

## **Congressional Redistricting in Ohio**

### **Introduction**

Are Republicans only able to win elections by manipulating the underlying system?

Is the new mantra for the Democratic Party, “Sue Until They’re Blue!”

A fresh assault on how congressional district maps are drawn has led to a slew of litigation across the country. Unfortunately, Ohio is not outside the scope of the controversy. See, [\*Ohio A. Philip Randolph Institute, et al. v. Ryan Smith, et al.\*](#), Case No.: 1:18-cv-00357. In this matter, Democrats are contending that Ohio’s congressional districts are unconstitutionally gerrymandered with Republicans holding a 12-4 majority of representative seats to Democrats over the last four election cycles. Although the number of Republican seats is lopsided, is it unconstitutional or even unfair?

The number of representatives in the United States House of Representatives (“House”) is “apportioned among several states.” See, Article 1, Section 2 of the U.S. Constitution. This is why Ohio has 16 members of the House and others, like New York, has 26. The intent is to reapportion the representatives among the states consistent with the population of that state. See, Section 2 of the 14<sup>th</sup> Amendment. The Bureau of the Census as defined in Title 13 U.S.C. § 11 is responsible for conducting this census.

Like most states, Ohio’s General Assembly is responsible for drawing its legislative districts. Although the statewide elections (governor, attorney general, secretary of state, and auditor) require simple majorities, congressional seats are divided into districts with the winner determined by a majority of voters within these designated areas.

This was all fine until 2011, when the Republican dominated General Assembly approved new congressional map. Since then, Republicans have been repeatedly reelected in 12 of the 16 districts. Now, Democrats are crying foul!

### **Declining Numbers and the Drawing of Ohio’s Congressional Map**

Unfortunately, the decennial census has recorded a steady decline in Ohio’s population from 1990 to 2010 (when the last census was conducted). In 1990, Ohio had 21 members of the United States House of Representatives (“House”). By 2010, this number was reduced to 18. Then, based of the 2010 census count, the number of House seats was again reduced to 16.

As it had done after every other census, the General Assembly was tasked with reapportioning the electorate map. As one would expect, removing two congressional seats while maintaining fairness in the process is not a simple task. There was much debate behind the scenes as to what seats would be discarded and how it would impact future elections. Nevertheless, Ohio had done it effectively since 1991. Why should it be a problem here?

### **Ohio's Redistricting Law**

Ohio's redistricting law can be found at Ohio Rev. Code § 103.51. Legislative task force on redistribution, reapportionment, and demographic research (eff. 07-26-1991). This provision provides that the General Assembly is to be advised by the Joint Legislative Task Force on Redistricting, Reapportionment, and Demographic Research ("Task Force") in drawing Ohio's U.S. Congressional districts. *See* Ohio Rev. Code § 103.51. The Task Force is a six-person, bipartisan committee, with three members appointed by the Speaker of the Ohio House of Representatives and three by the President of the Ohio Senate. *Id.* The proposed congressional map must be approved by both legislative bodies and then signed by Ohio's Governor. *Id.*

As the Republican Party held a substantial majority of the legislature as well as the governorship, Republicans were decisively in control of the process. After working through the Task Force the proposed map became a part of HB 319. The map was passed by the Ohio Senate by a vote of 24-7 and the Ohio House by a vote of 60-35. It was then signed into law by Governor John Kasich on September 26, 2011. Based upon the historical voting history of the redrawn congressional districts they would likely result in 12 Republican seats and 4 Democrat seats.

Nevertheless, this initial map was not without controversy. Trying to prevent further disagreement, the Republicans introduced a second slightly revised map known as HB 369 on November 3, 2011. This revised map was then signed into law by Governor Kasich on December 15, 2011. This second map again presented the 12/4 Republican/Democrat ratio. It was used in the congressional elections in 2012, 2014, and 2016 without any further debate.

However, the tone changed after the 2016 election.

### **Ballot Issue 1**

After the election of 2016, a new movement emerged to change how Ohio's districts are drawn. Apparently, three elections where the Republicans held onto their solid 12 seats had become too much for critics. Understanding the seriousness of the issue, and after months of negotiations between members of the Ohio legislature (Republicans, Democrats, and watchdog/advocacy groups) the Ohio Senate unanimously passed a measure putting the issue of redistricting to the voters of Ohio. In a similar fashion, the House measure received bipartisan support with 80% voting to place the issue on a statewide ballot for Ohio's voters to decide this issue. This became known as Issue 1 during the May 8, 2018 election.

Under the proposed law, the General Assembly would approve a 10-year district map provided three-fifths of the members from each house approve, with at least one-half of the minority party members also voting in its favor. If the legislature is unable to come to agreement, a redistricting commission would then be appointed with the mission of drawing a new map.

