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The Case for Federal Deference to State Court Redistricting Rulings: Lessons from Ohio's Districting Disaster

John Sullivan Baker
Columbia Law School

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**THE CASE FOR FEDERAL DEFERENCE TO STATE COURT
REDISTRICTING RULINGS: LESSONS FROM OHIO’S DISTRICTING
DISASTER**

*John Sullivan Baker**

In a watershed 2015 referendum, Ohioans decisively approved a state constitutional amendment that prohibited partisan gerrymandering of General Assembly districts and created the Ohio Redistricting Commission. Though the amendment mandated that the Commission draw proportional maps not primarily designed to favor or disfavor a political party, the Commission—composed of partisan elected officials—repeatedly enacted unconstitutional, heavily gerrymandered districting plans in blatant defiance of the Ohio Supreme Court.

*After the Ohio Supreme Court struck down four of the Commission’s plans, leaving Ohio without state House and Senate maps just months before the 2022 general election, a group of voters sued in the U.S. District Court for the Southern District of Ohio, arguing that federal judicial intervention was needed to protect Ohioans’ voting rights. In this case, *Gonidakis v. LaRose*, a three-judge panel imposed one of the Commission’s invalidated gerrymanders. By rendering this misguided decision, the panel disregarded the anti-gerrymandering provisions of the Ohio Constitution, thwarted the will of the voters, and created an incentive for the Commission to simply defy adverse state court rulings.*

*This Article critiques *Gonidakis* and examines when and how federal courts should intervene if state-level commission-based redistricting processes go awry. It argues that when a federal court decides a case in which a state court has struck down a map created by a redistricting commission, the federal court should usually—but not always—defer to the state court ruling.*

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* J.D. Candidate, 2024, Columbia Law School; B.S., 2020, Cornell University. I am grateful to Professor Richard Briffault for his invaluable advice and feedback. I would also like to thank Sonia Montejano and the entire *Voting Rights and Democracy Forum* editing team for helping me strengthen this piece. Alexis, thank you for supporting and encouraging me throughout the writing process.

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INTRODUCTION

In June 2022, the *Toledo Blade* editorial board surveyed the wreckage of Ohio's disastrous redistricting process: "The damage is done. Voters lost. The Ohio Constitution lost. There will be no fair redistricting maps in 2022."¹ Just seven years earlier, Ohio voters had acted decisively to end the anti-democratic practice of partisan gerrymandering by approving a groundbreaking amendment to the state constitution, which established the Ohio Redistricting Commission ("Commission").² The amendment tasked the Commission with creating districting plans for the Ohio House and Senate that correspond to Ohioans' statewide voting preferences and are not "primarily" designed to "favor or disfavor a political party."³ But following the 2020 census, Ohioans watched as the Commission defied both its popular mandate and the Ohio Supreme Court by repeatedly enacting unconstitutionally-gerrymandered maps favoring the Republican Party.⁴ The Commission's work was "aided and abetted by federal court judges," who dealt the decisive blow to Ohioans' hopes for fair districting.⁵

The federal judges that *The Blade* singled out decided *Gonidakis v. LaRose*, in which a three-judge panel of the U.S. District Court for the Southern District of Ohio resolved Ohio's post-2020 redistricting battle.⁶ The *Gonidakis* panel implemented one of the Commission's unconstitutional, heavily gerrymandered districting plans for the 2022 election, even though it—and four other plans—had been struck down by the Ohio Supreme Court.⁷ This Article critiques *Gonidakis* and examines when and how federal courts should intervene if state-level commission-based redistricting processes break down. It argues that when a federal court decides a case in which a state court has struck down a map created by a redistricting commission, the federal court should generally—but not always—defer to the state court ruling.

Part I provides a brief primer on partisan gerrymandering, the practice of manipulating electoral district boundaries to favor

¹ The Blade Editorial Board, *Editorial: Redistricting Officials Hold Ohioans in Contempt*, TOLEDO BLADE (June 22, 2022, 12:00 PM), <https://www.toledoblade.com/opinion/editorials/2022/06/22/redistricting-officials-hold-ohioans-in-contempt/stories/20220622028> [<https://perma.cc/CYN7-CH7F>].

² See *infra* notes 64–68 and accompanying text.

³ OHIO CONST. art. XI, § 6. For more on the effects of partisan gerrymandering, see *infra* Part I.

⁴ See *infra* Part II.A.

⁵ See f Blade Editorial Board, *supra* note 1.

⁶ *Gonidakis v. LaRose*, 599 F. Supp. 3d 642 (S.D. Ohio 2022).

⁷ See *infra* Part III.A.

one political party.⁸ It examines how gerrymandering undermines democracy and diminishes the voting power of minority groups. Part II chronicles Ohio’s journey from a watershed 2015 referendum, which created the Commission, to the impasse that sparked *Gonidakis v. LaRose*. Part III summarizes the main points of contention between the *Gonidakis* majority and dissent and explains why federal courts should respect state courts’ authority to rule on commission-enacted maps. Part IV describes why federal deference to state court decisions is important in the redistricting context. Finally, Part V argues that principles of federalism, separation of powers concerns, and the U.S. Supreme Court’s recent decision in *Moore v. Harper* require that other courts reject the *Gonidakis* majority’s reasoning and instead embrace an approach that respects authoritative state court redistricting rulings.

I. PARTISAN GERRYMANDERING: A BLIGHT ON AMERICAN DEMOCRACY

Partisan gerrymandering has deep roots in American history.⁹ Today, the term is widely used to denote district drawing designed to influence—or outright determine—who will win an election.¹⁰ Every ten years, after the U.S. Census is conducted, states and localities redraw district lines.¹¹ This decennial process typically creates opportunities for the party holding power to implement maps advantageous to its members.¹² Two strategies are used to create a gerrymandered map: “cracking” divides electoral groups between multiple districts, diluting their power in any one district,¹³ while, “packing” concentrates groups of voters in the fewest districts possible.¹⁴ In these districts, the packed electoral groups dominate, but they have minimal influence in other

⁸ *Gerrymandering & Fair Representation*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/gerrymandering-fair-representation> [https://perma.cc/V5GE-QQMZ] (last visited Oct. 20, 2023).

⁹ See Sue Halpern, *America’s Redistricting Process is Breaking Democracy*, NEW YORKER (May 25, 2022), <https://www.newyorker.com/news/the-political-scene/americas-redistricting-process-is-breaking-democracy> [https://perma.cc/C4JU-ERZJ]. The term “gerrymander” was coined by a political cartoonist in 1812 to mock a salamander-shaped Massachusetts district designed to favor the Democratic-Republican Party, of which Governor Elbridge Gerry was a member. *See id.*

¹⁰ Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [https://perma.cc/L4EZ-MU9Z] (last updated June 9, 2023).

¹¹ *Id.*

¹² *See id.*

¹³ *See id.*

¹⁴ *Id.*

districts.¹⁵ Although the term gerrymandering evokes an image of “bizarre and uncouth district boundaries,”¹⁶ cracking and packing can frequently produce clean-looking district lines that appear unobjectionable but give one party a major advantage.¹⁷

Gerrymandering has defined our political era. Following the GOP's 2008 electoral rout, Republicans embraced gerrymandering as a national political strategy, investing \$30 million in an initiative called the Redistricting Majority Project (“REDMAP”).¹⁸ Sponsored by the Republican State Leadership Council, REDMAP helped Republicans win control of at least nineteen state legislative bodies in 2010, consolidating their control over redistricting in ten out of the fifteen states whose congressional delegations would shrink or grow following the 2010 census.¹⁹ Gerrymandering also enabled the GOP to retain a House majority in 2012 with a healthy margin of thirty-three seats,²⁰ despite losing the national popular vote for the House by approximately 1.5 million votes.²¹

Democrats also gerrymander to entrench their power. Republican redistricting dominance spurred former Attorney General Eric Holder and other prominent Democrats to establish the National Democratic Redistricting Committee (“NDRC”), whose stated aim is to “make the redistricting process more fair.”²² Since its founding in 2017, the group has worked to win control of state-level offices with authority over redistricting.²³ Pro-Democratic gerrymandering efforts have had some success. For example, in Illinois, which lost a seat to post-2020 reapportionment, Democratic Governor J.B. Pritzker signed into law a new map with two additional blue congressional districts, creating thirteen Democratic-leaning seats, three Republican-leaning seats, and just one highly competitive seat in a state where Republicans received approximately 41 percent of the total congressional vote in 2020.²⁴

¹⁵ *See id.*

¹⁶ *Shaw v. Reno*, 509 U.S. 630, 677 (1993) (Stevens, J., dissenting).

¹⁷ *See Kirschenbaum & Li, supra* note 10.

¹⁸ *See Halpern, supra* note 9.

¹⁹ *See id.*

²⁰ *Id.*

²¹ *Id.*; *see also* KAREN L. HAAS, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 6, 2012, HOUSE OF REPRESENTATIVES 72–73 (2013), https://clerk.house.gov/member_info/electionInfo/2012election.pdf [<https://perma.cc/A3KH-RX69>].

²² Halpern, *supra* note 9.

²³ *See id.*

²⁴ *What Redistricting Looks Like in Every State – Illinois*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/redistricting-2022-maps/illinois> [<https://perma.cc/JQ8E-2E8Q>] (last updated July 19, 2022); CHERYL L. JOHNSON, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION FROM OFFICIAL SOURCES FOR THE ELECTION OF NOVEMBER 3, 2020 22–24 (2021), https://clerk.house.gov/member_info/electioninfo/2020/statistics2020.pdf [<https://perma.cc/CG5L-JWD5>].

Democrats were also able to consolidate power in New Jersey, replacing a Republican-leaning congressional seat and two highly competitive seats with three blue-leaning ones.²⁵

In the landmark 2019 case *Rucho v. Common Cause*, the U.S. Supreme Court ruled that partisan gerrymandering is non-justiciable at the federal level, as the issue presents “political questions beyond the reach of the federal courts.”²⁶ This application of the political question doctrine²⁷ means that partisan

²⁵ *What Redistricting Looks Like in Every State – New Jersey*, FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/redistricting-2022-maps/new-jersey> [https://perma.cc/939S-73SE] (last updated July 19, 2022).

²⁶ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

²⁷ Federal courts may decline to adjudicate “political questions,” which are issues “textually . . . commit[ed]” to another branch or that can’t be resolved using “judicially discoverable and manageable standards.” *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012); see also JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10756, *THE POLITICAL QUESTION DOCTRINE: AN INTRODUCTION (PART 1)* 2 (2022). The doctrine permits federal courts to refrain, in a narrow range of circumstances, from deciding cases that would otherwise be justiciable. See *Zivotofsky*, 566 U.S. at 195. “[R]ecogniz[ing] the limits that Article III imposes upon courts,” the judiciary developed the political question doctrine to safeguard the separation of powers. See *id.* at 202 (Sotomayor, J., concurring). The modern political question doctrine emerged in *Baker v. Carr*, a 1962 case in which the Supreme Court held that a Fourteenth Amendment challenge to an allegedly “arbitrary and capricious” state redistricting scheme was justiciable. See 369 U.S. 186, 206–08. Rejecting the argument that the case presented a nonjusticiable political question, Justice William Brennan’s majority opinion articulated six criteria the Court had historically used to define political questions. See *id.* at 217. These factors are the foundation for subsequent political question case law, although the Court has since “pared [them] back.” See G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause*, 95 IND. L.J. 1295, 1299–1304 (2020). Between *Baker* and *Rucho*, courts largely limited the doctrine to cases involving foreign affairs, war, or impeachment, spheres in which separation of powers concerns counsel deference to the other branches. See Comment, bin Ali Jaber v. United States: *D.C. Circuit Holds Statutory Challenge to Drone Strike is Nonjusticiable*, 131 HARV. L. REV. 1473, 1473 n. 9 (2018) (collecting D.C. Circuit cases); *Nixon v. United States*, 506 U.S. 224, 226 (1993) (rejecting a former district court judge’s challenge to Senator Walter L. Nixon’s impeachment); Kate Hardiman Rhodes, Note, *Restoring the Proper Role of the Courts in Election Law: Toward a Reinvigoration of the Political Question Doctrine*, 20 GEO. J.L. & PUB. POL’Y 755, 759 nn. 26–28 (collecting cases). By declaring partisan gerrymandering claims nonjusticiable, the *Rucho* Court broke new ground and drastically expanded the reach of the political question doctrine. Commentators—and Justice Kagan in dissent—have argued that the *Rucho* majority strayed from the political question doctrine’s separation of powers roots. *Rucho*, 139 S. Ct. at 2515 (Kagan, J., dissenting) (“[T]he majority declares that it can do nothing about an acknowledged constitutional violation because it . . . cannot find a workable legal standard to apply.”); see also Parsons, *supra* at 1342 (“[T]he Supreme Court held for the first time that it lacked jurisdiction over a case on the basis of a claim’s unmanageability alone.”); Comment, *Rucho v. Common Cause*, 133 HARV. L. REV. 252, 257, 259–60 (2019) (“*Rucho* is driven in large part by prudential considerations.”).

gerrymandering claims may only be brought in state court under state law. State-level gerrymandering claims have had some success in the redistricting cycle following the 2020 census—most notably in two Democratic-leaning states, Maryland and New York. In March 2022, a Maryland state judge struck down a congressional map that could have yielded an eight to zero sweep for Democrats.²⁸ And in April 2022, the New York Court of Appeals upheld a lower court ruling invalidating a Democratic gerrymander that would have created three additional blue congressional districts.²⁹

Despite some progress against gerrymandering, the United States has—by several measures—been more heavily gerrymandered since 2012 than at any point since the nineteenth century.³⁰ Analysis of the efficiency gap, a measure of symmetry between parties,³¹ reveals that the 2012 election's congressional and statehouse districting plans were “the most extreme gerrymanders in modern history,” with a heavy pro-Republican bias.³² Partisan bias,³³ another method of measuring gerrymandering, shows that, following the 2010 redistricting cycle, Republican candidates would have won nearly 10 percent more seats on average nationwide even if they tied for 50 percent of the two-party vote.³⁴ As of May 30, 2022, Republicans had a nationwide redistricting advantage according to four distinct notions of partisan fairness.³⁵ One of these

²⁸ Zach Montellaro, *Maryland Court Strikes Down Congressional Map as Illegal Democratic Gerrymander*, POLITICO (Mar. 25, 2022, 1:31 PM), <https://www.politico.com/news/2022/03/25/maryland-court-congressional-map-illegal-democratic-gerrymander-00020518> [<https://perma.cc/U5N2-J3PK>].

²⁹ See Nicholas Fandos, *Democrats Lose Control of N.Y. Election Maps, as Top Court Rejects Appeal*, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/nyregion/redistricting-congress-gerrymander-ny.html> [<https://perma.cc/H2A9-RWZM>]. For an overview and pointed critique of New York's 2022 redistricting process, see Richard Briffault, *Epic Fail: Harkenrider v. Hochul and New York's 2022 Misadventure in "Independent" Redistricting*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 251 (2023).

³⁰ See Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1421–26 (2020).

³¹ The efficiency gap “represents the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast.” Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2015).

³² See *id.*

³³ “Partisan bias measures the difference in seats each major party would be expected to win if it earns 50% of the two-party statewide vote.” Kang, *supra* note 30, at 1422 (citing ANTHONY J. MCGANN ET AL., GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY 56–67 (2016)).

³⁴ See *id.* at 1422.

