022-Ohio-1235, 199 N.E.3d 485, at ¶ 2; *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (League V)*, 168 Ohio St. 3d 522, 2022-Ohio-1727, 200 N.E.3d 197, at ¶ 5.

4. *See infra* notes 46–51 and accompanying text.

5. *See Ohio Bipartisan Redistricting Commission Amendment, Issue 1 (2015)*, *supra* note 1.

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goal of having district boundaries that are more compact and politically competitive.”⁶

First, the amendment to article XI of the Ohio Constitution included the formation of a Commission to be responsible for redistricting.⁷ The Ohio Redistricting Commission is composed of seven individuals including: the governor, auditor of state, secretary of state, one person appointed by the speaker of the house, one person appointed by the house minority leader, one person appointed by the president of the senate, and one person appointed by the senate minority leader.⁸

Second, article XI, section 6 provides the specific anti-gerrymandering provisions that the Ohio voters thought would help depoliticize the redistricting process in Ohio. Section 6 provides that the Commission shall attempt to draw a plan that is not “drawn primarily to favor or disfavor a political party” and the plan should “correspond closely to the statewide preferences of the voters of Ohio.”⁹ In addition, districts shall be compact.¹⁰

Third, the number of election cycles a general assembly plan remains in effect for is determined by the degree of bipartisan support the plan receives.¹¹ If the Commission adopts a plan and at least two members of the two largest political parties are in the majority, then the plan would be in effect until the next year ending in one—ten years.¹² If a plan is adopted without bipartisan support, then the plan would be in effect for only two election cycles—four years.¹³

Fourth, article XI, section 9 grants exclusive, original jurisdiction in all cases arising under these provisions to the Supreme Court of Ohio.¹⁴ However, the court is limited to reviewing and invalidating plans passed by the Commission. The court cannot “order, in any circumstance, the implementation or enforcement of any general assembly district plan that has not been approved by the [C]ommission in the manner prescribed by this article.”¹⁵ Furthermore, “[n]o court shall order the [C]ommission to adopt a particular general assembly district plan or to

6. Ballot Board: 2015, *Issue 1: Ballot Language*, OHIO SEC’Y OF STATE, <https://www.ohiosos.gov/globalassets/ballotboard/2015/1-language.pdf> (last visited July 8, 2024).

7. OHIO CONST. art. XI, § 1(A).

8. *Id.*

9. OHIO CONST. art. XI, § 6(A)–(B).

10. *Id.* art. XI, § 6(C).

11. *See id.* art. XI, § 8.

12. *See id.* art. XI, § 8(B).

13. *See id.* art. XI, § 8(C)(1)(a).

14. *Id.* § art. XI, 9(A).

15. *Id.* § art. XI, 9(D)(1).

draw a particular district.”¹⁶ The only remedies available are to order the Commission to fix one or more isolated violations or to order the Commission to adopt an entirely new general assembly district plan that complies with article XI.¹⁷

The governor, Mike DeWine, first convened the Commission on August 6, 2021.¹⁸ The deadline for a map to be adopted was supposed to be September 1, 2021, but delays in the release of decennial data by the Census Bureau led to the delayed formation of the Commission.¹⁹ On August 31, the Commission held its second meeting where Senator Sykes presented a proposed plan drafted by the Senate Democratic Caucus.²⁰ At this second meeting, House Minority Leader Sykes asked the rest of the Commission when they planned on presenting plans for public comment, at which time House Speaker Cupp replied that the plan the Republican Caucus was drafting would not be ready by the September 1 deadline.²¹

On September 9, 2021, Senate President Huffman proposed a plan to the Commission and offered the Republican Caucus’s drafters to talk about their plan.²² When the drafters were asked how the proposed plan complied with the Voting Rights Act, the drafters claimed that Huffman and Cupp instructed them not to use racial or demographic data when drafting the plan.²³ Senator Sykes and House Minority Leader Sykes, the only Democratic members of the Commission, raised concerns including compliance with the provisions in article XI, section 6.²⁴ After some revisions, the Commission would eventually approve the plan on September 16 by a five to two vote, along party lines.²⁵

Under the plan approved on September 16, 2021 (“Plan 1”), it was estimated that in the Ohio House of Representatives, sixty-two seats would lean Republican, and thirty-seven seats would lean Democrat.²⁶ In

16. *Id.* § art. XI, 9(D)(2).

17. *Id.* art. XI, § 9(D)(3).

18. *League I*, 2022-Ohio-65, ¶ 10.

19. *See id.* ¶ 33. The Commission consisted of respondents Governor Mike DeWine, Secretary of State Frank LaRose, Auditor of State Keith Faber, Speaker of the House Robert Cupp, President of the Senate Matthew Huffman, House Minority Leader Emilia Sykes, and Senator Vernon Sykes. *Id.* ¶ 10. DeWine, LaRose, Faber, Cupp, and Huffman are members of the Republican party, and Emilia Sykes and Vernon Sykes are members of the Democratic party. *Id.*

20. *Id.* ¶ 12.

21. *Id.* ¶¶ 12–13

22. *Id.* ¶ 15.

23. *Id.*

24. *Id.* ¶ 16.

25. *Id.* ¶ 24.

26. *Id.*

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the Ohio Senate, twenty-three seats would lean Republican, and ten seats would lean Democrat.²⁷

In a statement released by the Commission after the vote, the Commission explained that Plan 1 complied with the “‘mandatory requirements’ in [s]ections 2, 3, 4, 5, and 7 and that the Commission’s ‘attempt to meet the aspirational standards’ of [s]ection 6 did not result in any violation of the ‘mandatory requirements.’”²⁸ The Commission claimed that in the last sixteen statewide state and federal partisan elections, Republican candidates won thirteen out of sixteen of those elections, so the statewide proportion of voters favoring Republican candidates is eighty-one percent, with nineteen percent of voters favoring Democratic candidates.²⁹ However, the statewide proportion of voters favoring Republican candidates was about fifty-four percent and forty-six percent of voters favoring Democratic candidates when considering the total number of votes cast in those elections.³⁰ Therefore, the Commission reasoned that the proportionality standard in article XI is satisfied if the number of districts favoring Republican candidates is between fifty-four percent and eighty-one percent.³¹ Under Plan 1, eighty-five of a possible 132 House and Senate districts—about 64.4%—would have been Republican-leaning districts.³²

During the process of drawing Plan 1, the only members of the Commission who had access to the drafters were Senate President Huffman and House Speaker Cupp.³³ At one point during the negotiations leading up to the final approval of Plan 1, Secretary LaRose “admitted that Senate President Huffman’s plan was unfair but said that he would not vote against his Republican colleagues.”³⁴

Within two weeks of the adoption of Plan 1, three lawsuits were filed in the Supreme Court of Ohio against the Commission and its members. The three suits were filed by various organizations and individuals.³⁵ All three complaints alleged that Plan 1 violated sections 6(A) and 6(B) of

27. *Id.*

28. *Id.* ¶ 25.