The commission would consist of seven members: the governor, state auditor, secretary of state, and four legislators, two who come from the minority party. If this commission

is unable to agree on a map, it returns to the General Assembly. The General Assembly may then adopt it with three-fifths of its members' approval, including one-third of the minority.

If the General Assembly is unable to meet these criteria, then a simple majority is all that is required to implement the new districts. A map created in this manner will only be effective for four years.

Under the constitutional amendment, the Ohio Supreme Court retains exclusive jurisdiction over all challenges under this provision. As the law amends the Ohio Constitution, this will likely have the effect of keeping the jurisdiction of any lawsuits in Ohio and out of the federal court system. Thus, the law keeps within the tradition as envisioned by the authors of Article 1, Section 2 of the U.S. Constitution, that the states retain control of their congressional districts.

This "compromised" system known as Issue 1 won overwhelming approval by the electorate receiving 74.89% of the statewide vote. This new measure will replace the current redistricting guidelines in 2022. Despite these efforts a lawsuit was filed objecting to the lines as redrawn in 2011.

**Ohio A. Philip Randolph Institute, et al. v. Ryan Smith, et al.**

Although most Ohioans are unfamiliar with *Ohio A. Philip Randolph Institute, et al. v. Smith, et al.*, this case may very well change how congressional districts are drawn. This lawsuit, filed on May 23, 2018, generally alleges the congressional districts are drawn in a partisan manner.

Plaintiffs specifically assert:

- 1) The 2011 map burdens their First Amendment Right to Freedom of Speech and Association because the map was intentionally drawn to burden or penalize voters who support the Democratic Party;
- 2) The 2011 map denies them the Right to Vote under the Fourteenth Amendment pursuant to 42 U.S.C. § 1983;
- 3) The 2011 map intentionally discriminates against them by drawing congressional district lines in a manner that dilutes their votes on the basis of political affiliation in violation of the Equal Protection under the Fourteenth Amendment pursuant to 42 U.S.C. § 1983;
- 4) The 2011 map exceeds the states' power as provided for in Article I, Section IV of the U.S. Constitution to run election because the map had the effect of "cracking" and "packing" the individual Plaintiffs and members of the Democratic Party into districts so as to dilute their vote.

(See, Plaintiffs' Amended Complaint).

The relief requested by the Plaintiffs included:

- 1) A declaration that the 2011 Ohio U.S. Congressional redistricting statute, HB 369, and each of the sixteen districts created by that statute are unconstitutional in violation of the First Amendment, the First Amendment and Fourteenth Amendment right to vote, and Article I;
- 2) Declare that Congressional Districts 1, 2, 4, 5, 6, 7, 8, 10, 12, 14, 15 and 16, deprive democratic voters living in those districts an opportunity to elect their preferred congressional candidates, and/or a meaningful opportunity to influence congressional elections, absent special circumstances;
- 3) Declare that under a nondiscriminatory redistricting arrangement, Plaintiffs could reside in a compact congressional district that comports with traditional redistricting principles, and that provide them with an equal opportunity to elect their preferred congressional candidates and/or meaningfully influence congressional elections;
- 4) Permanently enjoin Defendants, their agents, officers and employees, including clerks in all Ohio counties, from administering, preparing for, or moving forward with any future elections of Ohio U.S. Congressional members using the plan enacted in HB 369;
- 5) Permanently enjoin Defendants, their agents, officers and employees, including clerks in all Ohio counties, from administering, preparing for, or moving forward with any future elections of Ohio U.S. Congressional members in Districts 1, 2, 4, 5, 6, 7, 8, 10, 12, 14, 15, and 16;
- 6) Establish a congressional districting plan that complies with the United States Constitution and all federal and state legal requirements, if the Ohio State Legislature and/or Governor fail to enact a new and constitutional plan in a timely manner;
- 7) Permanently enjoin the Ohio General Assembly and Defendants from creating any future legislative districts with the purpose or effect of burdening or penalizing an identifiable group, a political party, or individual voters based on their political beliefs, political party members, registration, affiliation or political activities, or voting histories;
- 8) Make any and all orders that are just, necessary, and proper to preserve Plaintiffs' constitutional rights to equally participate in elections of congressional representatives;
- 9) Award Plaintiffs their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action pursuant to 42 U.S.C. § 1988 and 52 U.S.C. § 1031(e);

10) Grant any and all relief of this Court deems just and proper.

(Plaintiffs' Amended Complaint).

On August 15, 2018, the United States District Court for the Southern District of Ohio denied Defendants' Motion to Dismiss. This matter is now set for trial before a three-judge panel on March 4, 2019. Regardless of the outcome, this matter will likely be appealed to the United States Supreme Court in what has become an active area of litigation in recent years.