³⁵ *Partisan Advantage Tracker*, MICH. STATE UNIV. INST. FOR PUB. POL'Y & SOC. RSCH., <https://ippsr.msu.edu/partisan-advantage-tracker> [<https://perma.cc/4YTW-3A3J>] (last visited Oct. 20, 2023).

fairness standards is an efficiency gap-based conception of partisan fairness,³⁶ by which a map would still be considered fair even if “the difference between the two parties’ seat-shares [were] twice their vote-share difference.”³⁷ According to this metric, under Ohio’s current congressional map, there are approximately 1.6 more Republican seats than there would be under a map that adhered to this efficiency-gap definition of fairness.³⁸ This advantage accounts for roughly 16 percent of the GOP’s 9.86 national seat advantage.³⁹ Only two states, according to the same standard, are more heavily gerrymandered than Ohio: Florida and Texas.⁴⁰

Ohio has long been a poster child for partisan gerrymandering. In 2010, Republicans—in control of the governor’s mansion and both houses of the Ohio General Assembly—enacted a highly effective gerrymander.⁴¹ In the 2012 election, the first to use the post-2010 maps, Republicans won twelve of Ohio’s sixteen congressional seats (75 percent), twenty-three of thirty-three Ohio Senate seats (70 percent), and sixty of ninety-nine Ohio House of Representatives seats (61 percent), even though President Barack Obama, a Democrat, carried the state with 50.1 percent of the vote and U.S. Senator Sherrod Brown, also a

³⁶ This conception of fairness still considers even a significant divergence between vote share and seat share to be fair. *Id.* The *Partisan Advantage Tracker* describes this definition of fairness as follows: “‘Efficiency Gap’ rule. The difference between the two parties’ seat-shares should be twice their vote-share difference, i.e., if one party gets 60 percent of the vote and the other gets 40 percent (a 20 percent vote-share difference), then they should split seats 70-30 percent (a 40 percent seat-share difference).” *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* Florida’s congressional map was upheld by the Florida Supreme Court. *See* Michael Wines et al., *Redistricting Nationwide Nears Finale with Florida Court Ruling*, N.Y. TIMES (June 2, 2022), <https://www.nytimes.com/2022/06/02/us/desantis-florida-voting-map.html> [<https://perma.cc/9YEY-PDY9>]. Texas is currently defending its congressional map—along with its state-level maps—in federal court. *See* League of United Latin Am. Citizens v. Abbott, AM. REDISTRICTING PROJECT (Sept. 22, 2023), <https://thearp.org/litigation/league-united-latin-am-citizens-v-abbott> [<https://perma.cc/ZUU2-CYLK>]. Among the plaintiffs is the Department of Justice, which has challenged the congressional and Texas House maps under Section 2 of the Voting Rights Act. *See id.*

⁴¹ *See* Audie Cornish & Paul Beck, *Redistricting In Ohio: A Primer*, NPR (Dec. 22, 2010, 3:00 PM), <https://www.npr.org/2010/12/22/132265854/Redistricting-In-Ohio-A-Primer> [<https://perma.cc/27KV-JWUK>]; *see also* Sabrina Eaton, *In Evenly Split Ohio, Redistricting Gives GOP 12-4 Edge in Congressional Seats*, CLEVELAND.COM (Nov. 12, 2012, 2:00 AM), https://www.cleveland.com/open/2012/11/in_evenly_split_ohio_redistrict.html [<https://perma.cc/5Y5Q-RX6H>].

Democrat, won reelection with 50.3 percent of the vote.⁴² Thanks to *Gonidakis*, the state legislative maps used for the 2022 election cycle were also heavily skewed in favor of Republicans. The Ohio Supreme Court has found that the districting plan implemented by the Commission displays a “gross and unnecessary disparity in the allocation of close districts.”⁴³

Implicit in the Ohio Supreme Court’s criticism is an understanding that partisan gerrymandering is deeply damaging to democracy.⁴⁴ When maps are gerrymandered, electoral outcomes are less likely to reflect the democratic will of the majority of voters.⁴⁵ This erodes democratic responsiveness and often shields politicians—safe in uncompetitive districts—from accountability to voters.⁴⁶ Further, because voting preferences are often associated with race and ethnicity, gerrymandering frequently diminishes the voting power of people of color, particularly that of Black and Hispanic voters in Southern states.⁴⁷ Partisan gerrymandering often has a harmful racial dimension, even when district lines might not

⁴² *Ohio Elections, 2021*, BALLOTPEDIA, https://ballotpedia.org/Ohio_elections,_2012#State_House [<https://perma.cc/BDR8-BC93>] (last visited Oct. 20, 2023); *Election 2012 – Ohio*, N.Y. TIMES, <https://www.nytimes.com/elections/2012/results/states/ohio.html> [<https://perma.cc/9BU6-DT2U>] (last visited Oct. 20, 2023).

⁴³ *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 168 Ohio St. 3d 309, 323 (2022).

⁴⁴ *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2509, 2512 (2019) (Kagan, J., dissenting) (arguing that “[t]he partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives,” and asserting that “[t]he majority disputes none of what I have said . . . about how gerrymanders undermine democracy.”); *see also* Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2115 (2018) (concluding “that the harm of gerrymandering is not limited to divergences between parties’ seat and vote shares. The injury extends, rather, to the distortion of the representation that legislators provide to their constituents.”); Bertrall Ross, *Partisan Gerrymandering, The First Amendment, and the Political Outsider*, 118 COLUM. L. REV. 2187 (2018) (emphasizing that gerrymandering both deprives political minorities of representation and impedes the political participation of individuals who do not belong to the party in power); Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J. L. & PUB. POL’Y 397, 400 (2005) (“[Manipulating district boundaries to secure] the election or reelection of a specific officeholder or the power of a specific political party violates the constitutional norm of popular sovereignty.”); Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEGIS. STUD. Q. 60 (2019) (finding that gerrymandering dissuades potential political-minority candidates from contesting districts, decreases candidate quality, reduces donor contributions, and deters voters from supporting the disadvantaged party).

⁴⁵ *See* Kirschenbaum & Li, *supra* note 10.

⁴⁶ *See id.*

⁴⁷ *See id.*

give rise to a successful racial gerrymandering claim under the Fourteenth Amendment's Equal Protection Clause or a racial vote dilution claim under Section 2 of the Voting Rights Act of 1965.⁴⁸ Partisan gerrymandering is tied to race because race is a "central fault line in elections across the country."⁴⁹ Residential segregation and racially polarized voting mean that communities of color are especially susceptible to being packed and cracked for "maximum political advantage,"⁵⁰ adding to the United States' sordid history of racial discrimination.⁵¹

⁴⁸ Under the Supreme Court's constitutional racial gerrymandering test, maps are analyzed to determine if race was the predominant factor in district line-drawing. Strict scrutiny applies to the use of race in redistricting. *See Shaw v. Reno*, 509 U.S. 630 (1993) (invalidating a district map so bizarrely shaped that it must have been drawn based on race); *see also Miller v. Johnson*, 515 U.S. 900 (1995) (holding that racial gerrymandering claims may be proved using evidence of district shape and demographics, as well as more direct evidence of legislative intent). Racial vote dilution claims, which arise when a minority group is precluded from electing its preferred candidates by "cracking" and "packing" minority voters, are brought under Section 2 of the Voting Rights Act. *See Thornburg v. Gingles*, 478 U.S. 30, 45 (1986). Under the *Gingles* framework, courts consider whether (1) a minority group would be large and geographically compact enough to elect a candidate of its choice in a single-member district, (2) the minority group is politically cohesive, and (3) the majority group votes so cohesively that it prevents the minority group from electing its candidate. *Id.* at 50–51. If the *Gingles* factors are satisfied, courts consider the totality of the circumstances, guided by a set of factors created by the Senate Judiciary Committee (*see infra* note 51) to determine whether the districting scheme prevents minority voters from participating equally in the democratic process and electing their preferred candidates. *See Racial Gerrymandering vs. Racial Vote Dilution, Explained*, DEMOCRACY DOCKET (Aug. 17, 2022), <https://www.democracydocket.com/analysis/racial-gerrymandering-vs-racial-vote-dilution-explained> [<https://perma.cc/MEK3-TZ7N>]. Surprising some observers, the Supreme Court, in *Allen v. Milligan*, recently declined to modify the *Gingles* test. 599 U.S. 1 (2023); *see also* Ellen Katz, *5Qs: Katz on the Allen v. Milligan Decision and the Future of the Voting Rights Act*, MICH. L. (June 19, 2023), <https://michigan.law.umich.edu/news/5qs-katz-allen-v-milligan-decision-and-future-voting-rights-act> [<https://perma.cc/KVR2-F86F>] ("The decision to affirm was surprising because the Court appeared poised to do just the opposite."). For a concise and accessible overview of the law governing racial gerrymandering and dilution claims, *see Racial Gerrymandering vs. Racial Vote Dilution, Explained, supra*.

⁴⁹ Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 263 (2020); *see also* Silvia Foster-Frau & Sabrina Rodriguez, *Racial Breakdowns for Midterms Expose Shifting Electorate*, WASH. POST (Nov. 11, 2022, 11:44 AM), <https://www.washingtonpost.com/nation/2022/11/11/black-asian-latino-voter-turnout> [<https://perma.cc/B9KA-ALZG>].

⁵⁰ Kirschenbaum & Li, *supra* note 10.

⁵¹ Voting discrimination is often inextricably linked with other forms of racial discrimination. The Senate Judiciary Committee recognized this fact when it enumerated, in a committee report accompanying the 1982 amendments to the Voting Rights Act, nine factors to help courts determine whether an electoral structure or voting regulation violates Section 2. *See Gingles*, 478 U.S. 30 at 43–

Racial political polarization—the degree to which different racial groups vote cohesively as a bloc for opposing parties or candidates—between white and Black Americans declined between the mid-1980s and mid-1990s but has subsequently increased, albeit slowly.⁵² Black-white polarization was also more severe in the South than in other regions of the country.⁵³ And while Hispanic-white polarization was less stark than Black-white polarization over the same period, it too spiked again in the 2000s.⁵⁴

Eighty-one percent of Republican or Republican-leaning voters in the 2020 electorate were white.⁵⁵ By contrast, only 59 percent of Democratic and Democratic-leaning voters identified as white in the lead-up to 2020.⁵⁶ In the 2022 midterms, more than 80 percent of Black voters supported Democratic congressional candidates, between 56 and 60 percent of Latino voters did so as well, and 58 percent of Asian Americans backed Democratic candidates for the U.S. House of Representatives—even though

46; *see also supra* note 48 and accompanying text. As noted previously, two Senate factors—one and five—have been widely invoked by courts to frame voting discrimination in the context of broader structural inequalities. *See* Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 675–97, 702–07 (2005). Factor one is “‘the extent of any history of official discrimination’ in the jurisdiction that ‘touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.’” *Id.* at 675 (quoting S. REP. NO. 97-417, at 27–30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177). Assessing factor one, courts have considered discrimination dating back to the 1800s and found that forms of non-voting discrimination “touch[.]” voting rights. *See id.* at 675–76. Among these forms of discrimination were legally enforced segregation, resistance to school integration, and employment discrimination. *See id.* at 676. As of 2005, judges in seventy cases that found factor one also found factor five, determining that “members of the minority group bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.” *Id.* at 702. Judges in fourteen other cases found that factor five was present but factor one was not, for a total of eighty-four cases in which minority groups in a jurisdiction bore the ongoing effects of discrimination in education, employment, and health. *See id.* at 704. Judges in at least thirty-one cases “assumed or deduced . . . that lower socioeconomic status hindered the minority group’s ability to participate effectively in the political process,” although the majority of courts required plaintiffs to provide evidence of reduced voter registration or turnout. *Id.* at 703.

⁵² *See* Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1349 (2016).

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *See* John Gramlich, *What the 2020 Electorate Looks Like by Party, Race and Ethnicity, Age, Education and Religion*, PEW RSCH. CTR. (Oct. 26, 2020), <https://www.pewresearch.org/fact-tank/2020/10/26/what-the-2020-electorate-looks-like-by-party-race-and-ethnicity-age-education-and-religion/> [<https://perma.cc/4QX7-2UP8>].

⁵⁶ *See id.*

Democratic dominance among these demographic groups has declined since 2018.⁵⁷

Due to the strong relationship between race and party preference, gerrymanders often divide communities along racial lines to achieve a partisan advantage.⁵⁸ Therefore, by skewing the populations to which elected leaders are accountable, even purportedly non-racial gerrymanders can infringe on the democratic sovereignty of minority communities. According to Professor Bertrall Ross, between 2012 and 2018, 90 percent of Republican U.S. House members hailed from majority-white congressional districts.⁵⁹ No majority-Black district elected a Republican to the U.S. House during that period, and no district electing a Republican was more than 36 percent Black.⁶⁰ By contrast, during those years, no more than 51 percent of House Democrats came from majority-white districts, 28 to 31 percent of House Democrats were from majority-Latino districts, and 19 to 28 percent of House Democrats hailed from majority-Black districts.⁶¹ Since Republicans hailing from majority-white districts made up a majority of the U.S. House in 2012 and 2014—and were only one seat short of a majority in 2016—Professor Ross points out that, troublingly, House Republicans “could have legislated according to the belief that their primary obligation is to represent white Americans, rather than Americans as a whole.”⁶²

While Professor Ross does not assert that Republicans actually held this belief, he shows that gerrymandering allowed a

⁵⁷ See Foster-Frau & Rodriguez, *supra* note 49.

⁵⁸ See, e.g., Joshua Kaplan, *How Ron DeSantis Blew Up Black-Held Congressional Districts and May Have Broken Florida Law*, PROPUBLICA (Oct. 11, 2022, 6:00 AM), <https://www.propublica.org/article/ron-desantis-florida-redistricting-map-scheme> [<https://perma.cc/X347-425P>] (describing how Florida Republicans consolidate power by “wip[ing] away half of the state’s Black-dominated congressional districts”); see also Lacy Crawford, Jr., *Federal District Court Upholds Illinois Redistricting Plan That Gerrymandered Black Voters in East St. Louis Area*, CHI. LAWS. COMM. FOR C.R. (Dec. 30, 2021), <https://www.lawyerscommittee.org/federal-court-upholds-illinois-redistricting-plan-that-gerrymandered-black-voters-in-east-st-louis-area/> [<https://perma.cc/ELZ7-6VNS>] (expressing disappointment with a three-judge panel’s ruling upholding a politically-motivated, Democrat-drawn Illinois House of Representatives map that split up a Black community in east St. Louis); Rebecca Kaplan & Caitlin Huey-Burns, *Some Democratic Lawmakers See Racism in New York Redistricting Process*, CBS NEWS (May 19, 2022, 1:39 PM), <https://www.cbsnews.com/news/new-york-congressional-map-redistricting/> [<https://perma.cc/N4JT-XCQW>] (highlighting criticism that the Democratic partisan gerrymander in New York, which was subsequently invalidated, harmed minority voting power).

⁵⁹ Bertrall Ross, *Partisan Gerrymandering as a Threat to Multiracial Democracy*, 50 COLUM. L. REV. 509, 522 (2022).

⁶⁰ *Id.*

⁶¹ *Id.* at 523.

⁶² *Id.*

political party to insulate itself from accountability to a broad cross-section of the public.⁶³ Ohioans refused to permit such behavior by their elected officials. By approving the 2015 anti-gerrymandering amendment, Ohioans repudiated the notion that politicians should be permitted to gerrymander their way out of full accountability to their communities. But as the next part will show, the Commission and the *Gonidakis* court ignored voters' clearly expressed will.

II. *GONIDAKIS*: FROM WATERSHED REFERENDUM TO REDISTRICTING DYSFUNCTION

Confronting an unparalleled degree of partisan gerrymandering, Ohio's voters decisively approved a 2015 constitutional referendum banning partisan favoritism in map drawing and creating the Ohio Redistricting Commission. This part describes how the initial promise of this commission turned out to be a mere illusion. The Commission's partisan members repeatedly refused to heed the commands of Ohio voters and the Ohio Supreme Court. They defied authoritative rulings striking down their maps, knowing that, thanks to an obscure provision in the Ohio Constitution, the state supreme court was powerless to order the implementation of any districting plan not approved by the Commission. And when the dispute between the justices and the Commission jeopardized Ohio's ability to hold an election at all, the *Gonidakis* court stepped in to bail out the Commission, providing a perverse incentive to continue defying the state's highest court.

A. *Ohio's Failed Redistricting Commission*

In November 2015, by a 71 to 29 percent margin, Ohio voters approved an amendment to the state constitution that created the bipartisan Ohio Redistricting Commission, which was charged with drawing Ohio House of Representatives and Ohio Senate district lines.⁶⁴ Before the referendum, Ohio's redistricting was governed by a five-member Apportionment Board, composed of the governor, the secretary of state, the auditor of state, and one member from each of the two major parties in the Ohio General Assembly.⁶⁵

⁶³ Professor Ross does contend, however, that the GOP "embraced whiteness as central to its identity." *Id.* at 510.

⁶⁴ *Ohio Bipartisan Redistricting Commission Amendment, Issue 1 (2015)*, BALLOTPEdia, [https://ballotpedia.org/Ohio_Bipartisan_Redistricting_Commission_Amendment_-_Issue_1_\(2015\)](https://ballotpedia.org/Ohio_Bipartisan_Redistricting_Commission_Amendment_-_Issue_1_(2015)) [https://perma.cc/P34Z-CNJN] (last visited Oct. 20, 2023).

⁶⁵ Michael Li & Eric Petry, *Redistricting Reform Wins Big in Ohio*, BRENNAN CTR. FOR JUST. (Nov. 5, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/redistricting-reform-wins-big-ohio> [https://perma.cc/V3JQ-DQJH].