29. *Id.*

30. *Id.*

31. *See id.*

32. *Id.*

33. *Id.* ¶ 39.

34. *Id.* ¶ 50.

35. *Id.* ¶ 28. The first suit was filed by the League of Women Voters of Ohio, the A. Philip Randolph Institute of Ohio, and six individuals. *Id.* The second suit was filed by ten individual voters. *Id.* The third suit was filed by the Ohio Organizing Collaborative, the Ohio chapter of the Council on American-Islamic Relations, the Ohio Environmental Council, and six individuals. *Id.*

article XI of the Ohio Constitution.³⁶ The third complaint further alleged that Plan 1 violated section 3(B)(2).³⁷ The Supreme Court of Ohio held Plan 1 violated the standards in article XI, sections 6(A) and 6(B), but did not reach the claims under section 3(B)(2).³⁸ The court ordered that the Commission shall reconvene and adopt a plan in conformity with the Ohio Constitution within ten days of the judgment.³⁹

Over the course of the next six months, the Commission would adopt four more plans and each one would be invalidated by the Supreme Court of Ohio.⁴⁰ A group of Republican voters sued the Commission and Secretary of State, Frank LaRose, in federal court after the second plan (“Plan 2”) adopted by the Commission was invalidated by the Supreme Court of Ohio on February 18, 2022.⁴¹ The federal court initially deferred to the Commission and the Supreme Court of Ohio in hopes that a redistricting plan that conforms with the Ohio Constitution would be adopted before the May primary.⁴² However, after the Commission’s fourth plan (“Plan 4”) was invalidated by the Supreme Court of Ohio on April 14, 2022, the federal court intervened to ensure that the primaries would take place.⁴³

A three-judge panel was formed by the Chief Judge of the U.S. Court of Appeals for the Sixth Circuit.⁴⁴ The plaintiffs, Republican voters and activists, requested that the federal court impose Plan 3 or Plan 4, both of which were invalidated by the Supreme Court of Ohio.⁴⁵ Before the Supreme Court of Ohio invalidated Plan 3, LaRose began implementing Plan 3, and eighty of eighty-eight counties in Ohio had implemented Plan 3.⁴⁶ Because LaRose began implementing Plan 3 prior to its invalidation in *League III*, Plan 3 could be adopted as late as May 28, 2022 and still be implemented before the August 2, 2022 deadline for a primary election.⁴⁷ Any plan other than Plan 3 would need to be adopted by April 20, 2022 to meet the August 2, 2022 deadline.⁴⁸ So, the federal court gave

36. *Id.*

37. *Id.* Section 3(B)(2) requires that any redistricting plan must “comply with all applicable provisions of the constitutions of Ohio and the United States and of federal law.” OHIO CONST. art. XI, § 3(B)(2).

38. *League I*, 2022-Ohio-65, ¶¶ 132–33.

39. *Id.* ¶ 137.

40. *See supra* note 3.

41. *Gonidakis v. LaRose*, 599 F.Supp.3d 642, 653 (S.D. Ohio 2022).

42. *See id.* at 653–54, 680.

43. *League IV*, 2022-Ohio-1235, ¶ 2; *Gonidakis*, 599 F.Supp.3d at 654.

44. *Gonidakis*, 599 F.Supp.3d at 654.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

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the Commission and the Supreme Court of Ohio a deadline of May 28 to adopt a new plan, otherwise Plan 3 would be used for the 2022 election cycle only.⁴⁹

On May 25, 2022, three days before the deadline imposed by the federal court, the Supreme Court of Ohio reaffirmed that Plans 3 and 4 were invalid and could not be used in the 2022 election cycle despite the federal court's order.⁵⁰ The Commission did not adopt a new plan and Plan 3 was used for the 2022 election cycle, despite the Supreme Court of Ohio's decision in *League V*.⁵¹

III. BACKGROUND

Article I, Section 4 of the U.S. Constitution gives the states the power to determine the time, place, and manner of electing members of Congress, subject to a few limitations.⁵² State legislative and congressional maps are usually redrawn every ten years following the release of decennial data by the U.S. Census Bureau.⁵³ State electoral districts must comply with federal statutes, including the 1965 Voting Rights Act.⁵⁴ While the Supreme Court has generally deferred to state governments regarding the drawing of electoral boundaries, for both congressional and state legislatures, the Court has ruled on a few key issues. In *Thornburg v. Gingles*, the Supreme Court held that drawing districts based on race violates the Voting Rights Act.⁵⁵ In a later case, the Court held that using race as the predominant factor in drawing boundaries violates the Equal Protection Clause.⁵⁶

49. *Id.* at 678–79.

50. *See League V*, 2022-Ohio-1727, ¶¶ 2–5 (holding Plan 3 was invalid because it violated article XI, sections 6(A) and 6(B) of the Ohio Constitution).

51. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (League VI)*, 172 Ohio St. 3d 597, 2023-Ohio-4271, 225 N.E.3d, at ¶7.

52. U.S. CONST. art. I, § 4, cl. 1.

53. *See, e.g.*, OHIO CONST. art. XI, §§ 1, 3 (explaining the Commission convenes in years ending with the numeral one and the population of the state is determined by the federal decennial census if available).

54. *See* 52 U.S.C. § 10101.

55. *See Thornburg v. Gingles*, 478 U.S. 30, 47–48 (1986) (finding based on a totality of circumstances that North Carolina's multimember districts diluted the strength of minority voters and thus violated § 2 of the Voting Rights Act).

56. *See Shaw v. Reno*, 509 U.S. 630, 645 (1993) (noting that “district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause”); *see also Miller v. Johnson*, 515 U.S. 900, 904–05 (1995) (applying the equal protection principles articulated in *Shaw*).

Gerrymandering is the practice of intentionally drawing electoral districts in a way that benefits one political party.⁵⁷ The effects can be severe and result in the majority party winning more seats or securing existing seats.⁵⁸ The practice of gerrymandering can be traced back to eighteenth century England where politicians formed districts with few eligible voters, making it easier to buy votes and gain seats in Parliament.⁵⁹ The term “gerrymandering” comes from a satirical cartoon published in the *Boston Gazette* in 1812 after Massachusetts Governor Elbridge Gerry’s administration enacted a law drawing new electoral districts.⁶⁰ After the redistricting, the cartoonist thought the district looked like a salamander, and thus, the “Gerry-mander” was born.⁶¹

The redistricting process varies state by state. In thirty-four states, the state legislatures have primary control over the redistricting process.⁶² Four states appoint advisory commissions made up of non-legislators who recommend plans to the state legislatures, but the legislatures have the final say.⁶³ In eight states, there are backup commissions in case the state legislature does not successfully pass a plan.⁶⁴ Seven states have politician commissions where elected officials serve as members.⁶⁵ The rest of the states draw state and federal districts using independent commissions where none of the members are legislators or public officials, and there is limited participation by any elected officials.⁶⁶

57. Andrew Prokop, *What is Gerrymandering?*, VOX (Nov. 14, 2018, 4:16 PM), <https://www.vox.com/2014/8/5/17991938/what-is-gerrymandering>.