### **Partisan Politics and Gerrymandering?**

Perhaps not surprisingly, partisan politics have played a role in drawing congressional districts since the First U.S. Congress in 1789. Anti-Federalist Patrick Henry pressed for redrawing the boundaries of Virginia's 5<sup>th</sup> Congressional District to prevent James Madison from winning a seat in the House of Representatives. Despite his efforts, James Madison won.

"Gerry-mandering" was first seen in an article in the *Boston Gazette* on March 26, 1812. The article was in reaction to then-governor of Massachusetts, Elbridge Gerry, signing a bill redistricting his state in a manner that benefited his Democratic-Republican Party. This oddly shaped district famously resembled a salamander.

The first known use of the term gerrymandering outside of Massachusetts came shortly thereafter. The *Concord Gazette* out of New Hampshire used gerrymandering to describe a dispute in that state on April 14, 1812. It was again published on October 12, 1812 to describe redistricting in Maryland.

The practice of gerrymandering was also used regularly when new states entered the union with the Republican's control of the admission process. Although certain types of gerrymandering have been found unconstitutional, i.e., racial discrimination (*Shaw v. Reno* 113 S. Ct. 2816 (1993)), partisan gerrymandering has posed a greater challenge given the inherent nature of politics impacting the drawing of congressional districts.

Simply, the idea of politics or partisan views coming into redrawing of congressional districts is not new. It is as old as the existence of the lines themselves.

### **Partisan Gerrymandering and the United States Supreme Court**

Partisan gerrymandering has challenged the United States Supreme Court. And while the court has held that it is justiciable, it has been unable to set a defined standard of what qualifies as unconstitutional partisan gerrymandering. See, *Davis v. Bandemer* 478 U.S. 109 (1986). The justices simply cannot agree on an appropriate constitutional standard by which to judge such allegations.

In *Vieth v. Jubelirer* 541 U.S. 267 (2004), the Supreme Court again revisited the topic. Again, no clear standard emerged for lower courts to evaluate partisan gerrymandering claims. In his concurrence with the plurality decision, Justice Anthony Kennedy suggested that a manageable means of determining the existence of partisan

gerrymandering could be found and tasked the lower courts to realize such a method. *Id.* at 312. So far, no single manner of judging partisan gerrymandering has emerged.

More recently, the Supreme Court failed to address the issue of partisan gerrymandering more directly. *Gill, et al. v. Whitford, et al.*, 585 U.S. \_\_\_\_ (2018) and *O. John Benisek, et al. v. Linda H. Lamone, et al.*, 138 S.Ct. 1942. In *Gill*, the offending maps allegedly prevented fair and effective representation by diluting voters' influence and penalizing voters because of their political beliefs. *Gill, et al. v. Whitford, et al.* The Court, with a 9-0 ruling, dismissed the case for a lack of standing and remanded it back to the lower court.

In *Benisek*, Republicans challenged a district map drawn by Democrats. In an unsigned opinion, the United States Supreme Court held that the Republicans failed to reach the high standard of "irreparable harm" that must be established for an injunction (such as the relief sought here) to be granted. As such, the Court affirmed the district court's decision not to enjoin the contested map, noting that its denial was not an abuse of discretion.

### **Did the redrawing of the congressional map change anything, really?**

The Plaintiffs in the Ohio lawsuit claim the present map "was not created by this official legislative process, but instead in covert, backroom dealings among various national and Ohio Republican officials and operatives." See *Ohio A. Philip Randolph Institute, et al. v. Ryan Smith, et al.*, Plaintiffs' Amended Complaint at ¶52. Yet, the 2011 map was approved exactly as envisioned by Ohio Rev. Code § 103.51. A map was proposed by the Task force and approved by the General Assembly. It was then signed by Governor Kasich pursuant to the 1991 law.

Plaintiffs further allege the technique utilized by the Republicans involves "cracking" and "packing":

The map drawers used the indices to design districts that would maximize the number of congressional districts in which a Republican would consistently win by manipulating the district boundaries around population. They planned to allow Democrats to win 4 districts, by packing Democratic voters into these districts, but carefully crafted the other 12 districts to ensure Republican wins that would endure across elections, often by cracking voters across district lines so that, absent special circumstances, these voters would never have the opportunity to elect their candidates of choice.

(*Id.* at ¶ 61).

Drawing this logic to an extended conclusion, do Republicans residing in one of the uncontested districts (3, 9, 11 and 13) have an argument that their rights have been violated? For instance, a voter in Youngstown, Ohio has been unable to elect a Republican

to the United States House of Representatives over the last 20 years. Is this really what was intended when the lines were being drawn? Will the Plaintiffs support redrawing these areas into more competitive districts where the Democrats may lose control of these seats? Of course not.