The Commission has seven members: the governor, the auditor, the secretary of state, “[o]ne person appointed by the speaker of the house of representatives; [o]ne person appointed by the legislative leader of the largest political party in the house of representatives of which the speaker of the house of representatives is not a member; [o]ne person appointed by the president of the senate; and [o]ne person appointed by the legislative leader of the largest political party in the senate of which the president of the senate is not a member.”⁶⁶ The structure effectively guarantees that the minority party in the legislature will have at least two seats on the Commission.⁶⁷ This is a slight improvement in minority party representation over the old Apportionment Board system, which guaranteed only one out of five seats to the state legislature’s minority party.⁶⁸

The 2015 amendment was specifically designed to end partisan gerrymandering. Article XI, Section 6 of the Ohio Constitution, added by the amendment, states that the Commission “shall attempt⁶⁹ to draw a general assembly district plan. . . [that is not] drawn primarily to favor or disfavor a political party.”⁷⁰ It further provides that General Assembly districts “shall be compact” and that the “proportion of districts whose voters . . . favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.”⁷¹ A simple majority of four Commission members is required to adopt a districting plan.⁷² For the map to last for an entire decade, it must be approved by at least “two members of the commission who represent each of the two largest political parties represented” in the state legislature.⁷³ If a map is approved

⁶⁶ OHIO CONST. art. XI, § 1 (numbering omitted).

⁶⁷ See Li & Petry, *supra* note 65.

⁶⁸ See *id.*

⁶⁹ The “shall attempt” language was a point of contention for the Ohio Supreme Court. The majority ruled that the word “attempt” does not mean that the standard is “merely aspirational.” *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 168 Ohio St. 3d 28, 42 (2022). There may be situations in which it’s impossible for the Commission to comply with the partisan favoritism provisions. See *id.* However, “if it is possible for a district plan to comply . . . the commission must adopt a plan that does so.” *Id.* (quoting *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 167 Ohio St. 3d 255, 278 (2022) (cleaned up)). By contrast, dissenting justices argued that the word “attempt” created a less stringent standard. Two dissenting justices wrote that the Ohio Constitution “requires only an attempt to create districts that favor one side or the other in close correspondence to statewide preferences, and that is exactly what the revised map does.” *Id.* at 49 (Kennedy & DeWine, JJ., dissenting).

⁷⁰ OHIO CONST. art. XI, § 6.

⁷¹ *Id.*

⁷² See OHIO CONST. art. XI, § 1(B)(1).

⁷³ *Id.* § 1(B)(3); Li & Petry, *supra* note 65.

by a simple majority but lacks the requisite bipartisan support, it goes into effect for only four years.⁷⁴

The amendment also limited judicial remedies if a court strikes down a Commission-enacted map: no court shall “order . . . the implementation or enforcement of any general assembly district plan that has not been approved by the commission in the manner prescribed by this article,”⁷⁵ nor shall a court “order the commission to adopt a particular general assembly district plan or to draw a particular district.”⁷⁶ Thanks to these provisions, the Ohio Supreme Court was unable to implement any alternative to the unconstitutional Commission maps that it had invalidated. Had it been able to, the federal court would likely not have needed to intervene.

In 2018, Ohio approved, by a 75 to 25 percent margin, a second constitutional amendment to combat congressional-level gerrymandering.⁷⁷ Under this new system, the General Assembly can adopt a ten-year map if 60 percent of members in each chamber and 50 percent of members in each party approve the map.⁷⁸ If these thresholds are not met, the Commission has an opportunity to implement its own ten-year map, but only if it has support from two minority party members.⁷⁹ If this process fails, the mapmaking process is kicked back to the state legislature, which then has a lower approval threshold to reach—one-third of each party—to implement a ten-year plan.⁸⁰ Finally, if a plan does not receive even that level of support, the legislature can adopt a four-year plan by a simple majority vote.⁸¹

Notably, the Ohio General Assembly's post-2020 congressional redistricting plan received no bipartisan support at any stage of the process,⁸² and the state supreme court twice struck down congressional districting plans, deeming them illegal partisan

⁷⁴ See OHIO CONST. art. XI, § 8.

⁷⁵ OHIO CONST. art. XI, § 9(D)(1).

⁷⁶ *Id.* § 9(D)(2).

⁷⁷ *Ohio Issue 1, Congressional Redistricting Procedures Amendment (May 2018)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio_Issue_1,_Congressional_Redistricting_Procedures_Amendment_\(May_2018\)](https://ballotpedia.org/Ohio_Issue_1,_Congressional_Redistricting_Procedures_Amendment_(May_2018)) [<https://perma.cc/9JKF-GVVL>] (last visited Oct. 20, 2023).

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See id.*

⁸² Jeremy Pelzer, *Ohio Is About to Hold Elections for Unconstitutional Congressional and Legislative Districts. Here's How It Happened*, CLEVELAND.COM (Oct. 9, 2022, 5:30 AM), <https://www.cleveland.com/news/2022/10/ohio-is-about-to-hold-elections-for-unconstitutional-congressional-and-legislative-districts-heres-how-it-happened.html> [<https://perma.cc/YM3Z-RN7N>].

gerrymanders.⁸³ While the congressional map—like the General Assembly maps—will have to be redrawn for 2024, an invalidated map was used in 2022 because the Ohio Supreme Court had set a timeline for oral arguments that went far beyond the primary date, at which point the districts had to be finalized.⁸⁴ While Ohio’s congressional redistricting process features the same themes as the General Assembly redistricting process, this Article specifically focuses on state legislative redistricting, not congressional redistricting.

B. Dereliction of Constitutional Duty: The Post-2020 Impasse

Following the 2020 census, the Ohio Redistricting Commission repeatedly adopted gerrymandered Ohio General Assembly maps that the Ohio Supreme Court found unconstitutional. The Commission ratified its first state house and senate maps in September 2021 and, in January 2022, the Ohio Supreme Court struck the districting plan down, holding that it failed to comply with the state constitutional requirements that “no plan be drawn primarily to favor a political party” and “the statewide proportion of districts whose voters favor each political party correspond closely to the statewide preferences of the voters of Ohio.”⁸⁵ Following the court’s rejection of Map 1,⁸⁶ the Commission approved three more plans, each of which the court also struck down.⁸⁷ As the weeks wore on and no plan was finalized, it “became increasingly uncertain” whether the State would be able to hold its state legislative primary as scheduled on May 3, 2022.⁸⁸ This uncertainty motivated a group of voters, including Michael

⁸³ Andrew J. Tobias, *Ohio Supreme Court Again Rejects Republican Congressional Map, Ordering Redraw for 2024 Election*, CLEVELAND.COM (July 19, 2022, 4:35 PM), <https://www.cleveland.com/news/2022/07/ohio-supreme-court-again-rejects-republican-congressional-map-ordering-redraw-for-2024-elections.html> [https://perma.cc/8QBN-RFU4].

⁸⁴ *See id.*; *see also* Jeremy Pelzer & Andrew J. Tobias, *Ohio Supreme Court Sets Arguments for Challenges to Republican Congressional Map Past May Primary Election*, CLEVELAND.COM (Mar. 29, 2022, 6:15 PM), <https://www.cleveland.com/news/2022/03/ohio-supreme-court-sets-arguments-for-challenges-to-republican-congressional-map-past-start-of-voting-for-may-primary-election.html> [https://perma.cc/U8V4-FEAU].

⁸⁵ *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 168 Ohio St. 3d 28, 29 (2022).

⁸⁶ While technically each districting plan involved two maps—one for the house and one for the senate—the *Gonidakis* opinion refers to each plan as a single map. It uses “Map 1” for the first plan, and so forth. *See generally* *Gonidakis v. Larose*, 599 F. Supp. 3d 642 (S.D. Ohio 2022).

⁸⁷ *Giroux v. LaRose*, No. 1:22-cv-309, 2022 U.S. Dist. LEXIS 106519, at *6 (S.D. Ohio June 14, 2022).

⁸⁸ *Id.* at *5.

Gonidakis, president of the anti-abortion group Ohio Right to Life,⁸⁹ to file a lawsuit requesting that the Southern District of Ohio “intervene to protect their right to vote in a primary election for state legislators.”⁹⁰

On April 20, 2022, a divided three-judge panel⁹¹ in *Gonidakis v. LaRose* postponed the primary until August 2, 2022, and selected Map 3, one of the heavily gerrymandered maps that the Ohio Supreme Court had struck down.⁹² The court did not implement Map 3 immediately, however. It set May 28, 2022, as the deadline for Ohio to implement a constitutionally compliant plan.⁹³ After the Ohio Supreme Court struck down a fifth General Assembly plan on May 25, the three-judge panel imposed Map 3 for the 2022 election cycle.⁹⁴

While the map—the Commission’s third—appears, on the surface, to reflect the partisan composition of the Ohio electorate, the seats that lean Democratic are disproportionately toss-up districts.⁹⁵ As a result, a “uniform two-point swing in favor of the Republican Party would net them all 26 ‘close’ Democratic seats and a bicameral supermajority, while the same vote swing in favor

⁸⁹ See Mike Gonidakis, *Who We Are*, OHIO RIGHT TO LIFE, https://ohiolife.org/who_we_are/mike_gonidakis/ [https://perma.cc/M474-JTUX] (last visited Oct. 20, 2023). Although *Rucho* held gerrymandering to present a political question that cannot be adjudicated in federal court, Ohio’s failure to implement *any* State Assembly map was justiciable at the federal level. When redistricting processes break down and jeopardize a state’s ability to hold elections at all, “federal courts are ‘left to embark on [the] delicate task’ of redistricting.” *Branch v. Smith*, 538 U.S. 254, 278 (2003) (citing *Abrams v. Johnson*, 521 U.S. 74, 101 (1997)); see also *Gonidakis*, 599 F. Supp. 3d at 646 (“Federal courts must impose new maps to protect the right to vote.”).

⁹⁰ *Gonidakis*, 599 F. Supp. 3d at 646.

⁹¹ A three-judge district court panel, which must have at least one circuit court judge, “shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.” 28 U.S.C. § 2284. The members of the *Gonidakis* panel were Judge Amul Thapar of the U.S. Court of Appeals for the Sixth Circuit, Chief Judge Algenon Marbley of the U.S. District Court for the Southern District of Ohio, and Judge Benjamin Beaton of the U.S. District Court for the Western District of Kentucky. *Gonidakis*, 599 F. Supp. 3d at 645.

⁹² See *Gonidakis*, 599 F. Supp. 3d at 648.

⁹³ See *id.* at 678.

⁹⁴ See *Ohio Supreme Court Rejects Legislative Maps – Again*, 13ABC ACTION NEWS (May 25, 2022, 4:41 PM), <https://www.13abc.com/2022/05/25/ohio-supreme-court-rejects-legislative-maps-again> [https://perma.cc/2XC5-9UFM]; see also Andy Chow, *Federal Court Intervenes in Ohio Redistricting, Orders State to Implement Unconstitutional District*, 91.3 WYSO (May 31, 2022, 7:46 AM), <https://www.wyso.org/local-and-statewide-news/2022-05-31/federal-court-intervenes-in-ohio-redistricting-orders-state-to-implement-unconstitutional-district> [https://perma.cc/WF3Z-LH5P].

⁹⁵ See Chow, *supra* note 94.

of the Democratic Party would net them nothing.”⁹⁶ If one excludes these close districts, the Republican party “can be expected to win 67.9% of non-excluded districts, and the Democratic Party 32.1%.”⁹⁷ By contrast, a map proportional to historical voting preferences would yield approximately a 54 to 46 percent advantage for the GOP.⁹⁸

C. The Case Law That Guided Gonidakis

Federal courts are obligated to give states “the widest berth possible” to fix federal law electoral process defects.⁹⁹ In *Grove v. Emison*, which addressed a claim that Minnesota’s state legislative and congressional districts were malapportioned,¹⁰⁰ the U.S. Supreme Court held that the trial court erred in failing to defer to a state court’s line-drawing efforts.¹⁰¹ The district court should have “establish[ed] a deadline by which, if the [state court] had not acted, the federal court would proceed.”¹⁰² Federal intervention would only have been justified if it had been “apparent that the state court . . . would not develop a redistricting plan in time for the

⁹⁶ *Gonidakis*, 599 F. Supp. 3d at 665.

⁹⁷ *Id.*

⁹⁸ *Id.* at 682.

⁹⁹ *Id.* at 665 (citing *Grove v. Emison* 507 U.S. 25 (1993); *Branch v. Smith*, 538 U.S. 254 (2003)).

¹⁰⁰ While gerrymandering is generally understood to involve districts of equal population, malapportionment claims deal with population disparities between districts, which magnifies the electoral influence of some voters at the expense of others. See Mark Joseph Stern, *Republicans May Revive the Most Dangerous Kind of Gerrymandering*, SLATE (Oct. 20, 2021, 4:57 PM), <https://slate.com/news-and-politics/2021/10/south-carolina-republicans-gerrymandering-malapportionment.html> [<https://perma.cc/D8VL-XZ79>]. Article I, Section 2, of the Constitution, which states that “Representatives . . . shall be apportioned among the several states . . . according to their respective numbers. . . .”, has been interpreted by the Supreme Court to require strict population equality between congressional districts. U.S. CONST. art. I, § 2; see also *Equal Population*, MINN. SENATE,

<https://www.senate.mn/departments/scr/REDIST/Red2000/ch2equal.htm> [<https://perma.cc/LN83-CP6R>] (last visited Oct. 20, 2023). State legislative districts are not held to the same exacting standard. See *Equal Population*, *supra*. While the Equal Protection Clause of the Fourteenth Amendment requires that state-level district populations be substantially equal, a districting plan may have an overall population variance (between the most and least populous districts) of up to 10 percent without giving rise to a prima facie discrimination claim of discrimination. See *id.* If a state-level districting plan has an overall population deviation of more than 10 percent, a state must provide a justification “based on legitimate considerations incident to the effectuation of a rational state policy.” *Id.* (quoting *Gaffney v. Cummings*, 412 U.S. 735, 742 (1973); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (internal quotation marks omitted)).

¹⁰¹ *Grove v. Emison* 507 U.S. 25, 42 (1993).

¹⁰² *Id.* at 36.

primaries.”¹⁰³ But in *Branch v. Smith*, where the Mississippi legislature failed to adopt a redistricting plan in time to receive preclearance under Section 5 of the Voting Rights Act,¹⁰⁴ the U.S. Supreme Court affirmed a districting plan implemented by the federal district court.¹⁰⁵ Citing *Grove* and *Branch*, the *Gonidakis* court emphasized that “at some point, the threat to the right to vote becomes so great that a federal court must intervene” if state authorities are unable to implement a map that complies with the law.¹⁰⁶

The *Gonidakis* court also held that *Grove* and *Branch* comport with *Purcell v. Gonzalez*,¹⁰⁷ which articulated the principle that “federal courts ordinarily should not enjoin a state’s election laws in the period close to an election.”¹⁰⁸ *Grove* and *Branch*, the *Gonidakis* court reasoned, comport with *Purcell* because they both “compel federal courts to *minimize* chaos and uncertainty (by imposing an election practice when the state has failed to set one).”¹⁰⁹ Relying on the *Purcell* principle, the U.S. Supreme Court has “repeatedly stayed injunctions by lower federal courts close to elections.”¹¹⁰ The *Gonidakis* court further stated that, because “the rules of the road must be clear and settled,”¹¹¹ it is sometimes necessary to permit elections to proceed even if “some state processes might violate federal or state law.”¹¹²

The *Gonidakis* court ultimately held that, despite *Purcell*’s limitation on last-minute intervention, it had to step in to ensure the General Assembly elections would go forward.¹¹³ It moved the date of the state legislative primary from May 3 to August 2, 2022, which it determined to be the latest possible date that the election could be held, given the practical limitations of election administration.¹¹⁴ It also selected the Commission’s third enacted map (“Map 3”)—which the Ohio Supreme Court had struck down on the grounds that it violated the state constitution’s proportionality and anti-partisan favoritism provisions.¹¹⁵ The court reasoned that, since the state

¹⁰³ *Id.*

¹⁰⁴ Following the Supreme Court’s 2013 ruling in *Shelby County v. Holder*, which invalidated the criteria determining which jurisdictions were subject to preclearance, Section 5 is no longer operational. 570 U.S. 529 (2013).

¹⁰⁵ See *Branch v. Smith*, 538 U.S. 254, 282 (2003).

¹⁰⁶ *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 666 (S.D. Ohio 2002).

¹⁰⁷ *Id.*; see also *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

¹⁰⁸ *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

¹⁰⁹ *Gonidakis*, 599 F. Supp. 3d at 667.

¹¹⁰ *Id.* at 666; see also *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30–31 (2020) (Kavanaugh, J., concurring) (collecting cases).

¹¹¹ *Milligan*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring).

¹¹² *Gonidakis*, 599 F. Supp. 3d at 666.

¹¹³ See *id.* at 668.

¹¹⁴ See *id.* at 669.