58. *Id.* For example, in the 2018 congressional elections in North Carolina, Democrats received close to fifty percent of the votes, but Republicans held on to ten of thirteen seats in the House because the districts were drawn to favor Republican candidates. *See id.*; *see also* *Rucho v. Common Cause*, 588 U.S. 684, 692 (2019).

59. Becky Little, *How Gerrymandering Began in the US*, HISTORY, <https://www.history.com/news/gerrymandering-origins-voting> (Aug. 7, 2023).

60. Brian Duignan, *Gerrymandering*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/gerrymandering> (May 30, 2024).

61. *Id.*

62. *Who Draws the Lines?*, ALL ABOUT REDISTRICTING, <https://redistricting.lls.edu/redistricting-101/who-draws-the-lines/> (last visited July 8, 2024).

63. *Id.* (identifying the four states as Iowa, Maine, Utah, and Vermont).

64. *Id.* (noting Connecticut, Illinois, Maryland, Mississippi, Ohio, Oklahoma, Oregon, and Texas use backup commissions for state district lines). Three states use backup Commissions for congressional districts (Connecticut, Indiana, and Ohio). *Id.*

65. *Id.* (noting that Arkansas, Hawaii, Missouri, New Jersey, Ohio, Pennsylvania, Virginia, Hawaii, and New Jersey, use politician commissions to draw congressional districts in addition to state district lines).

66. *Id.* (“Alaska, Arizona, California, Colorado, Idaho, Michigan, Montana, New York, and Washington”).

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The Supreme Court has considered multiple cases concerning partisan gerrymandering over the course of the last fifty years.⁶⁷ Recently, the Court has revisited the issue in *Rucho v. Common Cause*.⁶⁸ *Rucho* involved blatant partisan gerrymandering to the point where one of the two Republicans chairing the redistricting committee said “I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.”⁶⁹ Despite the admissions by the Republicans who drew the map, the *Rucho* Court held that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.”⁷⁰

While the *Rucho* Court closed the door on federal courts playing a role in resolving claims of excessive partisanship in the redistricting process, the Court did affirm that state legislatures, state courts, and Congress can still regulate partisanship in the redistricting process.⁷¹ A major factor in the Court’s decision was the issue of finding a standard for resolving gerrymandering claims that is “clear, manageable, and politically neutral.”⁷² In particular, the Court was concerned that there was no way “to ‘provid[e] a standard for deciding how much partisan dominance is too much.’”⁷³ While the Court’s holding in *Rucho* closed the door on federal courts resolving claims of excessive partisanship in state congressional redistricting maps, federal courts still play a role in protecting the right to vote.

Federal courts can still impose state electoral maps if necessary to protect the right to vote.⁷⁴ However, federal courts must do so only as a last resort after giving the states the opportunity to do so consistent with state law.⁷⁵ In *Grove* and *Branch*, the District Court gave the state courts a deadline to adopt a plan before it would impose a plan.⁷⁶ The Court in *Branch* upheld the map drawn by the District Court, stating that “federal courts are ‘left to embark on [the] delicate task’ of redistricting” when a

67. The Supreme Court first addressed the issue in 1973. See *Gaffney v. Cummings*, 412 U.S. 735, 735–36 (1973).

68. *Rucho v. Common Cause*, 588 U.S. 684 (2019).

69. *Id.* at 2491. The plan approved by the North Carolina General Assembly was drawn so Republican candidates were favored in ten of thirteen districts despite Democrats receiving more votes on a statewide basis in previous elections. *Id.*

70. *Id.* at 2506–07.

71. *Id.* at 2507–08.

72. *Id.* at 2498 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306–08 (2004) (Kennedy, J., concurring)).

73. *Id.* (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006) (alteration in original)).

74. See *Branch v. Smith*, 538 U.S. 254, 266, 272 (2003).

75. See *Grove v. Emison*, 507 U.S. 25, 34 (1993).

76. *Id.* at 29.

state is unable to adopt an election map.⁷⁷ So, while partisan gerrymandering claims are not justiciable in federal courts, federal courts may still become involved in the state redistricting process as a matter of last resort to protect the right to vote.⁷⁸

IV. COURT'S ANALYSIS

The Supreme Court of Ohio held Plan 1 was invalid because it did not comply with the mandatory requirements of article XI, section 6 of the Ohio Constitution, and ordered the Commission to adopt a new general assembly plan that complied with article XI.⁷⁹

A. *Majority*

Respondents first argue article XI does not provide a remedy for claims based on the Commission's alleged failure to comply with section 6.⁸⁰ Section 9 provides that the Supreme Court of Ohio "shall have exclusive, original jurisdiction" in cases arising under article XI.⁸¹ Respondents argue that under section 9(D)(3), remedies are only available if the Commission fails to adopt a plan that complies with section 2, 3, 4, 5, or 7, and that the court can only review whether a plan complies with section 6 after there is a predicate violation of section 2, 3, 4, 5, or 7.⁸² Thus, the respondents contend the court cannot invalidate a plan if "the challengers allege only a failure to comply with [s]ection 6."⁸³

According to the court, the respondents' interpretation of section 9 misunderstands the broad grant of jurisdiction and remedial power by sections 9(A) and 9(B).⁸⁴ Section 9(A) grants the Supreme Court of Ohio exclusive, original jurisdiction in all cases arising under article XI, not just in cases arising under violations of some of the sections.⁸⁵ Section

77. *Branch*, 538 U.S. at 278 (quoting *Abrams v. Johnson*, 521 U.S. 74, 101 (1997) (alteration in original)).

78. Other types of gerrymandering claims are justiciable in federal courts including cases relating to race and population. See *Thornburg v. Gingles*, 478 U.S. 30, 52 (1986) (addressing claims of racial bloc voting and racially polarized voting under the federal Voting Rights Act of 1965); see also *Reynolds v. Sims*, 377 U.S. 533, 559 (1964) ("[T]he constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature . . .").

79. *League I*, 2022-Ohio-65, ¶ 138.

80. *Id.* ¶ 91.

81. OHIO CONST. art. XI, § 9(A).

82. *League I*, 2022-Ohio-65, ¶ 92.

83. *Id.*

84. *Id.* ¶ 93.

85. *Id.*; see also OHIO CONST. art. XI, § 9(A).