The difficulties facing Democrat candidates against incumbent Republicans in these districts are real, no question about it. Yet, having difficulty electing a representative of their choosing does not make the entire process unconstitutional.

### **What did the Democrats really lose?**

The law governing the General Assembly was passed in 1991. *See* Ohio Rev. Code § 103.51. What is being contested is not the law, but whether the Republicans redistricting is facially unconstitutional under the First and Fourteenth Amendments. The law is valid. What is being measured is *how* the General Assembly redrew the districts in 2011. Again, the redraw followed the law and the legislatures and governor acted accordingly.

What is also interesting is that Democrats did not challenge any of the prior congressional elections since the redrawing of the lines were made law (i.e., 2012, 2014, and 2016). Nor did the Democrats contest the prior redistricting efforts from 1991 or 2001. A little historical review helps put the whole matter into perspective.

In 1990, Ohio had 21 members of the House of Representatives. Because of the 1990 census the number was reduced to 19 in 1991. In 1992, Democrats held a slim majority of 10 seats to Republicans' 9. In 1994, Republicans won 13 seats and Democrats won 6. The trend continued in 1996 with Republicans winning 11 and Democrats taking 8 seats. In 1998 and 2000, Republicans held an 11 – 8 advantage.

The 2000 census again impacted the number of House seats to be apportioned in Ohio. In 2001, the General Assembly was again tasked with redrawing the congressional map with only 18 districts. It did so using the 1991 law. That map remained in place without contest.

Interestingly, in 2002 and 2004, Republicans held a 12-6 advantage. In 2006, the numbers still favored Republicans 11 and Democrats 7. In 2008, with record turnout in support of President Barack Obama's election, Democrats won 10 seats and Republicans 8. Then in 2010, the tide shifted back to 13 Republicans and 5 Democrats winning their congressional races.

Also, aside from 4 years, 2006-2010, Republicans won the critical statewide races (governor, secretary of state, treasurer, and attorney general). Perhaps most importantly, the Republicans held these key seats at the time of the lines were being redrawn (i.e., 1991, 2001, 2011).

To categorize Ohio's current congressional districts as gerrymandered may be fair. However, what unfair result has come from the process of redrawing the districts? Just because a candidate declares to run does not entitle him or her to victory. A voter may

support an individual candidate but that support alone does not equate to success at the ballot box.

Each district has unique factors involved in each race. The hard truth is that incumbents win reelection at a very high rate. This is not a new. In fact, an overwhelming majority of incumbents in House races since 2011 won: 90% (2012), 94% (2014), 97% (2016), and 91% (2018). [www.opensecrets.org](http://www.opensecrets.org).

The reality is that after the 2010 census, Ohio's congressional representatives was reduced by 2 members. Through the entire redrawing process (and now millions of dollars in ballot initiatives and lawsuits) Democrats lost one seat. The number of Democratic incumbents went from 5 to 4. Yet, their incumbents remained secure in their seats and reelected multiple times.

At the same time, the Republicans reduced their number of potential House seats by one also. The final result could have been far worse with the Democrats losing both seats and the Republicans holding an even stronger majority. But that did not happen here. Both parties sacrificed one congressional seat.

### **Conclusion**

How can something be considered unconstitutional without a clear understanding of what is fair and neutral? The Supreme Court has been unable to establish a decision by which to measure partisan claims. As such, the three-judge panel faces an impossible task of trying to identify a wrong without being able to define the right way to redraw these districts.

The panel may look at alternative maps or listen to experts who pontificate on the issue. Yet, the simple reality is that the Democrats failed to win elections necessary for them to have greater influence at the time of redrawing the congressional map. Instead of winning enough seats in the Ohio legislature or the executive branch, they have moved to asking a federal court to provide them with the authority to redraw the districts more favorably to their candidates.

President Barack Obama commented in 2008 that “[e]lections have consequences.” Now it seems the Democrats have decided that if they can't win during the redistricting process they want the process scrapped and have the issue decided by federal judges and not the states as envisioned in the U.S. Constitution. Now that doesn't seem right, fair, just or necessary.

George Zamy is the founder of the Zamy Law Firm, LLC and has been involved in politics and campaigns on the local, statewide and national levels. Mr. Zamy practices in the areas of election law, estate planning, corporate and employment law, civil litigation and small business representation in both Ohio and Kentucky. Visit [www.zamaryl.com](http://www.zamaryl.com) for more information and to sign-up for their newsletter or visit their page on [Facebook](https://www.facebook.com/zamaryl.com). Zamy Law may be contacted at 513-448-4150.



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