¹¹⁵ See *id.* at 671.

supreme court had struck down each of the Commission's four plans proposed (up to that point), Map 3 was the best option because it already had been partially implemented by Ohio's Secretary of State.¹¹⁶ Further, the court ruled that using any map created by an independent mapmaker, an Intervenor's Expert,¹¹⁷ or a special master¹¹⁸—as the parties opposing the Commission maps proposed—would not have complied with the Ohio Constitution's provisions prohibiting courts from implementing new maps¹¹⁹ and requiring that the Commission approve any map.¹²⁰

The 2022 midterm elections demonstrated the ruthless efficiency of the Commission's gerrymander. On November 8, Republicans won a 67 to 32-seat supermajority in the Ohio House of Representatives.¹²¹ And with 17 of 33 Ohio Senate seats up for re-election, Republicans gained a seat in the legislature's upper chamber, increasing their supermajority to 26, a roughly 79 to 21 percent advantage over the Democrats.¹²²

These Republican advantages in the General Assembly far exceed the proportion of Ohioans who actually voted for Republicans statewide in 2022. Ohio's state house and senate margins are much greater than the 53 to 47 percent margin by which Republican J.D. Vance won his U.S. Senate race against Democrat Tim Ryan.¹²³ Republicans' state house advantage slightly exceeds Republicans' victory margin in the races for governor (63 to 37 percent), attorney general (60 to 40 percent), and secretary of state (60 to 40 percent).¹²⁴ No statewide race saw a candidate come anywhere near 79 percent of the vote, Republicans' share of state Senate seats.¹²⁵

¹¹⁶ *See id.* at 670–71.

¹¹⁷ For a discussion of the benefits and drawbacks to various forms of judicial map-drawing, see Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1132 (2005).

¹¹⁸ *See id.* at 1148.

¹¹⁹ OHIO CONST. art. XI, § 1(A).

¹²⁰ *Id.* § 9(D)(1).

¹²¹ *Ohio Election Results*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-ohio.html> [https://perma.cc/9UXF-6QAR] (last updated Dec. 14, 2022).

¹²² *Ohio State Senate Elections, 2022*, BALLOTPEDIA, https://ballotpedia.org/Ohio_State_Senate_elections,_2022 [https://perma.cc/296G-8SUX] (last visited Oct. 20, 2023).

¹²³ *Ohio Election Results - Senate*, POLITICO, <https://www.politico.com/2022-election/results/ohio/senate/> [https://perma.cc/GY6H-7F8T] (last updated Jan. 18, 3:09 PM).

¹²⁴ *2022 Ohio Election Results*, AKRON BEACON J., <https://www.beaconjournal.com/elections/results/2022-11-08/state/ohio/> [https://perma.cc/D9SX-7J4M] (last updated July 28, 2023).

¹²⁵ *Id.*

D. A Troubling Precedent

While the principles underlying the *Gonidakis* decision may seem logical at first glance, they create perverse incentives for redistricting commissions to merely wait out adverse court decisions. If a redistricting commission wants to skirt a particular law, it can simply refuse to ratify a map complying with that law or with court decisions enforcing it, thereby jeopardizing the state's ability to hold an election. Aiming to give the state its "wide[] berth," a federal court likely will wait to intervene as long as possible, meaning that it will only step in "in the period close to an election."¹²⁶ At that point, if the federal court follows *Gonidakis* and its interpretation of *Purcell*, the impending election will mean that it is too late to address the unlawful actions that threatened the election in the first place.

Gonidakis raises crucial questions about the proper role of the federal judiciary in a democratic federal system: When core state-level democratic governance structures fail, how can federal courts ensure orderly election administration while respecting state constitutional and statutory law? Since partisan gerrymandering claims are nonjusticiable under federal law, how much deference should federal courts accord to state court rulings on such claims?¹²⁷ And how can federal courts best effectuate the popular will of voters who, as in Ohio, decisively amended their state's foundational document to eliminate partisan gerrymandering? The answers to these questions are crucial; if other courts throw their hands up when facing an intransigent redistricting commission and looming election deadlines, they will send the message that partisan redistricting officials can ignore their mandates from voters with impunity. And when commissions can pursue partisan aims unrestrained, they will cease to serve as a crucial safeguard of free, fair, and competitive elections.¹²⁸

III. DUELING CONCEPTIONS OF DEFERENCE: THE *GONIDAKIS* OPINIONS

When a redistricting commission fails to draw a map that complies with state law, when and how should federal courts intervene? Is it appropriate for federal courts to countermand definitive state court interpretations of state constitutions, even if the alternative would require federal courts to get their hands dirty drawing district lines themselves? The *Gonidakis* panel—

¹²⁶ See *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 665, 666 (S.D. Ohio 2022); see also *supra* Part II.C.

¹²⁷ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

¹²⁸ See *supra* Part I; see *infra* Part IV.

consisting of Judge Amul Thapar of the U.S. Court of Appeals for the Sixth Circuit, Chief Judge Algenon Marbley of the U.S. District Court for the Southern District of Ohio, and Judge Benjamin Beaton of the U.S. District Court for the Western District of Kentucky—grappled with these questions, reaching distinct conclusions with dramatically different ramifications for Ohio’s democracy.

Judges Thapar and Beaton deferred to the Commission, reasoning that a commission-approved map could be implemented faster than any other.¹²⁹ They treated the Commission’s map as a legislative enactment warranting deference, and they refused to subordinate one constitutional provision, the requirement that any map be commission-approved, to another provision, the requirement that maps not be drawn to favor a particular party.¹³⁰ By contrast, Chief Judge Marbley, dissenting, argued that imposing an alternative map, created under Commission supervision but not approved by the Commission, would do the least damage to state law.¹³¹ The majority, Chief Judge Marbley argued, had failed in its duty to respect state law by disregarding Ohio Supreme Court rulings that should have been controlling.¹³² He also argued that the majority had ignored the Ohio Constitution’s substantive requirement that maps not be drawn to favor a political party and created incentives for the Commission to simply defy state courts.¹³³ Chief Judge Marbley’s stance, as this Article argues in Part V, is broadly consistent with the U.S. Supreme Court’s decision in *Moore v. Harper*, handed down more than a year after *Gonidakis*, in which a six-justice majority reaffirmed the longstanding principle that redistricting authorities are subject to state constitutional constraints.¹³⁴

A. *The Gonidakis Majority Approach: Deference to the Redistricting Commission*

In selecting a map to implement, the *Gonidakis* majority’s reasoning was guided largely by a desire to give Ohio as much time as possible to implement a workable redistricting plan.¹³⁵ Map 3—for which Ohio Secretary of State Frank LaRose had already begun preparing—was therefore a natural choice, though Secretary LaRose “later shifted to Map 4 as the legally preferable map.”¹³⁶ By contrast, the parties opposing the commission’s maps sought a map

¹²⁹ See *infra* Part III.A.

¹³⁰ See *id.*

¹³¹ See *infra* Part III.B.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ 600 U.S. 1, 34 (2023).

¹³⁵ See *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 670 (S.D. Ohio 2022).

¹³⁶ *Id.*

created by independent mapmakers or a special master.¹³⁷ The court acknowledged that neither side's proposed solution was ideal, as "each [] [was] flawed in some way."¹³⁸ The commission-created maps all contravened the state constitution's proportionality and anti-partisan favoritism provisions, as interpreted and applied by the Ohio Supreme Court.¹³⁹ And if the court were to implement its own map, it would violate the Ohio Constitution's provisions requiring the Commission to approve maps¹⁴⁰ and preventing courts from imposing maps not adopted by the Commission.¹⁴¹

Despite Map 3's flaws, the court ultimately reasoned that it was the least imperfect option.¹⁴² Since the Secretary of State had already begun preparing, it could be implemented faster than any other map, buying the Commission more time to get its act together.¹⁴³ Eighty of eighty-eight counties had loaded the map into their systems, and some statutory periods, such as deadlines for candidates moving residence and registration, had already gone into effect under the map.¹⁴⁴ As a result, the Secretary of State would only need approximately sixty-five days to implement Map 3, rather than the 104 days it would take to implement any other map.¹⁴⁵ For these same reasons, Map 3 would also reduce "electoral disruptions, costs, and risk."¹⁴⁶ Similar concerns, the court noted, had informed the U.S. District Court for the Middle District of North Carolina's decision in *Covington v. North Carolina*,¹⁴⁷ when it refused to impose a special election as a remedy, and the Northern District of Florida's ruling in *Johnson v. Smith*,¹⁴⁸ when it declined "to enjoin unconstitutional maps due to confusion and disruption."¹⁴⁹

While the intervenors in the case¹⁵⁰ "understandably" asked the court to avoid Map 3 because it conflicted with the state's anti-gerrymandering constitutional provisions, the majority held their position would have required "favor[ing] the decision of one organ

¹³⁷ *Id.* at 671.

¹³⁸ *Id.*

¹³⁹ *Id.*; see also OHIO CONST. art. XI, § 6.

¹⁴⁰ *Gonidakis*, 599 F. Supp. 3d at 671; see also OHIO CONST. art. XI, § 1(A).

¹⁴¹ *Gonidakis*, 599 F. Supp. 3d at 671; see also OHIO CONST. art. XI, § 9(D).

¹⁴² *Gonidakis*, 599 F. Supp. 3d at 671.

¹⁴³ See *id.* at 672.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 270 F. Supp. 3d 881, 898–900 (M.D.N.C. 2017).

¹⁴⁸ No. TCA 94-40025, 1994 WL 907596, at *1 (N.D. Fla. July 18, 1994).

¹⁴⁹ *Gonidakis*, 599 F. Supp. 3d at 672.

¹⁵⁰ *Id.* at 673. Among the intervenors were the A. Philip Randolph Institute of Ohio; Council on American-Islamic Relations, Ohio; League of Women Voters of Ohio; Ohio Environmental Council; and Ohio Organizing Collaborative. *Id.* at 653. The intervenors also included State Senator Vernon Sykes and House Minority Leader Allison Russo, Democratic members of the Commission. *Id.*

of state government over another.”¹⁵¹ The court reasoned it could not do so for three reasons: First, and critically, the *Gonidakis* majority reasoned that, since voters handed redistricting authority to the Commission, it “exercises and expresses the states’ [sic] legislative preferences.”¹⁵² Because of this, the court applied U.S. Supreme Court precedent requiring the “policy choices of a state’s legislature [to] take precedence in redistricting,” over the Ohio Supreme Court’s interpretation of the state constitution.¹⁵³ In support, the majority invoked *Upham v. Seamon*,¹⁵⁴ in which the Supreme Court vacated a district court judgment redrawing district lines to which the Attorney General did not object under the Voting Rights Act’s preclearance process,¹⁵⁵ as well as *Wise v. Lipscomb*,¹⁵⁶ in which the Court reinstated a municipal reapportionment plan after the Fifth Circuit had struck it down.¹⁵⁷ In both *Upham* and *Wise*, the Court stated that federal courts should defer to legislative judgments in the redistricting context.¹⁵⁸ The court also cited *Perry v. Perez*,¹⁵⁹ which held that legislative policies underlying redistricting plans should guide courts, and *Abrams v. Johnson*,¹⁶⁰ which stands for the proposition that the Supreme Court has a “more deferential standard for malapportionment when a legislature created the map rather than a court.”¹⁶¹ The *Gonidakis* court also cited two district court cases and a case from the U.S. Court of Appeals for the Eleventh Circuit in which legislative judgments were given deference, even though redistricting plans violated state statutory or constitutional law.¹⁶²

Second, the *Gonidakis* majority justified its deference to the Commission by finding “no basis in Ohio or federal-constitutional

¹⁵¹ *Id.* at 673.

¹⁵² *Id.* at 674; *see also* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015).

¹⁵³ *Gonidakis*, 599 F. Supp. 3d at 673.

¹⁵⁴ 456 U.S. 37 (1982).

¹⁵⁵ *See* 42 U.S.C. § 1973.

¹⁵⁶ 437 U.S. 535 (1978).

¹⁵⁷ *See id.* at 546–47; *see also* *Gonidakis*, 599 F. Supp. 3d at 673.

¹⁵⁸ *See Upham*, 456 U.S. at 40–41; *Wise*, 437 U.S. at 539–40.

¹⁵⁹ 565 U.S. 388, 393 (2012).

¹⁶⁰ 521 U.S. 74, 98 (1997).

¹⁶¹ *Gonidakis*, 599 F. Supp. 3d at 673.

¹⁶² *Id.* at 674 (“In *Navajo Nation v. Arizona Independent Redistricting Commission*, a district court ordered the use of a districting plan passed by a commission even though the emergency plan did not comply with the Arizona Constitution’s notice provisions. 230 F. Supp. 2d 998, 1008 (D. Ariz. 2002)); *see also* *Straw v. Barbour Cnty.*, 864 F. Supp. 1148, 1155 & n.15 (M.D. Ala. 1994) (giving deference to commission plan despite meeting’s violation of state notice requirement, where exigent circumstances existed); *see also* *Tallahassee Branch of NAACP v. Leon Cnty.*, 827 F.2d 1436, 1438–39 (11th Cir. 1987) (noting that legislative plans receive more deference than court-created plans and finding the county plan was entitled to deference even though it was passed without a referendum as required by state law).

law for favoring some provisions of the Ohio Constitution over others.”¹⁶³ An intervenor, 2022 state house candidate Bria Bennett, argued otherwise, contending that the requirement that maps have Commission approval is simply procedural and should not trump the state constitution’s partisan proportionality provisions, which are substantive.¹⁶⁴ Bennett cited *Large v. Fremont County*,¹⁶⁵ in which the U.S. Court of Appeals for the Tenth Circuit invalidated a county districting system that violated Wyoming law, to support the proposition that “a state legislature is not owed deference when its map violates higher state law,” including a state constitution.¹⁶⁶ However, in the majority’s view, *Large* held that deference is owed “first and foremost” to the legislative judgments of a state and that any political subdivision that “substantively contravenes” state law does not deserve deference as “it no longer acts as an agent of that sovereign.”¹⁶⁷ And because this holding “was premised on the core principle that federal courts must give deference to the *state legislature*,” *Large* does not strip the state legislature “of the relative deference they are due when a court determines a map violates the state constitution.”¹⁶⁸ Nor, the majority added, does *Large* support any distinction in how courts treat substantive and procedural state constitutional violations, despite its use of the word “substantive.”¹⁶⁹

And even if there were “some legal hierarchy . . . between substantive and procedural law,” the *Gonidakis* court held, the Ohio Supreme Court’s interpretation of the state constitution’s requirements in the context of redistricting is not necessarily more authoritative than that of the Commission.¹⁷⁰ How, the majority essentially asked, could the Ohio Supreme Court’s ability to review a map be more substantive than the Commission’s right to approve a map?¹⁷¹ After all, the Ohio Constitution grants redistricting authority to the Commission,¹⁷² and the Ohio Supreme Court itself has “repeatedly made clear that the Commission’s role is essential to a valid electoral map under Ohio’s constitutional scheme.”¹⁷³ Deferring to the Ohio Supreme Court, the *Gonidakis* court reasoned,

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 674–75; *see also* Bria Bennett, RUN FOR SOMETHING, <https://directory.runforsomething.net/candidate/2309/bennett-bria> [<https://perma.cc/8EAX-7959>] (last visited Oct. 20, 2023).

¹⁶⁵ 670 F.3d 1133, 1147 (10th Cir. 2012).

¹⁶⁶ *Gonidakis*, 599 F. Supp. 3d at 674.

¹⁶⁷ *Id.* at 674 (quoting *Large v. Fremont Cnty.*, 670 F.3d 1133, 1146 (10th Cir. 2012)).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 675.

¹⁷⁰ *Id.*

¹⁷¹ *See id.*

¹⁷² OHIO CONST. art. XI, § 1(A).

¹⁷³ *Gonidakis*, 599 F. Supp. 3d at 675 (citing *LOWV IV*, 2022-Ohio-1235, 2022 WL 1113988, at *15, *17).

would have meant “stak[ing] out a novel and contrary position as a matter of state constitutional law.”¹⁷⁴

Third and finally, the *Gonidakis* court relied on its equitable discretion to implement maps to “ensure that elections are carried out in an orderly fashion in conformity with federal law,” even if those maps violate state law.¹⁷⁵ In doing so, it again cited *Upham*,¹⁷⁶ which found “courts may order elections be held under illegal maps when necessary,”¹⁷⁷ along with three cases in which district courts permitted elections to go forward under illegally apportioned maps.¹⁷⁸ The *Gonidakis* majority reasoned that its equitable powers allowed sacrificing full compliance with the Ohio Constitution in the interest of election administration, compliance with federal law, and respect for the state constitutional provisions barring the judicial imposition of maps that lack Commission approval.¹⁷⁹ The court re-emphasized that Map 3 would be the easiest to implement for an already-delayed election, and it noted once again that any independently created map would not satisfy the constitutional requirement that a map be Commission-approved.¹⁸⁰ The court also declined to revert to the 2010 district boundaries—with which voters and administrators alike were already familiar—primarily on the ground that the old map was now malapportioned given the population changes recorded in the 2020 census.¹⁸¹

B. The Gonidakis Dissent’s Approach: Deference to the Ohio Supreme Court

Chief Judge Marbley of the Southern District of Ohio, the dissenter in *Gonidakis*, shared the majority’s deferential intentions. The majority, he said, rightly sought to “avoid intrusion on state sovereignty,”¹⁸² yet failed. His dissent rested on three key points: First, the majority failed in its duty to respect state law. It ended up “tabl[ing] a watershed constitutional referendum” and invalidating

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ 456 U.S. 37, 44 (1982).