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9(B) provides, in part, that if “any general assembly district[ing] plan made by the Ohio [R]edistricting [C]ommission, or any district is determined to be invalid . . . then, notwithstanding any other provisions of this constitution, the [C]ommission shall be reconstituted as provided in [s]ection 1 of this article.”⁸⁶ Reading section 9(A) and 9(B) together allows the court to review redistricting plans for failure to comply with any section of article XI.⁸⁷

Accepting the respondents’ argument that the court cannot review a plan based solely on a failure to comply with section 6 would make section 6 meaningless.⁸⁸ The court’s prior rulings instruct the court to “avoid any construction that makes a provision ‘meaningless or inoperative.’”⁸⁹ In addition, sections 9(B) and 9(D)(3) can be harmonized because section 9(B) provides that the court may declare a plan invalid in its entirety and order the commission to adopt an entirely new plan while section 9(D)(3) gives the court options other than invalidating a plan in its entirety if the violations to section 2, 3, 4, 5, or 7 are isolated.⁹⁰ Therefore, the Supreme Court of Ohio can review and invalidate a plan for a violation of section 6 alone.⁹¹

Next, Senate President Huffman and House Speaker Cupp argue that the article XI, section 6 provisions are aspirational rather than mandatory.⁹² Section 6 provides that “[t]he Ohio [R]edistricting [C]ommission shall attempt to draw a general assembly district plan that meets all of the following standards.”⁹³ While the word “attempt” does not appear in other sections that provide requirements for a plan adopted by the Commission, the court still finds that section 6, specifically the “shall attempt” language, imposes enforceable duties on the Commission.⁹⁴ The court relied on previous cases where similar language was interpreted as imposing mandatory obligations. For example, in a prior case the court had interpreted “[s]hall endeavor” as mandatory language.⁹⁵ The court also relied on the plain meaning of the phrase “shall attempt,” finding that “[s]ection 6 speaks not of desire but of

86. OHIO CONST. art. XI, § 9(B).

87. *See League I*, 2022-Ohio-65, ¶ 94.

88. *Id.*

89. *Id.* (quoting *State ex rel. Myers v. Bd. of Educ.*, 116 N.E. 516, 517 (Ohio 1917)).

90. *Id.* ¶ 96.

91. *See id.* ¶ 94.

92. *Id.* ¶ 82.

93. OHIO CONST. art. XI, § 6.

94. *League I*, 2022-Ohio-65, ¶ 86.

95. *Id.* ¶ 85 (citing *State ex rel. Republic Steel Corp. v. Ohio C.R. Comm’n.*, 339 N.E.2d 658 (Ohio 1975)).

direction.”⁹⁶ The court acknowledges that “the standards set forth in [section 6] may not come to fruition, [section 6] nevertheless requires the [C]ommission to try to achieve them.”⁹⁷

Senate President Huffman and House Speaker Cupp also argue that the legislative intent behind section 6 was to make the provisions aspirational.⁹⁸ Prior to the amendments to article XI, one representative who advocated for the amendment described the criteria in section 6 as aspirational during a legislative debate.⁹⁹ Senate President Huffman, who was a House member at the time the amendment was being debated, agreed that section 6 was aspirational, stating “there is ‘a clear order of things that are mandatory [and] other things that are aspirational in nature.’”¹⁰⁰ The majority rejects Huffman and Cupp’s argument that the legislature intended the criteria in section 6(A) and 6(B) to be aspirational rather than mandatory because the intent of the Ohio General Assembly is not determined by the assertions of a single legislator but rather “from the expression of the legislative body as a whole.”¹⁰¹ Furthermore, the court “will not use legislative debate ‘to muddy clear statutory language.’”¹⁰² Therefore, the court held comments made by legislators during the debate on the amendment do not change the plain language interpretation of the criteria provided in section 6(A) and 6(B).¹⁰³

Next, the court found the Commission did not attempt to comply with the standard set forth in section 6(B), and the Commission “did not have the right target in mind” when they calculated the statewide preferences of voters.¹⁰⁴ Section 6(B) requires that the Commission shall attempt to draw a plan that corresponds to the statewide preferences of Ohio voters.¹⁰⁵ According to the court, the section 6(B) standard requires the calculation then comparison of how voters in the proposed districts will likely vote in future elections and the statewide preferences of the voters

96. *Id.* at ¶¶ 86–90 (citing *State ex rel. Cincinnati Enquirer v. Lyons*, 14 N.E.3d 989, 997 (Ohio 2014) (noting “shall” in a statute or rule connotes a mandatory obligation”). In examining the plain meaning, the court also looked to the dictionary definition of “attempt.” *Id.* ¶ 86 (citing PHILIP BABCOCK GOVE, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 140 (2002)) (defining “attempt” as “to make an effort to do, accomplish, solve, or effect”).

97. *Id.* ¶ 90.

98. *Id.* ¶ 89.

99. *Id.*

100. *Id.* (alteration in original).

101. *Id.* ¶ 90 (citing *Nichols v. Villarreal*, 680 N.E.2d 1259 (Ohio 4th Dist. 1996)).

102. *Id.* (quoting *Milner v. Dep’t. of Navy*, 562 U.S. 562, 572 (2011)).

103. *Id.*

104. *Id.* ¶ 102

105. OHIO CONST. art. XI, § 6(B).

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of Ohio.¹⁰⁶ The first calculation involves using prior election results to determine how voters in the proposed districts are likely to vote in future elections.¹⁰⁷ The second calculation looks at the preferences of Ohio voters as a whole and is calculated by totaling the votes cast for candidates from either party statewide.¹⁰⁸ The Commission should then compare the two figures to determine if the plan corresponds closely with the statewide preferences of the voters of Ohio.¹⁰⁹

In the statement the Commission released along with Plan 1,¹¹⁰ the Commission acknowledged that 64.4% of the proposed districts in Plan 1 favored Republican candidates.¹¹¹ In addition, the statement released also stated that Republican candidates won thirteen of sixteen—eighty-one percent statewide partisan contests during the last ten years.¹¹² Republican candidates also received fifty-four percent of the all votes cast statewide over the last ten years.¹¹³ Therefore, according to the 8(C)(2) statement released with Plan 1, the proportion of Ohio voters that favor Republican candidates is between fifty-four percent and eighty-one percent, so Plan 1 satisfies the standard in section 6(B).¹¹⁴ This statement was so absurd that the court refused to give any credence to the eighty-one percent figure, stating the statewide preferences of the voters of Ohio is determined by looking at the total number of votes cast in statewide state and federal elections over the last ten years.¹¹⁵ About fifty-four percent of Ohio voters voted for Republican candidates and about forty-six percent voted for Democratic candidates, so the court held the Commission should have used the fifty-four percent, and not the eighty-one percent, figure for determining the statewide preferences of voters.¹¹⁶

106. *League I*, 2022-Ohio-65, ¶¶ 105–06.