¹⁷⁷ *Gonidakis*, 599 F. Supp. 3d at 675 (citing *Upham v. Seamon*, 456 U.S. 37, 44 (1982)).

¹⁷⁸ *See id.*; *see also* *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981) (implementing malapportioned maps due to pressing election timeline); *Martin v. Venables*, 401 F. Supp. 611, 620–21 (D. Conn. 1975) (same); *Covington v. North Carolina*, No. 1:15-cv-399, 2015 WL 13806587, at *4 (M.D.N.C. Nov. 25, 2015) (refusing to enjoin a racially gerrymandered map because it would be too disruptive to an election).

¹⁷⁹ *See Gonidakis*, 599 F. Supp. 3d at 675.

¹⁸⁰ *See id.* at 675–76.

¹⁸¹ *Id.* at 678. Despite this, the court added that the 2010 boundaries would be the second best option after Map 3. *Id.*

¹⁸² *Id.* at 679 (Marbley, C.J., dissenting).

Ohio Supreme Court decisions that should have been controlling.¹⁸³ Second, the majority failed to comply with precedent requiring courts to satisfy “the federal *and* state Constitutions.”¹⁸⁴ To do the least damage to federal law, the majority should instead have enacted a proportional districting proposal, the Johnson/McDonald Plan, created jointly by a Republican-nominated map drawer and a Democrat-nominated map drawer under Commission supervision.¹⁸⁵ And third, the majority, “reward[ing] the Commission's brinksmanship over the rights of Ohio voters,”¹⁸⁶ created perverse incentives moving forward.

In situations like the one at hand, Chief Judge Marbley wrote, courts must reconcile “the requirements of the Constitution with the goals of state political policy”¹⁸⁷ as expressed in the state constitution and statutes.¹⁸⁸ This means respecting state policies to the “maximum extent” when curing federal rights violations.¹⁸⁹ Implementing Map 3 was inconsistent with these precedential commands because the map did not satisfy the proportional redistricting criteria codified in the Ohio Constitution by popular vote in 2015.¹⁹⁰ After all, the state supreme court had found district lines were intentionally drawn to favor the Republican Party at the expense of the Democrats, violating the state constitution.¹⁹¹

Chief Judge Marbley further argued that the Ohio Supreme Court's decision striking down the Commission maps should have been dispositive.¹⁹² The U.S. Supreme Court and lower federal courts had held repeatedly that state courts should be free to independently interpret their state constitutions.¹⁹³ And during Ohio's redistricting saga, state authorities had consistently recognized the Ohio Supreme Court's rulings as authoritative and controlling.¹⁹⁴ In a letter to the General Assembly, the state attorney general wrote that a federal court could not countermand an Ohio Supreme Court ruling striking down a Commission map, and the

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* at 686.

¹⁸⁶ *Id.* at 679.

¹⁸⁷ *Id.* at 680 (quoting *Upham v. Seamon*, 456 U.S. 37, 43 (1982)).

¹⁸⁸ *Id.* (citing *White v. Weiser*, 412 U.S. 783, 795 (1973)).

¹⁸⁹ *Id.* at 681.

¹⁹⁰ *See id.*; *see also* OHIO CONST. art. XI, § 6.

¹⁹¹ *Gonidakis*, 599 F. Supp. 3d at 682 (Marbley, C.J., dissenting). A hallmark of Map 3 was that “a uniform two-point swing in favor of the Republican Party would net them all 26 ‘close’ Democratic seats and a bicameral supermajority, while the same vote swing in favor of the Democratic Party would net them nothing.” *Id.* (citing *League of Women Voters of Ohio v. State Redistricting Comm'n*, 168 Ohio St. 3d 309, 322 (2022)).

¹⁹² *See id.* at 683.

¹⁹³ *See id.* (collecting cases).

¹⁹⁴ *See id.*

secretary of state argued repeatedly in court filings that he could not advocate for a struck-down map.¹⁹⁵

Instead of acknowledging state officials' duty to comply with the supreme court's rulings, Chief Judge Marbley argued, the majority erroneously treated the Commission's defiance of the high court as valid state policy.¹⁹⁶ While *White v. Weiser* mandates deference to a state's "policies and preferences,"¹⁹⁷ the majority could not treat a map struck down by a state supreme court as an expression of that state's policy or preference.¹⁹⁸ And since the Commission intentionally defied the Ohio Supreme Court by refusing to pass a compliant map, Chief Judge Marbley could not "see how the deliberate and unlawful acts of the Commission, authoritatively invalidated by the Ohio Supreme Court, can constitute a legislative policy pronouncement that now deserves the benefit of deference."¹⁹⁹ Rather than a valid expression of state policy, Map 3 was an ultra vires enactment lacking "legitimate force."²⁰⁰ Further, none of the cases cited by the majority actually held that a federal court may impose a map after a state supreme court has struck it down.²⁰¹ Indeed, "[t]he closest case on point,

¹⁹⁵ *Id.* To maintain focus on the Commission and the courts, this Article does not delve deeply into the role of the executive branch in Ohio's redistricting. Governor Mike DeWine served on the Commission, but largely deferred to other members, most notably Senate President Matt Huffman and House Speaker Bob Cupp. See Jessie Balmert, *Gov. Mike DeWine Said He'd Take the Lead. But Did He?*, CINCINNATI ENQUIRER (Apr. 10, 2022, 10:23 PM), <https://www.cincinnati.com/story/news/politics/elections/2022/04/11/ohio-redistricting-gov-mike-dewine-said-hed-take-lead-did-he/9467933002> [https://perma.cc/EH3P-S2ZG]. Complicating matters, Governor DeWine's son, Pat DeWine, is an Ohio Supreme Court justice. See Marty Schladen, *Another Question About DeWine Conflicts in Ohio Redistricting*, OHIO CAP. J. (Feb. 23, 2022, 3:55 AM), <https://ohiocapitaljournal.com/2022/02/23/another-question-about-dewine-conflicts-in-ohio-redistricting> [https://perma.cc/EH4Y-827S]. Justice DeWine repeatedly voted to uphold the Commission-produced maps, only recusing himself in contempt proceedings against his father, raising concerns of a conflict of interest. See *id.* Governor DeWine has since criticized the redistricting process, admonishing Republicans and Democrats for failing to compromise and arguing that the supreme court should have focused on designing "a greater number of districts that either party could win." *Gov. Mike DeWine Served on Redistricting Commission that Violated Ohio Constitution. Now He Wants to Ban Politicians from the Process*, TRIB. NEWS SERV. (Feb. 17, 2023), <https://www.limaohio.com/top-stories/2023/02/17/gov-mike-dewine-served-on-redistricting-commission-that-violated-ohio-constitution-now-he-wants-to-ban-politicians-from-the-process> [https://perma.cc/UW5U-E752]. In early 2023, the Governor stated that "[t]aking [redistricting] out of the hands, frankly, of elected officials is probably a good idea." *Id.*

¹⁹⁶ See *Gonidakis*, 599 F. Supp. 3d at 683–84 (Marbley, C.J., dissenting).

¹⁹⁷ *White v. Weiser* 412 U.S. 783, 795 (1973).

¹⁹⁸ See *Gonidakis*, 599 F. Supp. 3d at 683–84 (Marbley, C.J., dissenting).

¹⁹⁹ *Id.* at 684.

²⁰⁰ *Id.* (citing *Gentry v. Deuth*, 456 F.3d 687, 697 (6th Cir. 2006)).

²⁰¹ See *id.*

Perry v. Perez, makes no mention of state-court invalidation and holds only that a federal court ‘should be guided by the legislative policies underlying’ a state plan.”²⁰²

Chief Judge Marbley also contended that the majority disrespected the democratic sovereignty of Ohioans, “the supreme power of the state,”²⁰³ who overwhelmingly voted to enshrine proportional districting in the state constitution.²⁰⁴ The voters’ substantive policy preference that redistricting be “fair, bipartisan, and transparent,”²⁰⁵ expressed by a margin of approximately 70 to 30 percent of voters, deserved deference over a Commission pursuing partisanship in defiance of the state’s highest court.²⁰⁶

An independently drawn, commission-supervised plan would have done the least damage to Ohio law while protecting federal voting rights, Chief Judge Marbley argued. Instead of Map 3, he advocated for the Johnson/McDonald Plan, a work in progress spearheaded by Dr. Douglas Johnson, an independent expert appointed by the Republican commissioners, and Dr. Michael McDonald, appointed by the Democratic commissioners.²⁰⁷ The experts were retained after the Ohio Supreme Court “suggest[ed]” an independent mapmaker.²⁰⁸ The Commission laid down ground rules reflecting the Ohio Constitution’s partisan proportionality provisions and the state supreme court rulings.²⁰⁹ It also set up a dispute resolution framework using professional mediators.²¹⁰ Yet the Commission prevented the experts from completing their work. Chief Judge Marbley explained that, when Drs. Johnson and McDonald submitted three plans to the Commission seeking its guidance, the Commission did not formally decide any of the outstanding issues raised.²¹¹ Making matters worse, the president of the Ohio Senate, Matt Huffman, made a last-minute demand that “the independent map drawers consider the residence locations of non-term-limited and mid-term House and Senate incumbents in drafting a plan.”²¹² The next day—the Ohio Supreme Court’s deadline for a new map—the Commission chose to amend Map 3 instead of helping the independent experts complete a map that

²⁰² *Id.* (quoting *Perry v. Perez*, 565 U.S. 388, 393 (2012)).

²⁰³ *State ex rel. Weinberger v. Miller*, 99 N.E. 1078, 1079 (Ohio 1912).

²⁰⁴ *See id.*; *see also Gonidakis*, 599 F. Supp. 3d at 685 (Marbley, C.J., dissenting).

²⁰⁵ *See Gonidakis*, 599 F. Supp. 3d at 689.

²⁰⁶ *Id.* at 685.

²⁰⁷ *Id.* at 685–86.

²⁰⁸ *Id.* at 686.

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *See id.*

²¹² *Id.* (quoting *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 168 Ohio St. 3d 374, 388–89 (Ohio 2022)).

complied with the incumbency-protection provisions.²¹³ As a result, Speaker of the House Robert Cupp determined that the experts could not finish their maps on time and moved to adopt the modified version of the invalidated Map 3, which was almost identical to its predecessor.²¹⁴ During preliminary hearings for *Gonidakis*, expert witnesses testified that the Johnson/McDonald Plan “satisfies all constitutional requirements,” achieving “near-perfect symmetry in competitive seats” and “[replicating] the proportionality target of 54% Republican-leaning seats, 46% Democratic-leaning seats.”²¹⁵ Yet the Commission chose not to act on it.

Chief Judge Marbley also noted that Judge Thapar stated during a preliminary injunction hearing that the court’s task was to do “the least amount of damage to Ohio law,”²¹⁶ yet adopting Map 3 does *more* damage to Ohio law than the Johnson/McDonald Plan would have.²¹⁷ It is more damaging, Chief Judge Marbley argued, to dismiss voters’ democratic will by casting aside the substantive anti-gerrymandering provisions of the Ohio Constitution, and disregard controlling Ohio Supreme Court rulings, than to violate a procedural constitutional rule.²¹⁸ And there was no doubt, he emphasized, that the judges had the leeway to weigh which remedy would do the least harm. Federal courts have broad discretion to achieve “maximum harmony with state and federal law” by implementing their own redistricting plans when state procedures break down.²¹⁹

Lastly, Chief Judge Marbley argued that the majority created an incentive for the commission to defy the state supreme court. Per the majority, by selecting the partially implemented Map 3 and staying its implementation until May 28, 2022²²⁰—in hopes that the state would produce a workable map before then—the court was exercising deference to state processes.²²¹ However, Chief Judge Marbley pointed out that the Commission would have no incentive to create a proportional map with the heavily gerrymandered map as a backstop.²²² Essentially, the Commission could “do nothing and await a map with the desired partisan favoritism,” or repeat a

²¹³ *Id.* at 686–87 (citing *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 168 Ohio St. 3d 374, 388–89 (Ohio 2022)).

²¹⁴ *See id.* at 687.

²¹⁵ *Id.*

²¹⁶ *Id.* at 689.

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ *Id.* To drive home the point, Chief Judge Marbley listed fourteen cases in which federal district courts did just this. *See id.* (listing cases in which courts “used their authority to consider outside plans or undertake their own map-drawing when a valid and approved plan is unavailable.”).

²²⁰ *Id.* at 647.

²²¹ *See id.* at 690.

²²² *See id.* at 690–91.

contentious map drawing process for the fifth time, requiring the primary be delayed even further and election deadlines be changed by legislation.²²³ In the end, Chief Judge Marbley's prediction turned out to be prescient: Ohio did not produce a viable alternative in time for the August 2 primary, and Map 3 was put in place for the 2022 election cycle.²²⁴

Chief Judge Marbley concluded his dissent with a reminder that the majority's decision did not actually resolve Ohio's tortuous redistricting saga; Map 3 was approved for the 2022 election cycle only, leaving Ohio to repeat the redistricting process in the lead-up to 2024.²²⁵ And the Commission will have the same "perverse" incentive to maintain power by "simply waiting out adverse court decisions."²²⁶

IV. WHY IT MATTERS WHO DECIDES: DEFINING PROPER DEFERENCE

A. *The Unique Role of State Courts in the American System*

States and their constitutions are foundational to the American democratic project. "One oddity about American constitutional law today," argues Chief Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit, "is we started the whole thing in reverse. All of our constitutional guarantees—the rights guarantees—originated in the *state* constitutions."²²⁷ The Constitutional Convention in Philadelphia was not a revolution, but rather a "cut and paste job," as was much of the Bill of Rights.²²⁸ Since the founding, state constitutions have both enshrined Americans' fundamental liberties and underpinned our federalist system, which provides "a double security . . . to the rights of the people."²²⁹ Because power is divided vertically between the states and the federal government, as well as horizontally between the three branches of state and federal governments, the people of the United States have a measure of security from concentrated government power, which the founders considered a potent threat to liberty.²³⁰ Vertical separation of powers goes hand in hand with

²²³ *Id.*

²²⁴ *See supra* notes 114–115 and accompanying text.

²²⁵ *See Gonidakis*, 599 F. Supp. 3d at 692.

²²⁶ *Id.*

²²⁷ David F. Levi et al., *51 Imperfect Solutions: State and Federal Judges Consider the Role of State Constitutions*, 103 JUDICATURE 33, 36 (2019).

²²⁸ *Id.*

²²⁹ THE FEDERALIST NO. 51 (James Madison).

²³⁰ *See id.*; *see also* James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1734 (2002).

state sovereignty, or states' ability to "function as political entities in their own right," without which Americans would not enjoy the rights-protective benefits of federalism.²³¹ In Justice Anthony Kennedy's words, federalism "allows States to respond . . . to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."²³²

As a key democratic safeguard at the state level, courts are a cornerstone of American federalism. Professor Jessica Bulman-Pozen and Professor Miriam Seifter contend that state courts play a crucial and unique role in our democracy because they "interpret constitutions in which democracy is an animating, organizing commitment."²³³ This commitment to popular sovereignty, which Professor Bulman-Pozen and Professor Seifter call the "democracy principle," is far weaker in the federal constitution, from which federal courts draw their authority.²³⁴ Forty-nine state constitutions contain "operative textual commitments to popular sovereignty," every state constitution enshrines voting rights, and over half of state constitutions require elections to be "free," "free and equal," or "free and open."²³⁵ In addition, state constitutions often contain mechanisms designed to limit legislatures' power and preserve elected officials' accountability, including term limits and "detailed procedural requirements."²³⁶

These provisions, interpreted and enforced by state supreme courts, form the first line of defense against state legislators who are quietly undermining democracy and infringing on voters' democratic sovereignty.²³⁷ And while these efforts are some of "the most serious" threats to our democratic system, they might also appear to be "most banal."²³⁸ Some machinations do not reveal themselves as "partisan power grab[s] without attention to context," such as those that strip authority from local officials and transfer it to reliably partisan state officials.²³⁹ State legislatures' quietly antidemocratic tactics also include a "rash of audits, subpoenas, and

²³¹ *Bond v. United States*, 564 U.S. 211, 221 (2011).