107. *Id.* ¶ 105. The first calculation should be done by examining results from statewide state and federal elections from the previous ten years. *Id.*

108. *Id.* ¶ 107.

109. *Id.* ¶¶ 104–08.

110. If the Commission adopts a plan by a simple majority vote, the Commission is required to “include a statement explaining what the [C]ommission determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of districts in the plan whose voters . . . favor each political party corresponds closely to those preferences” described in section 6(B). OHIO CONST. art. XI, § 8(C)(2).

111. *League I*, 2022-Ohio-65, ¶ 105; *Article XI, Section 8(C)(2) Statement*, OHIO REDISTRICTING COMM’N (Sept. 15, 2021) [hereinafter *8(C)(2) Statement*], <https://archive.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-september-15-2021-76/article-xi-sec-8c2-statement.pdf>.

112. *8(C)(2) Statement*, *supra* note 111.

113. *League I*, 2022-Ohio-65, ¶ 46.

114. *Id.* ¶ 106; *8(C)(2) Statement*, *supra* note 111.

115. *See League I*, 2022-Ohio-65, ¶¶ 106–07.

116. *See id.* ¶ 108.

The court notes that even if the Commission did use the correct figure for the statewide preferences of Ohio voters, the Commission still did not attempt to comply with the standard in section 6(B) because the process of drafting Plan 1 only involved the Republican members of the Commission.¹¹⁷ Huffman and Cupp appointed Ray DiRossi and Blake Springhetti, who work for the Senate and House Republican Caucuses, respectively, to draw maps and present the plans to the Commission.¹¹⁸ DiRossi and Springhetti testified that despite having access to partisan data in the drafting software they were using, they were never told to attempt to comply with section 6.¹¹⁹ Senate President Huffman and House Speaker Cupp also admit to instructing DiRossi and Springhetti to focus on other provisions in article XI but not section 6.¹²⁰

Respondents argue that they did attempt to satisfy article XI, section 6(B) by negotiating with the Democratic members of the Commission after introducing the plan to the Commission on September 9, 2021.¹²¹ The court rejects this argument holding that evidence of “political negotiations” is insufficient to satisfy the standard under section 6 because evidence of “political negotiations” alone does not show an attempt to draw a plan that complies with the requirements of section 6.¹²²

In support of their claims that the Commission did not attempt to comply with section 6, Petitioners introduced expert evidence showing that the Commission could have drawn a more proportional plan than the plan that was adopted.¹²³ One expert used a redistricting simulation algorithm to generate 5,000 potential plans using article XI criteria.¹²⁴ None of the 5,000 plans favored Republican candidates as much as the Commission’s plan, and “the plan adopted by the [C]ommission was an outlier, displaying a greater degree of disproportionality than any of the

117. *Id.* ¶ 109.

118. *Id.* ¶ 34.

119. *Id.* ¶ 109.

120. *Id.*

121. *Id.* ¶ 110. Respondents also argue that they made modifications to the plan that was initially introduced before September 15, 2021, and that this is evidence of an attempt to comply with section 6(B). *Id.*

122. *Id.* The court also notes that section 6(B) does not require that the majority-party or minority-party members of the Commission draft a plan that is acceptable to the other members, rather the members of the Commission as a whole must attempt to draft a plan that corresponds closely to the statewide voter preferences; and evidence that only one party had control over the drafting process indicates the drafters did not attempt to comply with section 6. *Id.* ¶ 111.

123. *Id.* ¶ 112.

124. *Id.*

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simulated maps.”¹²⁵ Other experts submitted reports agreeing that Plan 1 was an outlier that greatly favored Republican candidates.¹²⁶ In response, Respondents do not dispute the expert evidence, but rather they claim “[Petitioners’] experts can easily draw simulated maps after the fact that provide exact proportionality by making exact proportionality one of their criteria for drawing maps” and “there are no manageable standards for this court to apply in determining how ‘fair’ a plan must be.”¹²⁷ The court states that section 6(B) “recognizes that fairness is measured by efforts taken to achieve close proportionality,” and that the expert evidence “supports the conclusion that the [C]ommission did not attempt to meet the standard set forth in [s]ection 6(B).”¹²⁸

Finally, the court held the Commission did not attempt to meet the standard in section 6(A), which provides that “[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party.”¹²⁹ The court begins by noting that other courts have found that direct or circumstantial evidence can be offered to show that a plan was drafted to favor a political party.¹³⁰ The court looked at the process the Commission utilized to draft Plan 1 and evidence showing Plan 1’s partisan skew cannot be explained by nondiscriminatory factors.¹³¹

According to the court, the process in which the plan was drafted may support an inference of predominant partisan intent.¹³² Plan 1 was drafted by DiRossi and Springhetti, who worked for the Senate and House Republican Caucuses, and they were overseen by Huffman and Cupp.¹³³ Huffman and Cupp were the only Commission members that had input, and they did not instruct DiRossi or Springhetti to comply with section 6 because they did not view section 6 as mandatory.¹³⁴ Thus, the court held that the Commission did not draft the proposed plan in the manner prescribed in article XI because the Commission itself did not engage in the drafting process.¹³⁵ Rather, the two parties with the most self-interest in protecting their members, the Democratic and Republican

125. *Id.*

126. *Id.*

127. *Id.* ¶ 113.

128. *Id.*

129. *Id.* ¶ 115 (alteration in original) (quoting OHIO CONST. art. XI, § 6(A)).

130. *Id.* ¶ 117.

131. *League I*, 2022-Ohio-65, ¶¶ 118–131.

132. *Id.* ¶ 118.

133. *Id.*

134. *Id.* DiRossi and Springhetti testified that while drawing the maps they had access to the partisan leanings of the potential districts, but claimed they were focused on article XI’s technical line-drawing requirements. *Id.*

135. *Id.* ¶ 119.

caucuses, drafted maps without input from the rest of the Commission.¹³⁶ Because the process that resulted in the adoption of Plan 1 was controlled by one party's legislative leaders and not the Commission, the court held the Commission did not attempt to comply with the provisions in section 6.¹³⁷

In addition to issues with the process the Commission utilized to draft Plan 1, expert evidence supports the conclusion that Plan 1's partisan skew cannot be explained solely by nondiscriminatory factors.¹³⁸ Expert evidence "showed that if Republican candidates won 54% of the statewide vote . . . , they would win 64 House seats (a supermajority)" under Plan 1.¹³⁹ In contrast, Democratic candidates would not even win a bare majority of the House if they received fifty-four percent of the statewide votes under Plan 1.¹⁴⁰ Similarly, a ten percent swing in statewide vote shares would result in Republican candidates winning an average of seventeen percent more seats in the Senate than Democratic candidates under Plan 1 for the same vote share.¹⁴¹ This result indicates that the advantage Republican candidates have under Plan 1 is not due to chance, accident, or statewide preferences, but the advantage is caused by targeted cracking and packing of Democratic voters.¹⁴² Thus, the court held Plan 1 did not comply with article XI, section 6 and ordered the Commission to adopt a new plan that complies with the provisions in the Ohio Constitution before January 22, 2022.¹⁴³

B. *Dissent*

Justice Kennedy wrote the first dissent, primarily focusing on whether the Supreme Court of Ohio can review and invalidate a plan for a violation of article XI, section 6.¹⁴⁴ Article XI, section 9(D)(3) grants the

136. *Id.*

137. *Id.* ¶ 120.

138. *Id.* ¶ 121. Plan 1 would result in Republicans being favored to win between sixty-one and sixty-eight seats in the House and between twenty and twenty-four Senate seats. *Id.*

139. *Id.* ¶ 122.

140. *Id.*

141. *Id.*

142. *Id.* ¶ 121. Respondents offered expert testimony showing Ohio's political geography and that complying with the requirements of sections 3 and 4 may lead to a map favoring Republican candidates, but that the evidence shows these factors would not result in as significant of a partisan skew as was present in Plan 1. *Id.* ¶ 131.

143. *Id.* ¶¶ 138–39. The court did not address the article XI, section 3(B)(2) claims because the plan was invalidated under sections 6(A) and 6(B). *Id.* ¶¶ 132–33.

144. *Id.* ¶ 187 (Kennedy, J., dissenting). Justice Kennedy also objects to the majority's interpretation of the language in section 6 and the majority's conclusion that the Commission did not attempt to comply with sections 6(A) and 6(B). *Id.* ¶¶ 233–251.

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court authority to invalidate plans if they do not comply with the requirements in section 2, 3, 4, 5, or 7.¹⁴⁵ Kennedy asserts that section 6 is omitted from the list on purpose, therefore the court cannot invalidate a plan because it did not comply with section 6.¹⁴⁶ In response to the majority's holding that section 9(B) grants broad authority to review and invalidate a plan for violating any section of article XI, Kennedy contends that section 9(B) provides that only after a plan is invalidated (for reasons other than a violation of section 6), the Commission must reconvene and adopt a new plan.¹⁴⁷ Therefore, section 9(B) is not an independent source of judicial power to review and invalidate a plan because it does not address any action a court is required to take.¹⁴⁸

Justice Fischer wrote the second dissent, focusing on whether the court can review a plan that was passed for four years, rather than ten years, under the impasse procedures of article XI, section 8.¹⁴⁹ Section 8(C)(1)(A) provides that if a plan does not get approved by at least one member of each of the largest political parties, then the plan will only be in effect for four years, instead of ten if the plan had received bipartisan support.¹⁵⁰ Justice Fischer asserts that sections 8(B) and 8(C)(1)(b) provide that plans should stay in effect for ten or six years, respectively, "except as provided in section 9 of this article."¹⁵¹ Conversely, section 8(C)(1)(a) does not contain the same language.¹⁵² Therefore, Justice Fischer concludes that four year plans remain in effect for four years and are not subject to review by the court.¹⁵³

V. ANALYSIS & IMPLICATIONS

The redistricting process inherently presents a conflict of interest. Legislators are responsible for drawing district lines, but the same legislators, and their parties, are the primary beneficiaries of the lines they draw.¹⁵⁴ In order to mitigate the partisan influence on the

145. OHIO CONST. art. XI, § 9(D)(3).

146. See *League I*, 2022-Ohio-342, ¶ 189 (Kennedy, J., dissenting).

147. *Id.* ¶ 190.

148. *Id.*

149. *Id.* ¶¶ 280–81 (Fischer, J., dissenting). Justice Fischer also disagreed with the majority's holding that the court can review plans for violations of section 6 and that a violation of section 6 had been proven beyond a reasonable doubt. *Id.* ¶¶ 336–344.

150. OHIO CONST. art. XI, §§ 8(B), (C)(1)(a).

151. *League I*, 2022-Ohio-65, ¶¶ 280–81 (Fischer, J., dissenting) (emphasis omitted) (quoting OHIO CONST. art. XI, §9).

152. *Id.* ¶ 285

153. *Id.*

154. See Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 334 (2007)

redistricting process, Ohio voters approved an amendment in 2015 that would “[e]nd the partisan process for drawing Ohio House and Senate districts.”¹⁵⁵ But what the voters of Ohio received after the amendment went into effect in 2022 was a redistricting plan more gerrymandered than before.¹⁵⁶ Following the 2022 election, Republicans were able to secure a supermajority in the state’s House and Senate, holding sixty-seven of the ninety-nine seats in the House and twenty-six of the thirty-three seats in the Senate.¹⁵⁷

The Supreme Court of Ohio’s decision in *League I* exposed a critical flaw in the amendment to article XI: there was no way to stop the majority party from adopting plans that clearly favored candidates from the majority party. In its decision, the court noted that it was limited to invalidating parts or an entire plan adopted by the Commission, however, the court could order the adoption of a certain plan, order changes to a plan, or prescribe the process in which the Commission adopts a plan.¹⁵⁸ This became an obvious problem after a plan invalidated by the court was used in the 2022 election cycle because the Commission was able to let the clock run out by submitting four plans that favored the majority party.¹⁵⁹ The lack of power granted to the Supreme Court of Ohio was not the only issue that became obvious following the court’s decision in *League I*.

Another issue the court faced was determining what constitutes an “attempt” by the Commission to draft a plan that does not favor one party. The court points to the plan’s drafting process and various statistical tests done by experts that showed the “plan’s partisan skew cannot be explained solely by nondiscriminatory factors” as evidence that

(“[Redistricting] is an area where legislators’ self-interest often trumps the pursuit of the public good.”); Scott M. Lesowitz, *Independent Redistricting Commissions*, 43 HARV. J. ON LEGIS. 535, 535 (2006) (“While it is debatable just how egregious the [Texas] Republican-led redistricting plan was, [the 2004] election does demonstrate the potential power of a legislature to adjust political outcomes through the redistricting process—a practice that has been employed by Democrats and Republicans alike.”).

155. Ballot Board: 2015, *supra* note 6; Michael Li, *Redistricting Reform Wins Big in Ohio*, BRENNAN CENTER FOR JUSTICE (Nov. 5, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/redistricting-reform-wins-big-ohio>.

156. Following an order from the U.S. District Court for the Southern District of Ohio, Eastern Division, Plan 3 was used for the 2022 election cycle, despite the Supreme Court of Ohio previously invalidating it. *See supra* text accompanying notes 46–51.