²³² *Id.*

²³³ Jessica Bulman-Pozen & Miriam Seifter, *State Constitutions as a Defense Against Election Subversion*, LAWFARE (Sept. 9, 2022, 8:31 AM), <https://www.lawfareblog.com/state-constitutions-defense-against-election-subversion> [<https://perma.cc/6TNX-PKB9>].

²³⁴ See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 859 (2021).

²³⁵ Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1340–41 (2022).

²³⁶ *Id.* at 1341.

²³⁷ See *id.* at 1347.

²³⁸ *Id.* at 1337.

²³⁹ See *id.* at 1348.

threats of criminal enforcement,” which weaponize tools of good government to corrode democracy.²⁴⁰ These under-the-radar threats, on which Professors Bulman-Pozen and Seifter focus, tend to draw less attention than bolder attempts to undermine democracy, like the Ohio Redistricting Commission’s defiance of the Ohio Supreme Court.²⁴¹ Although they do not mention *Gonidakis*, Professors Bulman-Pozen and Seifter point to the Ohio Commission’s intransigence in the face of adverse state supreme court orders as an example of “new election subversion [that] is brazen in its lawlessness.”²⁴²

While election subversion like that at issue in *Gonidakis* is susceptible to fairly straightforward challenges in state court under current law, Professors Bulman-Pozen and Seifter contend that even the more discreet forms of election subversion can be effectively countered by state courts wielding state constitutional law infused with the democracy principle.²⁴³ Their institutional characteristics make them exceedingly well suited to the task.²⁴⁴ First, the overwhelming majority of state judiciaries—including Ohio’s²⁴⁵—are elected and/or subject to retention votes, unlike the federal judiciary, whose members are nominated by the president and confirmed by the U.S. Senate for life terms.²⁴⁶ This means that state

²⁴⁰ *See id.*

²⁴¹ *See id.* at 1347.

²⁴² *Id.*

²⁴³ *See id.* at 1356.

²⁴⁴ *See id.* at 1357.

²⁴⁵ *Supreme Court Justices Overview*, SUP. CT. OF OHIO & THE OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-overview> [<https://perma.cc/R7GD-CPRZ>] (last visited Oct. 20, 2023).

²⁴⁶ Bulman-Pozen & Seifter, *supra* note 235, at 1357. Eight states—Alabama, Illinois, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, and Texas (two courts of last resort)—elect their highest courts’ justices with partisan elections. *Nonpartisan Election of Judges*, BALLOTPEDIA, https://ballotpedia.org/Nonpartisan_election_of_judges [<https://perma.cc/TDA3-SD2J>] (last visited Oct. 20, 2023). Thirteen states—Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Dakota, Oregon, Washington, West Virginia, and Wisconsin—elect their justices with nonpartisan elections. *Id.* The supreme court justices of two states—South Carolina and Virginia—are elected by the state legislature. *Id.* Michigan has a unique method in which supreme court candidates are nominated by political parties but elected on a nonpartisan ballot. *Michigan Manual 2009-2010 – The Supreme Court*, MICH. LEGISLATURE V-3, http://www.legislature.mi.gov/documents/publications/MichiganManual/2009-2010/09-10_MM_V_pp_02-03_SupremeIntro.pdf [<https://perma.cc/CGQ7-298H>] (last visited Oct. 20, 2023). Sixteen states—Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming—hold yes/no retention elections for supreme court justices initially appointed by

courts tend to be more democratically accountable than federal courts.²⁴⁷ Popular election also ensures that state court judges can act independently of the other two branches, since they draw their power directly from the people.²⁴⁸ And state supreme courts are less likely to be subject to the political forces that drive partisan gerrymandering, since most of the thirty-eight states whose high court judges are subject to election or retention votes have implemented structural features to insulate judges from partisan politics.²⁴⁹ Thirteen states elect their high court judges in nonpartisan elections; only eight states hold partisan elections; Michigan Supreme Court candidates run without party labels, though they are nominated by parties; and a further sixteen states—most of which use merit-oriented nominating commissions—subject governor-appointed justices to yes/no, retention elections without opposing candidates.²⁵⁰ Further, since all but four states conduct at-large elections for their highest courts (rather than

the governor. *Retention Election*, BALLOTPEDIA, https://ballotpedia.org/Retention_election [<https://perma.cc/2MPH-LBYQ>] (last visited Oct. 20, 2023); *see also Arizona Judicial Performance Review*, AZCOURTS.GOV, <https://www.azcourts.gov/jpr> [<https://perma.cc/8HYD-RBXW>] (last visited Oct. 20, 2023); Byrhonda Lyons, *Four Justices Vie to Keep Spots on ‘Collegial’ California Supreme Court*, CAL MATTERS, <https://calmatters.org/justice/2022/10/california-supreme-court-ballot-collegial/> [<https://perma.cc/4TGY-Z8N5>] (last updated Oct. 20, 2023); *Merit Selection, Retention & Mandatory Retirement of Justices*, FLA. SUP. CT., <https://supremecourt.flcourts.gov/Justices/Merit-Selection-Retention-Retirement> [<https://perma.cc/7CXA-5UTG>] (last visited Oct. 20, 2023); *Indiana’s Judicial Retention System*, IND. JUD. BRANCH, <https://www.in.gov/courts/about/retention/> [<https://perma.cc/JL35-LRN7>] (last visited Oct. 20, 2023); Rachel Mipro, *Kansas Supreme Court Justices Hang onto Seats in Retention Vote*, KAN. REFLECTOR, (Nov. 9, 2022, 9:25 AM), <https://kansasreflector.com/2022/11/09/kansas-supreme-court-justices-retained-in-november-vote/> [<https://perma.cc/LWS4-YBRX>]; Joey Schneider, *Which Missouri Judges Could be Retained? 52 Up for New Terms*, FOX2NOW, (Oct. 28, 2022, 9:17 AM), <https://fox2now.com/news/politics/2022-midterm-elections/which-missouri-judges-could-be-retained-52-up-for-new-terms/> [<https://perma.cc/ER26-SMKU>] (Oct. 28, 2022, 9:17 AM); Cole Allen, *Judges on the Ballot in Oklahoma: What You Need to Know*, OK POLICY, <https://okpolicy.org/judges-ballot-oklahoma-need-know/> [<https://perma.cc/MCP4-CMNP>] (last updated Nov. 18, 2022); *Judicial Elections*, S.D. Unified Jud. Sys., <https://ujcs.sd.gov/Resources/JudicialElections.aspx> [<https://perma.cc/6AFK-SUU2>] (last visited Oct. 20, 2023); *FAQ About Judicial Elections*, KNOXVILLE BAR ASS’N, <https://www.knoxbar.org/?pg=Election2022FAQ> [<https://perma.cc/DBW4-DSB6>] (last visited Oct. 20, 2022).

²⁴⁷ See Bulman-Pozen & Seifter, *supra* note 235, at 1357.

²⁴⁸ See *id.*

²⁴⁹ See *supra* note 246.

²⁵⁰ *Id.*

assigning justices to distinct circuits or districts), gerrymandering is generally not a concern at the state supreme court level.²⁵¹

Second, as mentioned above, state courts draw on their states' distinct, democracy-oriented constitutional traditions.²⁵² As a result, they are more likely to respect the principles of popular sovereignty than federal courts applying only the federal constitution. Third, state courts have broader jurisdiction as well as a wider "portfolio of work" than federal courts.²⁵³ They routinely "blur lines between the branches," taking on responsibilities like attorney discipline and the drawing of legislative districts.²⁵⁴ State courts remain common law courts, they lack most of the jurisdictional limits that Article III imposes on federal courts, and many issue advisory opinions—a no-go for federal courts.²⁵⁵ All this means that state courts are both highly democratically legitimate *and* more flexible than federal courts.

B. *Why Insufficient Deference to State Courts is Dangerous*

Because state courts are uniquely well-suited to counter even under-the-radar anti-democratic machinations, not to mention the sort of brazen subversion in which the Ohio Redistricting Commission engaged, any federal court that fails to exercise sufficient deference to a state court in the context of elections risks undermining the structural safeguards state courts provide. Federal judges' decisions are less likely to be grounded in the values of the democracy principle, which do not infuse the federal constitution in the same way they animate state constitutions.²⁵⁶ Article III judges are also less likely to have experience interpreting state constitutions and are thus less likely to apply them in a way that comports with their foundational democratic principles. Further, if a federal court chooses to defer, at the expense of a state supreme court, to another state institution lacking the democratic accountability held by freely and fairly elected state judges—such as an appointed commission captured by partisans—it may upend state processes designed to empower the people. In doing so, a federal court would both

²⁵¹ The four states with supreme court circuits or districts are Illinois, Kentucky, Louisiana, and Mississippi. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/NJ36-PVK7>] (last updated Apr. 14, 2023). For a discussion of the threat gerrymandered courts pose to democracy, along with potential solutions to judicial gerrymandering, see Jed Handelsman Shugerman, *Countering Gerrymandered Courts*, 122 COLUM. L. REV. F. 18 (2022).

²⁵² See Bulman-Pozen & Seifter, *supra* note 235, at 1358.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See *id.* at 1358–59.

²⁵⁶ See Bulman-Pozen & Seifter, *supra* note 234, at 859.

infringe on state sovereignty and make it less likely that electoral outcomes reflect the popular will, as the framers of most state constitutions intended.²⁵⁷ Finally, federal courts that fail to defer to state courts risk undermining their own legitimacy. When unelected, life-tenured federal judges nullify decisions made by elected state judges in cases affecting voters' ability to exercise self-governance, the public may resent federal interference with state democratic processes and question the federal court's authority.

C. *Why Redistricting Commissions Must Be Subject to State Checks and Balances*

Redistricting commissions play a crucial role in American elections. As of 2019, twenty-three states had redistricting commissions of some kind for state legislative districts.²⁵⁸ In the wake of *Shelby County v. Holder*, which struck down the Voting Rights Act preclearance formula,²⁵⁹ and *Rucho v. Common Cause*, which held that partisan gerrymandering claims are not justiciable in federal courts,²⁶⁰ redistricting commissions are key to ensuring maps are fair and elections reflect the majority will. In states like Ohio, where one party—thanks to gerrymandering—holds supermajorities in both chambers of the state legislature²⁶¹ and has occupied the governor's mansion for all but four years since 1992,²⁶² redistricting commissions represent citizens' best hope for restoring meaningful democratic competition, electoral accountability, and checks and balances.

Though redistricting commissions are a crucial tool for ending and preventing one-party rule, they do not always function as intended, so federal courts should hesitate to undermine state judicial authority over them. As the events leading up to *Gonidakis* illustrated, redistricting commissions may be captured by partisans, preventing them from fulfilling their duty to draw fair maps. In fact, an American Bar Association report recommends that elected

²⁵⁷ See generally Bulman-Pozen & Seifter, *supra* note 234 (describing the prevalence of the democracy principle in state constitutions).

²⁵⁸ Fiona Kniaz, *Redistricting: The Road to Reform*, EAGLETON INST. OF POL. CTR. ON THE AM. GOVERNOR 23 (May 2021), <https://governors.rutgers.edu/wp-content/uploads/2021/08/Redistricting-Report-final.pdf> [<https://perma.cc/2PRG-8HNT>].

²⁵⁹ See *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

²⁶⁰ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

²⁶¹ See Samantha Hendrickson, *Republicans Retain Veto-Proof Majority in Ohio House, Senate*, ASSOCIATED PRESS (Nov. 9, 2022, 1:53 AM), <https://apnews.com/article/us-supreme-court-ohio-legislature-religion-a53eae689ac8a0b73bb166c610b82c11> [<https://perma.cc/5H7P-A6VE>].

²⁶² *Party Control of Ohio State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_Ohio_state_government [<https://perma.cc/VNN2-FB3X>] (last visited Oct. 20, 2023).

officials and political appointees not serve on redistricting commissions.²⁶³ The report criticizes Ohio and Virginia's commissions, on which sitting state legislators served, noting that a Virginia state senator manipulated district lines to include his home.²⁶⁴ The report considers New York's independent commission, to which Republicans appointed only former state legislators or former state legislative staffers, similarly problematic.²⁶⁵ The New York commission, on which the report's author served, "failed spectacularly after [it was] unable to reach an agreement . . . due to structural failures in [its] design."²⁶⁶ The Commission could not reach consensus on districts where the Republican vice chair, a former state senator, could have run.²⁶⁷ Counterintuitively, however, redistricting commissions often fail when they are evenly balanced by party.²⁶⁸ Seats on New York and Virginia's commissions were split evenly between the parties, leading to "total paralysis," since every vote essentially needed to be unanimous.²⁶⁹ Further, many redistricting commissions, including New York's, Utah's, and Maryland's, can be overridden by state legislatures.²⁷⁰ In these states, the party controlling the state house has veto power over any map that threatens its political power.²⁷¹ A model redistricting commission, according to the report, would look very similar to those established in California, Colorado, and Michigan, which have "independent, non-politically appointed commissioners," and the power to implement maps on their own, without intervention by any other branch of state government.²⁷²

With the potential for such severe dysfunction, redistricting commissions should not command federal courts' blind deference. Federal courts must recognize the necessary role that state courts play in checking the authority of commissions whose decision-making may be driven by partisan calculations. When a commission fails to act on its mandate, whether due to partisan deadlock or a lack

²⁶³ See David Imamura, *The Rise and Fall of Redistricting Commissions: Lessons from the 2020 Redistricting Cycle*, AM. BAR ASS'N (Oct. 24, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economics-of-voting/the-rise-and-fall-of-redistricting-commissions/ [<https://perma.cc/SNZ9-GQVT>].

²⁶⁴ See *id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See *id.* Soon after the Commission deadlocked, the vice chair announced his candidacy for a district "he himself had been trying to draw mere weeks before."
Id.

²⁶⁸ See *id.*

²⁶⁹ *Id.*

²⁷⁰ See *id.*

²⁷¹ See *id.*

²⁷² See *id.*

of independent authority, it is typically state courts that must step in to ensure that elections can go forward.²⁷³ This role, and the sheer volume of litigation²⁷⁴ it entails, allows state courts to develop expertise—which federal courts often lack—in adjudicating complex redistricting matters under the distinct law and institutional structures of each state. In addition, contrary to the views of the *Gonidakis* majority, redistricting commissions themselves are even worse arbiters of the law that binds them, since they hold a narrow scope of authority relative to state courts, lack state courts’ specialized expertise on state constitutional structures, and may have a strong interest (most obviously when captured by partisans) in consolidating their authority.

D. More Cases Like Gonidakis Are Possible

To create maps for the 2024 election cycle, Ohio will have to endure the pain of redistricting all over again,²⁷⁵ which could spark further federal litigation in which judges must decide whether to side with the Commission or the state supreme court. And despite an effort led by former Ohio Supreme Court Chief Justice Maureen O’Connor²⁷⁶ to amend the Ohio Constitution and create a new redistricting commission without elected officials, the Commission will retain its current composition until at least November 2024, when the proposed amendment could appear on the ballot.²⁷⁷

²⁷³ For an overview of post-2020 redistricting litigation, including the myriad state court suits involving redistricting commissions in Maryland, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Washington, see *Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST. (Jan. 11, 2023), <https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0> [<https://perma.cc/AFS9-G24A>].

²⁷⁴ See *id.*

²⁷⁵ See 599 F. Supp. 3d 642, 675 (S.D. Ohio 2022) (Marbley, C.J., dissenting).

²⁷⁶ Chief Justice O’Connor reached Ohio’s judicial age limit when she turned seventy in 2022—after casting the deciding votes to strike down the Commission’s maps. See Jamilah Muhammad, *Supreme Court of Ohio Chief Justice Maureen O’Connor Weighs in on Redistricting in Final Address*, SPECTRUM NEWS 1 (Sep. 15, 2022, 6:44 PM), <https://spectrumnews1.com/oh/columbus/news/2022/09/15/chief-justice-oconnor-gives-last-judiciary-address> [<https://perma.cc/FW96-LSAQ>].

²⁷⁷ See Haley BeMiller, *Retired Chief Justice Maureen O’Connor Ramps up Efforts for Redistricting Reform in 2024*, COLUMBUS DISPATCH (Feb. 1, 2023, 2:44 PM), <https://www.dispatch.com/story/news/politics/2023/02/01/maureen-oconnor-aims-for-ohio-redistricting-reform-in-2024/69863312007/> [<https://perma.cc/Y92Y-5JT6>]; see also Morgan Trau, *Former Ohio Chief Justice Continues Fight Against Gerrymandered Maps*, NEWS 5 CLEVELAND (Aug. 18, 2023, 6:07 PM), <https://www.news5cleveland.com/news/politics/ohio-politics/former-ohio-chief-justice-continues-fight-against-gerrymandered-maps> [<https://perma.cc/4ZLP-538P>]. To appear on the ballot, the proposed amendment, whose wording has been approved by the state attorney general, will need

While the Ohio Supreme Court's composition and election system have changed since *Gonidakis*, it could very well strike down future Commission-drawn maps. After O'Connor, a Republican swing vote,²⁷⁸ retired due to age limits, voters elected Associate Justice Sharon Kennedy, a staunch conservative, as chief justice.²⁷⁹ Further, Republican Justices Pat DeWine and Pat Fischer won re-election.²⁸⁰ To fill Kennedy's seat, Governor Mike DeWine appointed Joseph Deters, the Hamilton County prosecutor and former state treasurer.²⁸¹ As before, Republicans have a four to three advantage on the Court, but it is unclear how Justice Deters will rule on redistricting.²⁸² If no other justices change their vote positions,

approval from the Ohio Ballot Board. *See Amendment Aimed at Reforming Ohio's Troubled Political Mapmaking System Edges Toward 2024 Ballot*, SPECTRUM NEWS 1 (Oct. 3, 2023, 10:34 AM), <https://spectrumnews1.com/oh/columbus/news/2023/10/03/amendment-for-mapmaking-system>; *see also* Abigail Bottar, *Citizens Not Politicians Resubmitting Summary Language for Ohio Redistricting Amendment Tuesday*, IDEASTREAM PUB. MEDIA (Sept. 5, 2023, 1:03 PM), <https://www.ideastream.org/government-politics/2023-09-05/citizens-not-politicians-resubmitting-summary-language-for-ohio-redistricting-amendment-tuesday> [<https://perma.cc/K2C2-CXHH>]. Its supporters will then have to gather over 400,000 signatures from registered voters. *See Trau, supra*.

²⁷⁸ Prior to 2022, judicial primaries were partisan but general elections were nonpartisan. *See Jackie Borhardt, Should Party Label Appear on Judicial Ballots? Ohio Senate Passes Bill to Make Higher Court Races Partisan*, CINCINNATI ENQUIRER (Apr. 21, 2021, 2:30 PM), <https://www.cincinnati.com/story/news/politics/2021/04/21/ohio-senate-passes-bill-make-state-supreme-court-appellate-court-races-partisan/6872184002/> [<https://perma.cc/F8G2-9YMJ>].

²⁷⁹ *See* Laura Benshoff, *How GOP State Supreme Court Wins Could Change State Policies and Who Runs Congress*, NPR (Nov. 22, 2022, 5:00 AM), <https://www.npr.org/2022/11/22/1138344117/republican-state-supreme-court-abortion-voting-redistricting-ohio-north-carolina> [<https://perma.cc/65VD-LW2N>].

²⁸⁰ *See* Amanda Powers & Douglas Keith, *Key 2022 State Supreme Court Election Results and What They Mean*, BRENNAN CTR. FOR JUST. (Nov. 9, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/key-2022-state-supreme-court-election-results-and-what-they-mean> [<https://perma.cc/2FNS-CP8A>].

²⁸¹ *See Governor DeWine to Appoint Joseph T. Deters to Ohio Supreme Court*, OHIO GOVERNOR MIKE DEWINE (Dec. 22, 2022), <https://governor.ohio.gov/media/appointments/governor-dewine-to-appoint-joseph-t-deters-to-ohio-supreme-court-12222022> [<https://perma.cc/56NV-4LJR>].

²⁸² Laura Hancock, *3rd Republican Judge Announces Campaign for Ohio Supreme Court*, CLEVELAND.COM (May 15, 2023, 12:36 PM), <https://www.cleveland.com/news/2023/05/3rd-republican-judge-announces-campaign-for-ohio-supreme-court.html> [<https://perma.cc/ZZ6Z-N4NE>]. Thanks to legislation passed by the GOP-controlled Assembly in 2021, the November 2022 election was the first in which supreme court candidates ran under party labels in the general election. *See id.* Prior to this change, general elections were nonpartisan, but candidates ran in partisan primaries. *See id.* Because of this, the court's partisan power balance is more formal than before. *See id.*

and if Justice Deters rules as Justice O'Connor did, Ohio would likely be in for a repeat of *Gonidakis*.

State-level litigation in the lead-up to 2024 has already begun. In September 2023, the Commission approved new General Assembly maps that, while heavily gerrymandered, appear slightly more favorable to the Democratic Party than the maps chosen by the *Gonidakis* court.²⁸³ Under the new plan, 62 percent of Ohio House seats and 70 percent of Ohio Senate seats lean Republican.²⁸⁴ Three lawsuits²⁸⁵ challenging the new maps are now before the Ohio Supreme Court, which has “exclusive, original” jurisdiction in General Assembly redistricting cases.²⁸⁶

And though Ohio's particular form of redistricting dysfunction was unique during the post-2020 districting cycle,²⁸⁷ similar situations could arise across the country if legislatures begin restricting state supreme courts' jurisdiction to implement maps after an impasse. When a court is powerless to implement maps on its own, a commission will have less incentive to comply with rulings it dislikes. Such noncompliance, as Ohio showed, leads to districting deadlock, which threatens federal voting rights and triggers federal litigation. If this happens, federal courts must be prepared to minimize damage to state-level democracy by deferring to authoritative state court rulings that enforce anti-gerrymandering provisions.

V. REINING IN ROGUE REDISTRICTING COMMISSIONS: A DEFERENTIAL APPROACH TO STATE COURT DISTRICTING RULINGS

Gonidakis masqueraded as a deferential decision, but it did unnecessary damage to Ohio law by steamrolling the Ohio Supreme Court and disregarding voters' clearly expressed desire to end partisan gerrymandering. This part argues that federal courts should respect state courts as the most appropriate adjudicators of redistricting disputes and exercise deference to them as a means of minimizing intrusion into state processes. Courts should reject

²⁸³ See Samantha Hendrickson, *Bipartisan Ohio Commission Unanimously Approves New Maps That Favor Republican State Legislators*, ASSOCIATED PRESS (Sept. 27, 2023, 11:28 AM), <https://apnews.com/article/redistricting-ohio-maps-dc1840beea861ee5dcd5391d2156802d> [https://perma.cc/CTB9-88WN].

²⁸⁴ *Id.*

²⁸⁵ Jeremy Pelzer, *Ohio's New Legislative Redistricting Plan is Challenged in Court: What Happens Now?*, CLEVELAND.COM (Oct. 9, 2023, 9:00 AM), <https://www.cleveland.com/news/2023/10/ohios-new-legislative-redistricting-plan-is-challenged-in-court-what-happens-now.html#:~:text=COLUMBUS%2C%20Ohio%E2%80%94Three%20legal%20challenges,have%20a%20lot%20of%20time> [https://perma.cc/V6BN-XSU3].

²⁸⁶ OHIO CONST. art. XI, § 9.

²⁸⁷ For a comparison with other states' post-election court battles, see *Redistricting Litigation Roundup*, *supra* note 273.

Gonidakis as an unwarranted—and unprecedented—violation of federalism's core principles and look to Chief Judge Marbley's dissent as a model of judicial deference and pro-democratic restraint.

While federal courts should strive to defer to state courts in this context, deference is not an absolute command and should not be exercised blindly. A state court could, for example, violate the democracy principle,²⁸⁸ infringe on a redistricting commission's legitimately exercised authority, or rubber-stamp partisan maps created by a rogue commission. In these—hopefully rare—situations, the presumption in favor of deference should be overcome by a showing that deference would subvert substantive state anti-gerrymandering provisions or otherwise endanger the health of state-level democracy. The answers to the questions raised in *Gonidakis* are not one-size-fits-all, and any solution requires courts to balance key values of American jurisprudence, including comity, respect for democratic sovereignty, and pragmatism. To maintain a focused scope, however, this Article will not conduct a detailed examination of situations in which federal courts should decline to defer to state court rulings.

A. *Deference to State Courts Minimizes Damage to State Law*

Federal courts can safeguard the integrity of state law by deferring to state court interpretations thereof. Because state courts are the ultimate insiders, rather than “outsiders” like federal courts,²⁸⁹ they are most likely to apply state law in a way that comports with their states' constitutional structures and the substantive commitments to democracy that state constitutional law so often embodies.²⁹⁰ And because state supreme court justices are usually elected or subject to retention votes, their decisions tend to have more democratic legitimacy than those of federal judges.²⁹¹ Since state court decisions are more likely to respect state legal structures and be valid in the eyes of the public, a federal court that honors state rulings is likely to inflict “as little violence [on] state law as possible,” which the *Gonidakis* court purported—but failed—to do.²⁹²

Usually, minimizing damage means staying out of state districting disputes. The U.S. Supreme Court has held many times

²⁸⁸ See Bulman-Pozen & Seifter, *supra* note 234, at 859.

²⁸⁹ See *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (noting that the Supreme Court has referred to itself as “outsiders’ lacking the common exposure to local law which comes from sitting in the jurisdiction.”).

²⁹⁰ See *supra* Part IV.A.

²⁹¹ See *id.*

²⁹² *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 671 (S.D. Ohio 2022); see *supra* Part II.

that “reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.”²⁹³ In line with this principle, federal courts should not obstruct reapportionment nor allow litigation to interfere with it, unless “state branches will fail timely to perform that duty.”²⁹⁴ Even if a federal court becomes obligated to step in and “embark on the delicate task of redistricting,” it should wait as long as possible to do so.²⁹⁵ In *Branch v. Smith*, a 2003 case involving the Mississippi legislature’s failure to implement a redistricting scheme, the U.S. Supreme Court affirmed the district court’s decision to implement a map only after a state court missed the deadline.²⁹⁶ In *Branch*, the district court deferred to state processes by giving “the state court adequate opportunity to develop a redistricting plan.”²⁹⁷

While the *Gonidakis* court likewise waited to step in, it failed to heed one of the lessons of *Branch*: if a state court cannot implement a map on its own, a federal court should be prepared to draw district lines itself or use independent experts to do so. And when a federal court has a choice, as in *Gonidakis*, to affirm a state court decision upholding substantive provisions of state constitutional law or otherwise allow a partisan districting commission to ignore those substantive provisions, it will usually demonstrate maximum respect for state law by siding with the superior arbiter of state constitutional questions—the state court. This principle applies even when a state court is, like the Ohio Supreme Court, expressly prohibited from implementing a map on its own.²⁹⁸ Had the *Gonidakis* court implemented a map not approved by the Commission, but consistent with the Ohio Supreme Court’s interpretation of the state constitution, it might have violated the constitutional requirement that any districting plan be Commission-approved. But it would have ensured that the crucial substantive provisions ensuring political proportionality would govern.²⁹⁹

Even according to the *Gonidakis* majority’s reasoning, federal courts have the authority to make such judgment calls. “[F]ederal courts,” the majority wrote, “have broad equitable discretion and often temporarily implement maps that conflict with state law in some respect to avoid disruptions and to ensure that elections are carried out in an orderly fashion in conformity with

²⁹³ *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

²⁹⁴ *Grove v. Emison*, 507 U.S. 25, 34 (1993).

²⁹⁵ *Branch v. Smith*, 538 U.S. 254, 278 (2003).

²⁹⁶ *See id.* at 258, 282.

²⁹⁷ *Id.* at 262.

²⁹⁸ *See* OHIO CONST. art. XI, § 9(D).

²⁹⁹ *Id.* art. XI, § 6.

federal law.”³⁰⁰ While the district court erroneously considered deference to the Ohio Supreme Court the more disruptive option, it correctly recognized the broader principle that it could countenance one state law violation to prevent a more serious one.³⁰¹

*B. Even if Redistricting Commissions Exercise and Express
Legislative Policy Preferences, No Precedent Suggests Their
Enactments Deserve Deference Over Adverse State Supreme Court
Rulings*

The *Gonidakis* court held that, since state legislatures have “primary jurisdiction over legislative reapportionment,”³⁰² federal courts should be “guided by the legislative policies underlying a state plan.”³⁰³ And since a redistricting commission “exercises and expresses the states’ legislative preferences,”³⁰⁴ the court concluded that the Commission had “primacy.”³⁰⁵ But, in reaching this conclusion, the *Gonidakis* court stretched precedent too far. It could not point to any case holding that a commission is entitled to deference when seeking to implement a map struck down by its state’s highest court.

To support its holding, the *Gonidakis* court cited two district court cases and one circuit court case. In *Navajo Nation v. Arizona Independent Redistricting Commission*³⁰⁶ and *Straw v. Barbour County*,³⁰⁷ district courts granted deference to apportionment plans that violated state law. Neither case, however, involved a commission’s repeated defiance of state supreme court rulings. In *Navajo Nation*, where the district court approved a commission-enacted emergency map despite it not complying with state constitutional notice requirements, no state trial ever even occurred—and the map was far less legally flawed than the districting plan at issue in *Gonidakis*.³⁰⁸ Though the commission-enacted map did not meet the state notice requirements, it “substantially complied” with the Fourteenth Amendment and the Voting Rights Act of 1965.³⁰⁹ Further, the district court did not hold that the state court violated any state constitutional provisions

³⁰⁰ *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 675 (S.D. Ohio 2022) (collecting cases).

³⁰¹ *See id.*

³⁰² *Id.* at 673 (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)).

³⁰³ *Id.* (quoting *Perry v. Perez*, 565 U.S. 388, 393 (2012)).

³⁰⁴ *Id.* at 674 (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015)).

³⁰⁵ *Id.* at 676.

³⁰⁶ 230 F. Supp. 2d 998, 1008 (D. Ariz. 2002).

³⁰⁷ 864 F. Supp. 1148, 1155 (M.D. Ala. 1994).

³⁰⁸ *See Navajo Nation*, 230 F. Supp. 2d at 1003.

³⁰⁹ *See id.* at 1009.

besides the notice requirements.³¹⁰ Crucially, unlike in *Gonidakis*, the need for an emergency map was not manufactured by a recalcitrant commission that refused to conform to state law as interpreted by the state’s high court;³¹¹ instead, the Arizona commission was forced to enact an emergency plan (without the required notice) to respond to an adverse U.S. Department of Justice preclearance decision, which prevented it implementing its previous plan.³¹² However, the commission assured the court that the prior map had been enacted with sufficient notice, that the commission had made “all reasonable efforts . . . to notify the public” of hearings on the emergency map, and that it was “undisputed that many interested parties with disparate views . . . participated in the process of developing” the emergency plan.³¹³

Further, *Straw v. Barbour County*³¹⁴—which *Gonidakis* cited for the proposition that redistricting commissions deserve deference—involved an Alabama *county* commission, even though *Gonidakis* failed to clarify this fact.³¹⁵ In *Straw*, a group of Black residents sued their county in federal court, arguing that county commission district lines violated the Fourteenth Amendment and Section 2 of the Voting Rights Act.³¹⁶ The county subsequently admitted that the lines violated the Fourteenth Amendment, leaving the district court to choose a new map from four options, of which it selected one created by the county commission.³¹⁷ And although the county commission created the new map without giving sufficient notice of its meeting, as required by state law, it was nonetheless a valid legislative enactment that—unlike the unconstitutional Ohio plan—“[did] not suffer from any constitutional or statutory defects.”³¹⁸

Finally, *Gonidakis* cited *Tallahassee Branch of the NAACP v. Leon County*³¹⁹ to establish that “legislative plans receive more deference than court-created plans.”³²⁰ However, like the two district court cases, *Tallahassee Branch* did not involve a state supreme court’s invalidation of a redistricting commission’s map.³²¹ Instead, it expounded the principle that “[w]hen a reapportionment

³¹⁰ See generally *id.*

³¹¹ See generally *id.*

³¹² See *id.* at 1003, 1007.

³¹³ *Id.* at 1008.

³¹⁴ 864 F. Supp. 1148, 1155 (M.D. Ala. 1994).

³¹⁵ See *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 674 (S.D. Ohio 2022).

³¹⁶ See *Straw*, 864 F. Supp. at 1149.

³¹⁷ See *id.* at 1152.

³¹⁸ *Id.* at 1153.

³¹⁹ 827 F.2d 1436 (11th Cir. 1987).

³²⁰ *Gonidakis*, 599 F. Supp. 3d at 674 (citing *Tallahassee Branch of the NAACP v. Leon Cnty.*, 827 F.2d 1436, 1438–39 (11th Cir. 1987)).