157. Republicans gained three seats in the House and one seat in the Senate. *Ohio House of Representatives*, BALLOTPEDIA, https://ballotpedia.org/Ohio_House_of_Representatives (last visited July 8, 2024); *Ohio State Senate*, BALLOTPEDIA, https://ballotpedia.org/Ohio_State_Senate (last visited July 8, 2024).

158. *See League I*, 2022-Ohio-65, ¶ 96.

159. *See League I*, 2022-Ohio-65; *League II*, 2022-Ohio-342; *League III*, 2022-Ohio-789; *League IV*, 2022-Ohio-1235; *League V*, 2022-Ohio-1727.

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the plan was drawn primarily to favor a party.¹⁶⁰ The Supreme Court of Ohio's analysis of sections 6(A) and 6(B) uses expert witnesses and statistical evidence, which touches on a common issue in gerrymandering cases: how should courts determine "fairness."¹⁶¹

In *League I*, Plan 1 was plainly drawn primarily to favor Republican candidates with Republicans projected to win sixty-two seats in the House and twenty-three seats in the Senate.¹⁶² Measuring fairness became more difficult when the Supreme Court of Ohio reviewed the next three plans the Commission adopted. In *League II*, the court invalidated Plan 2 where Republican candidates were projected to win fifty-seven seats in the House and twenty seats in the Senate.¹⁶³ Plan 2 seemed to be more "fair" because there were less Republican-leaning districts, however, the drafters crafted twelve Democratic-leaning districts that had vote shares of less than fifty-two percent (making them "toss-up" districts).¹⁶⁴ Conversely, there were no Republican-leaning toss-up districts, effectively making fifty-eight percent of the seats in the House and Senate the floor for Republicans while forty-two percent of the seats the ceiling for Democrats.¹⁶⁵ Plans 3 and 4 followed the same pattern as Plan 2, creating nominally more Democrat-leaning districts that had vote shares between fifty and fifty-two percent. Plan 3, the plan eventually used in the 2022 elections despite being invalidated by the Supreme Court of Ohio in *League III*, had so many Democrat-leaning districts that were toss-up districts that a five percent increase in vote share for Republican candidates would result in twenty-three more seats, but the same five percent increase for Democrats would result in two more seats at most.¹⁶⁶ Throughout its decisions, the Supreme Court of Ohio notes that the Commission does not need to adopt a plan that would result in a certain number of competitive districts or a certain number of

160. *League I*, 2022-Ohio-65, ¶ 121. The Supreme Court has previously held that when a single party exclusively controls the redistricting process, "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Davis v. Bandemer*, 478 U.S. 109, 129 (1986) (plurality opinion), *abrogated on other grounds by Rucho v. Common Cause*, 588 U.S. 684 (2019).

161. *League I*, 2022-Ohio-65, ¶ 113 (noting Huffman and Cupp argue there is no manageable standard for determining a plan's fairness); *see also Rucho*, 588 U.S. at 703 (citing *Vieth v. Jubelirer*, 541 U.S. 267, 306–08 (2004) (Kennedy, J., concurring)).

162. *League I*, 2022-Ohio-65, ¶ 24.

163. *League II*, 2022-Ohio-342, ¶¶ 3, 19.

164. *Id.* ¶ 40.

165. *Id.*

166. *League III*, 2022-Ohio-789, ¶ 33. *See also League IV*, 2022-Ohio-1235, ¶ 60 ("A statewide swing of [two] percent in the Republican Party's favor would sweep all the competitive districts into its column, while a similar swing in the favor of the Democratic Party would earn it no additional seats.")

Republican/Democrat leaning districts, but rather the fact that every toss-up district is Democrat-leaning and a small increase in vote shares would result in Republicans gaining many seats is plain evidence of a plan being drawn primarily to favor or disfavor a political party.¹⁶⁷

The Supreme Court of Ohio's analysis of the general assembly district plans in the *League Cases* helps to get over some of the hurdles identified in *Rucho*, *Veith*, and other gerrymandering cases.¹⁶⁸ Courts in other states have struggled to find a standard to evaluate whether a plan was drawn primarily to favor a party, but the court's analysis of Plan 1 can be instructive.¹⁶⁹ The courts analysis in *League I* is noteworthy as it is the most in-depth where the subsequent decisions summarize or reiterate the more detailed analysis in the first decision. The reliance on evidence other than the proportion of districts that favor candidates to determine whether the plans were drawn to favor a party is what makes the Supreme Court of Ohio's analysis unique and instructive.¹⁷⁰ For example, the court looked at the fact that there were no Republican-leaning districts that were toss-up districts while there were between twenty-three and twenty-six Democrat-leaning toss-up districts.¹⁷¹ The issue was not the nominal amount of districts each party was projected

167. See, e.g., *League II*, 2022-Ohio-342, ¶ 40 ("While the Constitution does not require exact parity in terms of the vote share of each district, the commission's adoption of a plan in which the quality of partisan favoritism is monolithically disparate is further evidence of a [s]ection 6(A) violation.") (emphasis omitted).

168. See *Rucho v. Common Cause*, 588 U.S. 684, 702 (2019) (citing *Veith v. Jubelirer*, 541 U.S. 267, 306–08 (2004) (Kennedy, J., concurring) (noting the issue in gerrymandering cases is finding a standard for resolving claims that is "clear, manageable, and politically neutral").

169. State courts have come out differently on gerrymandering cases recently. See, e.g., *Harper v. Hall*, 886 S.E.2d 393, 416 (N.C. 2023) (finding gerrymandering claims nonjusticiable because North Carolina's Constitution "does not provide any judicially discernable or manageable standards for determining how much partisan gerrymandering is too much"); *Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶¶ 70–71, 410 Wis. 2d 1, 998 N.W.2d 370 (failing to determine a standard for evaluating remedial maps but holding that partisan impact would be one factor considered); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 816-17 (Pa. 2018) (finding that impermissible gerrymandering can be established by a showing that neutral criteria—including compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among districts—were subordinated to other factors).

170. Compare *League I*, 2022-Ohio-65, ¶¶ 112–131, with *Gaffney v. Cummings*, 412 U.S. 735, 751–52 (1973) (upholding a reapportionment plan for Connecticut as "virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties"), and *Davis v. Bandemer*, 478 U.S. 109, 116–18 (1986) (reversing lower court's invalidation of Indiana's reapportionment plan that disadvantaged Democrats through irregular district lines and a "peculiar mix of single-member and multimember districts").

171. *League IV*, 2022-Ohio-1235, ¶ 50.

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to win, but rather the fact that the asymmetry in toss-up districts would result in a situation where Republicans could gain seats by getting one or two percent more votes in Democrat-leaning districts, but Democrats would have to get at least five percent more votes to win any seats. The court acknowledged that the proposed districts do not need to exactly match the statewide vote shares for each party and there are geopolitical factors that play a role in drafting maps, but the stark asymmetry in the number of competitive districts in the adopted plans clearly showed the plan was drawn to favor one party.

Under the approach taken by the Supreme Court of Ohio, courts do not need to adopt a technical standard for reviewing redistricting plans and determining “fairness.” Instead, courts would only need to look at the process in which the map was drawn and evidence that the district lines cannot be explained by factors other than partisan favoritism. Some examples of the types of evidence presented in *League I* include comparisons of Plan 1 to simulated plans created using article XI requirements, asymmetry in the number of competitive/toss-up districts, the number of seats won if both parties received fifty percent of the votes, packed wins (“wasted votes”), and mean-median differences in districts.¹⁷² These measures look at the fairness of the elections as a whole rather than how the proposed districts align with the proportion of voters that support either party. Under these measures, a plan could have Republican-candidates favored in more than fifty-four percent of districts and still be not primarily drawn to favor the Republican party. The court acknowledges this when an expert presented a hypothetical plan that complied with article XI and had Republicans winning fifty-seven percent of House districts and fifty-five percent of Senate districts.¹⁷³

In other words, the Supreme Court of Ohio’s analysis *did not* focus on whether the nominal amount of Republican/Democrat-leaning districts matched the proportion of voters who favored Republican/Democrat candidates, but rather was the process in which the lines were drawn “fair” in that a change in vote shares would result in a corresponding change in representation. So, the Commission could adopt a plan where fifty-four percent, or more, of the districts are Republican-leaning and still satisfy the requirements of article XI, but the Commission cannot adopt a plan that protects Republican-leaning districts by making Democrat-leaning districts more vulnerable effectively establishing a floor for Republicans and a ceiling for Democrats. This conclusion is best seen looking at Plan 3 where a five

172. *League I*, 2022-Ohio-65, ¶¶ 121–26, ¶ 264.

173. *League II*, 2022-Ohio-342, ¶ 32.

percent increase in vote share for Republicans would result in up to twenty-three additional seats when the same increase in votes for Democrats would result in, at most, two more seats.¹⁷⁴ In conclusion, the Supreme Court of Ohio essentially held plans do not need to be acceptable to both parties or comply to some technical standard, but plans cannot be drawn in a way that guarantees the majority party can never lose its advantage.

Another major issue the Supreme Court of Ohio faced was limited remedies in article XI, section 9. Section 9 is toothless compared to other states' anti-gerrymandering laws because the only remedy available to the court is to invalidate all or part of a plan adopted by the Commission.¹⁷⁵ So, the Commission can keep submitting gerrymandered plans until the time runs out and a gerrymandered plan must then be used to ensure that an election happens. This is exactly what happened during the 2022 election cycle in Ohio. The Commission never adopted another plan following the Supreme Court of Ohio's order invalidating Plan 3 (again) in *League V* and elections proceeded using the invalid plan. The result was Republicans gaining a supermajority in the House, sixty-seven to thirty-three, and in the Senate, twenty-six to seven.¹⁷⁶

As an extra slap in the face to the Ohio voters who voted in favor of amending article XI, many of the current Commission members were heavily involved in the effort to pass the amendment that resulted in their control over the redistricting process. Senate President Huffman himself partnered with Senator Sykes to form an organization called "Fair Districts for Ohio" in support of Issue 1.¹⁷⁷ Fair Districts for Ohio circulated flyers that claimed the amendment would bring the following reforms: "[p]rotects against gerrymandering by prohibiting any district from primarily favoring one political party" and "[r]equires districts to closely follow the statewide preferences of the voters."¹⁷⁸ Senate President Huffman, along with Auditor Faber and Secretary LaRose who cosponsored the joint resolution while they were senators, pulled off one of the greatest bait-and-switches in the history of American politics.

174. *League III*, 2022-Ohio-789, ¶ 33 (Ohio 2022). Plan 3 looked "more fair" because the proposed districts would result in Republicans nominally having a fifty-four to forty-five advantage in the House and an eighteen to fifteen advantage in the Senate, which is less than the previous plans. *Id.* ¶ 15

175. The Supreme Court of Florida, for example, can review and invalidate plans adopted by the legislature. If invalidated, the legislature gets a chance to revise the plan. If the court finds the plan is still invalid, the court can have its own map drawn. *See League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 261, 270–71 (Fla. 2015).

176. *See supra* note 157 and accompanying text.

177. *League I*, 2022-Ohio-65, ¶ 55.

178. *Id.*

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These three members of the Commission convinced 71.5%¹⁷⁹ of Ohio voters that the amendment to article XI would protect against gerrymandering, then they exploited the very reforms they championed to pass a clearly gerrymandered map that keeps their party in power.

Going forward, Ohioans have a few options. First, they can vote on another ballot initiative to amend article XI again. Ohio can follow the lead of other states and take the redistricting process out of the hands of the politicians that directly benefit from the maps they draw and give the duty to independent redistricting Commissions.¹⁸⁰ Another option available is to challenge the General Assembly Plan as a violation of the Ohio Constitution's guarantees of equal protection,¹⁸¹ assembly,¹⁸² and free speech.¹⁸³ The Pennsylvania Supreme Court recently invalidated a congressional redistricting plan, finding that the gerrymandered plan violated the Pennsylvania Constitution's "Free and Equal Elections Clause."¹⁸⁴ A similar challenge could be brought in Ohio under article XI, section 3(B)(2), which provides any plan adopted by the Commission must comply with all applicable provisions of federal law as well as the federal and Ohio constitutions.¹⁸⁵

VI. CONCLUSION

Gerrymandering gives legislators the ability to choose their voters instead of voters choosing candidates, and the result is the solidification of power for the majority party and the eroding of power for the minority party. Politicians in Ohio have hijacked the new redistricting process to secure seats for members of their party. The formation of a bipartisan redistricting commission was supposed to end the partisan process of redistricting and protect against gerrymandering, but the result has been the exploitation of the new process to adopt a redistricting plan that is more skewed in favor of the majority party than ever. Now that the 2022 election cycle has finished, the effects of using the gerrymandered Plan 3 can plainly be seen. To the surprise of no one, Republicans have gained seats in both the House and Senate solidifying their supermajority. Ohio

179. See *Ohio Bipartisan Redistricting Commission Amendment, Issue 1 (2015)*, *supra* note 1.

180. See Emily Rong Zhang, *Bolstering Faith with Facts: Supporting Independent Redistricting Commissions with Redistricting Algorithms*, 109 CALIF. L. REV. 987, 989–90 (2021).

181. OHIO CONST. art. I, § 2.

182. OHIO CONST. art. I, § 3.

183. OHIO CONST. art. I, § 11.

184. *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

185. OHIO CONST. art. 11, § 3(B)(2).

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voters now have an uphill battle to protect their right to vote from the inevitable dilution that comes from the adoption of gerrymandered election maps.