³²¹ It, too, concerned a county commission. See *Tallahassee Branch of the NAACP v. Leon Cnty.*, 827 F.2d 1436, 1438 (11th Cir. 1987).

plan is prepared by the *district* court,” the plan is held to a more exacting standard than plans created by state legislative bodies.³²² The case does not support the conclusion that a districting commission deserves deference in the face of an authoritative *state* court ruling striking it down.

C. By Deferring to the Redistricting Commission's Interpretation of the Ohio Constitution, the Gonidakis Court Violated Separation of Powers Principles

The *Gonidakis* majority questioned why “the Commission’s role [would] prove any less substantive than the Ohio Supreme Court’s review,”³²³ holding that separation of powers principles justified overriding the state court’s interpretation of the Ohio Constitution in favor of the Commission’s interpretation.³²⁴ However, by undermining the authority of the Ohio Supreme Court, the *Gonidakis* court exacerbated a separation of powers problem that Ohioans decisively voted to fix.

The *Gonidakis* court justified deference to the Commission on the principle that “[c]oncentration of power in the hands of a single branch is a threat to liberty”³²⁵—but it misidentified which branch posed the threat. Deference to the Ohio Supreme Court would have strengthened state-level separation of powers by restricting the redistricting authority of the executive and legislative branches, as Ohio voters intended in their 2015 constitutional referendum. The state court—mindful of the state constitutional provisions preventing it from implementing a map—never aimed to concentrate power in its own hands, but rather sought to ensure that the Commission abide by the anti-gerrymandering mandate imposed by the 2015 amendment. It recognized that, in the *Gonidakis* majority’s words, “the Commission’s role is essential to a valid electoral map under Ohio’s constitutional scheme” by “acknowledging the court can only review maps passed by the Commission and cannot adopt a map or direct the Commission what to do.”³²⁶

By contrast, the composition of the Commission posed a state-level separation of powers problem, which the federal court’s decision exacerbated. The Commission was dominated by elected officials from the party controlling the state house, who had a strong incentive to undermine their own democratic accountability by

³²² *Id.* (emphasis added).

³²³ *Gonidakis*, 599 F. Supp. 3d at 675.

³²⁴ *See id.*

³²⁵ *Id.* (quoting *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring)).

³²⁶ *Id.* (citing *League of Women Voters v. Ohio Redistricting Comm’n IV*, 2022-Ohio-1235, 2022 WL 1113988, at *15, *17).

skewing maps in their party's favor. By essentially negating state judicial oversight over the Commission, the federal court concentrated power in the hands of politicians whose power was already entrenched by heavily gerrymandered maps.

Further, when a federal court improperly inserts itself into state redistricting processes and infringes on state-level separation of powers, it also violates vertical separation of powers principles. By cutting out the Ohio Supreme Court from its fundamental role in interpreting the Ohio Constitution, the *Gonidakis* majority effectively seized its power. The *Gonidakis* court ensured federal judges' interpretation of Ohio law—not state justices' interpretation—would govern the outcome of Ohio's redistricting. In the future, as Chief Judge Marbley warned, the Ohio Redistricting Commission will know that, when it faces adverse rulings from the Ohio Supreme Court, it can simply ignore them, manufacture an election-jeopardizing crisis, and wait for a federal court to resolve the matter in its favor.

D. Chief Judge Marbley's Approach Would Have Done the Least Damage to State Law

Chief Judge Marbley's solution to Ohio's redistricting mess—the nearly-finished, politically proportional Johnson/McDonald Plan, created by a bipartisan pair of experts under the supervision of the Redistricting Commission—would have maximized respect for the Commission's process, the Ohio Supreme Court's rulings, and Ohio voters' interest in fair state legislative maps.³²⁷ And it would have done this without forcing the district court to override state processes with its own maps.

The *Gonidakis* majority was correct to state that deference to state legislative processes is an important value. As Professor Nathaniel Persily has written, “[d]eference to the legislature is the starting point for judicial involvement in the redistricting process.”³²⁸ Implementing the Johnson/McDonald Plan,³²⁹ a product of the Commission's processes, would have been consistent with the value of deference. As Chief Judge Marbley pointed out, the plan “was crafted under the close direction of the Commission, and was abandoned chiefly for lack of time under circumstances created by the *Commission itself*.”³³⁰ Had the Commission not thrown a wrench into its own processes by stonewalling the Johnson/McDonald map drawers,³³¹ the plan would likely have

³²⁷ See *supra* Part III.B.

³²⁸ Persily, *supra* note 117, at 1132.

³²⁹ See *Gonidakis*, 599 F. Supp. 3d at 685–86 (Marbley, C.J., dissenting).

³³⁰ *Id.* at 690 (emphasis added).

³³¹ See *supra* Part III.B.

satisfied the Ohio Supreme Court and gone into effect—obviating the need for federal intervention.

The Johnson/McDonald Plan would have held up under Ohio Supreme Court scrutiny because it embraced partisan proportionality. Indeed, since the plan “satisfie[d] Article XI as interpreted by the Ohio Supreme Court,” Chief Judge Marbley was confident that it “would pass muster at the Ohio Supreme Court and that the Commission would have adopted [it] with sufficient time and political will.”³³² The Ohio Supreme Court’s rulings, like Chief Judge Marbley’s proposed remedy, would have implemented Ohioans’ democratic vision for their state. Deference, as Chief Judge Marbley wrote, was owed foremost “to the people’s clear command that redistricting is to be fair, bipartisan, and transparent,” not to the constitutionally defiant, partisan Commission.³³³

Crucially, the Johnson/McDonald Plan would—like the majority opinion—have prevented the district court from shouldering the “‘unwelcome obligation’ of venturing deep into the political thicket to draw district lines.”³³⁴ While federal courts must inevitably draw lines in certain circumstances—when adjudicating some claims under the U.S. Constitution or Section 2 of the Voting Rights Act, for example—a federal “court’s [map drawing] task is inevitably an exposed and sensitive one that must be accomplished circumspectly,”³³⁵ as districting is primarily a state responsibility.³³⁶ By leaving the line drawing to experts appointed and supervised by Ohio redistricting authorities, Chief Judge Marbley would have respected the spirit of the constitutional provisions barring a court-imposed map, exercised circumspection, and deftly sidestepped the political thicket.

E. The Gonidakis Decision Violates Principles Reaffirmed by the U.S. Supreme Court in Moore v. Harper

In *Moore v. Harper*, the recent U.S. Supreme Court decision that largely rejected the controversial independent state legislature theory, a six-justice majority (1) held that redistricting authorities are bound by state constitutions, and (2) recognized that state-level judicial review has been integral to the American constitutional order since the founding.³³⁷ And while the Court held that the

³³² *Gonidakis*, 599 F. Supp. 3d at 690 (Marbley, C.J., dissenting).

³³³ *See id.*

³³⁴ Persily, *supra* note 117, at 1165 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

³³⁵ *Connor v. Finch*, 431 U.S. 407, 415 (1977).

³³⁶ *See Growe v. Emison*, 507 U.S. 25, 34 (1993).

³³⁷ *See Moore v. Harper*, 600 U.S. 1, 26 (2023) (“A state legislature may not ‘create congressional districts independently of’ requirements imposed ‘by the state constitution with respect to the enactment of laws.’”).

presumption in favor of deference to state courts can be overcome in extraordinary circumstances, it clarified that decisions like *Gonidakis* go too far.³³⁸

Citing *Arizona State Legislature v. Arizona Independent Redistricting Commission*, which upheld Arizona's redistricting commission, the *Moore* court held that "[w]hatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution."³³⁹ Further, Chief Justice John Roberts, writing for the majority, noted that state judicial review in the United States has deep roots; it originated before *Marbury v. Madison*, "matured throughout the founding era," and was recognized by the founders, including James Madison and Alexander Hamilton.³⁴⁰ Before 1787, "[s]tate courts in at least seven states invalidated state or local laws under their State constitutions,"³⁴¹ and the concept of judicial review was so entrenched "by the time [the Supreme Court] decided *Marbury* in 1803 that Chief Justice John Marshall referred to judicial review as 'one of the fundamental principles of our society.'"³⁴²

While state courts "retain the authority to apply state constitutional restraints" even when legislatures invoke power granted by the federal constitution, "state courts may not . . . exceed the bounds of ordinary judicial review."³⁴³ If this happens, a federal court may step in.³⁴⁴ While the *Moore* court did not specify where these bounds lie, they at least constrain actions that would "unconstitutionally intrude upon the role specifically reserved to state legislatures by [the U.S. Constitution's Elections Clause]."³⁴⁵ Put differently, federal courts should adhere to the "general rule of accepting state court interpretations of state law," but deference to state courts should be "tempered" by "concern that state courts might read state law in such a manner as to circumvent federal constitutional provisions."³⁴⁶

³³⁸ *See id.* at 37.

³³⁹ *Id.* at 25 (citing *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015)).

³⁴⁰ *See id.* at 27.

³⁴¹ *Id.* at 21 (quoting J. SUTTON, 51 IMPERFECT SOLUTIONS 13 (2018)).

³⁴² *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803)).

³⁴³ *Id.* at 37.

³⁴⁴ *See id.*

³⁴⁵ *Id.* The Elections Clause states "The 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, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4.

³⁴⁶ *See Moore*, 600 U.S. at 37. Justice Kavanaugh, concurring, attempted to put a finer point on this standard, embracing Chief Justice Rehnquist's standard from *Bush v. Gore*, opining that federal action is appropriate when "the state court

Although *Moore* concerned the federal Elections Clause specifically, it buttressed longstanding, broadly applicable guardrails on federal court intervention in any matter of state constitutional law. The *Gonidakis* court blew past these guardrails, disrespecting the long history and tradition of state-level judicial review. There was no justification for countermanding the Ohio Supreme Court because there was no concern that the state court violated the federal constitution or abandoned a “fair reading” of state law.³⁴⁷ The *Gonidakis* court’s core dilemma—whether to enforce the Ohio Constitution’s substantive anti-gerrymandering provisions instead of its procedural provisions requiring the Commission to approve any map—did not even involve a dispute over any federal constitutional provision. Instead, the dispute at the heart of *Gonidakis* concerned competing state-level interpretations of the *Ohio* Constitution. It is inconceivable that an Ohio Supreme Court decision giving effect to explicit state constitutional textual guarantees—enacted directly by voters—could exceed the bounds of appropriate state judicial review or improperly infringe on legislative authority, particularly since *Moore* offers a lengthy affirmation of state courts’ power to apply their constitutions. By enforcing the clear, unambiguous text of the state constitution’s anti-gerrymandering provisions, the state court effectuated its most fair reading—one resoundingly approved by Ohioans in 2015.

Even Justice Clarence Thomas’s dissent, in which he and Justice Neil Gorsuch embraced the independent state legislature theory and critiqued the vagueness of the majority’s “bounds of ordinary judicial review” standard, weighs against the sort of federal judicial intervention that defined *Gonidakis*. Justice Thomas “fear[s]” that the majority’s standard will invite federal court interference in matters of state constitutional law that “are not amenable to meaningful or principled adjudication by federal courts” and lead Article III judges to decide the outcome of elections “in the midst of quickly evolving, politically charged controversies.”³⁴⁸ The *Gonidakis* court did precisely what Justice Thomas feared. It inserted itself into a fast-moving, politically charged matter of state constitutional law. It overruled a state court that was better positioned to reach a meaningful and principled decision. And it influenced the size of the majority that Ohio Republicans would win in the 2022 election.

‘impermissibly distorted’ state law ‘beyond what a fair reading required.’” *Id.* at 38 (citing 531 U.S. 98, 133 (Rehnquist, C.J., dissenting)) (Kavanaugh, J., concurring).

³⁴⁷ *See id.* at 38.

³⁴⁸ *Id.* at 65.

CONCLUSION

“Electoral districting creates electoral outcomes.”³⁴⁹ When politicians pick their voters, they make it harder for their constituents to vote them out.³⁵⁰ This makes elected bodies less accountable and less representative of the people they are meant to serve.³⁵¹ Recognizing that democracy breaks down when one party uses gerrymandering to entrench its power, Ohioans overwhelmingly voted to amend the Ohio Constitution and enshrine fair districts in the Buckeye State’s foundational document.³⁵² But the Ohio Redistricting Commission, created by the amendment to draw maps that reflect voters’ preferences and treat parties equitably, abdicated their constitutional duty, subjecting Ohioans to skewed maps once more.³⁵³ The Ohio Supreme Court could not countenance this behavior, but each time the high court struck down one of the Commission’s gerrymanders, the defiant commission simply enacted another.³⁵⁴ The Commission’s intransigence left Ohio without valid state legislative maps just months before the 2022 midterms.³⁵⁵

The three-judge *Gonidakis* court had an opportunity to honor voters’ will, respect the Ohio Supreme Court’s authoritative rulings, and safeguard the health of Ohio’s democracy.³⁵⁶ Instead, it erred by deferring to the Commission instead of the Ohio Supreme Court.³⁵⁷ It chose to respect a state constitutional rule of procedure—that any map be approved by the Commission—instead of the state constitution’s substantive requirement that maps not be drawn primarily to favor or disfavor a political party.³⁵⁸ In doing so, the majority took an arbitrarily narrow view of the deference it owed state-level processes and preferences.³⁵⁹ The judges held that the choices of the Commission should “take precedence” because redistricting commissions are charged with “exercis[ing] and express[ing]” the state’s legislative judgments, and precedent requires courts to defer to those judgments.³⁶⁰ But, as the dissenting judge in *Gonidakis* pointed out, the majority disregarded the anti-gerrymandering policy preference of the voters who had empowered

³⁴⁹ Comment, *Rucho v. Common Cause*, *supra* note 27, at 252.

³⁵⁰ *See supra* Part I.

³⁵¹ *See supra* Part I.

³⁵² *See supra* Part II.

³⁵³ *See supra* Part II.B.

³⁵⁴ *See supra* Part II.B.

³⁵⁵ *See supra* Part II.B.

³⁵⁶ *See supra* Parts IV, V.

³⁵⁷ *See supra* Parts III, V.

³⁵⁸ *See supra* Parts III, V.

³⁵⁹ *See supra* Parts III, V.

³⁶⁰ *See supra* Parts III, V.

the Commission, ignoring that the Ohio Supreme Court had rendered the ultimate map an invalid expression of state legislative policy.³⁶¹

Other federal courts called to adjudicate clashes between a redistricting commission and a state supreme court should—in most cases—defer to state court interpretations of state law.³⁶² While federal court intervention in state districting disputes can risk damaging state law,³⁶³ federal judges can minimize this risk by deferring to state court rulings.³⁶⁴ State courts are insiders when it comes to state law, with specialized expertise gained from experience adjudicating state-level disputes.³⁶⁵ Because state constitutions so often embody substantive commitments to electoral democracy not found in the federal constitution, and since state supreme court judges are usually elected, state court rulings tend to be more democratically legitimate.³⁶⁶ In addition, by approving Map 3, the *Gonidakis* court created vertical and horizontal separation of powers problems.³⁶⁷ By nullifying state court rulings reining in a Commission run by members of Ohio's legislative and executive branches, the *Gonidakis* majority seized authority from the state judiciary, transferring it to the state's political branches and the federal judiciary.³⁶⁸ And although the *Gonidakis* court was right to recognize that precedent counsels deference to state legislative judgments in some cases, no case law suggests that federal courts should defer to such judgments—whether by a commission or legislature—when they fly in the face of authoritative state court rulings.³⁶⁹ In fact, the Supreme Court recently said the opposite in *Moore v. Harper*.³⁷⁰ Nothing suggests that the Ohio Supreme Court, by enforcing the plain text of the Ohio Constitution's anti-gerrymandering provisions, exceeded its proper authority.³⁷¹

As *The Toledo Blade's* editorial board wrote, “If constitutional amendments passed by voters don't matter, the state of democracy in Ohio has reached critical condition.”³⁷² In 2015, Ohio voters rightly recognized that anti-gerrymandering reforms are key to maintaining a healthy, robust democracy in which political leaders are held accountable to the people. By enabling the partisans

³⁶¹ See *supra* Parts III, V.

³⁶² See *supra* Part V.

³⁶³ See *supra* notes 216–219 and accompanying text.

³⁶⁴ See *supra* Part V.A.

³⁶⁵ See *supra* Part V.A.

³⁶⁶ See *supra* Part V.A.

³⁶⁷ See *supra* Part V.C.

³⁶⁸ See *supra* Part V.C.

³⁶⁹ See *supra* Part V.B.

³⁷⁰ See *supra* Part V.E.

³⁷¹ See *supra* Part V.E.

³⁷² Editorial Board, *supra* note 1.

on the Ohio Redistricting Commission to thwart the will of the voters for political gain, the *Gonidakis* majority abdicated its judicial responsibilities, ran roughshod over the Ohio Constitution, and dealt a blow to the state's feeble democracy. Other courts must not repeat its mistakes.