IN THE
SUPREME COURT OF OHIO

LEAGUE OF WOMEN VOTERS OF OHIO, *et al.*, Relators, v. OHIO REDISTRICTING COMMISSION, *et al.*, Respondents.	Case No. 2021-1193 Original Action Pursuant to Ohio Const., Art. XI Apportionment Case
BRIA BENNETT, *et al.*, Relators, v. OHIO REDISTRICTING COMMISSION, *et al.*, Respondents.	Case No. 2021-1198 Original Action Pursuant to Ohio Const., Art. XI Apportionment Case
THE OHIO ORGANIZING COLLABORATIVE, *et al.*, Relators, v. OHIO REDISTRICTING COMMISSION, *et al.*, Respondents.	Case No. 2021-1210 Original Action Pursuant to Ohio Const., Art. XI Apportionment Case

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INTRODUCTION

In its first opinion invalidating the Commission's original adopted General-Assembly Plan, this Court held that the goal, if not the requirement, is for the Commission to adopt a plan that achieves proportionality, measured as a 54-46% split between Republican- and Democratic-leaning seats in the General Assembly. *See League of Women Voters of Ohio v. Ohio Redistricting Commission*, Slip Opinion No 2022-Ohio-65 ("First Opinion"). In its second opinion invalidating the Commission's second approved General-Assembly Plan, this Court held that a plan that included 12 seats leaning Democratic by less than 51% and zero seats leaning Republican by the same margin violated the Ohio Constitution due to political asymmetry. *See League of Women Voters of Ohio v. Ohio Redistricting Commission*, Slip Opinion No 2022-Ohio-342 ("Second Opinion").

In response to these two opinions, the Commission approved a new plan (the "February 24 Plan") that achieved the exact 54-46% strict-proportionality ratio that this Court identified as the goal in its First Opinion. Further, it reduced the number of seats leaning Democratic by less than 51% from 12 to five, moving Democratic-leaning seats out of that range into safer territory for Democrats. Moreover, the February 24 Plan complies with the remaining requirements of Article XI, Sections 2, 3, 4, 5, and 7.

Nonetheless, the Democratic members of the Commission voted against the latest plan, ensuring it will last only four years, and the Petitioners maintain that the plan still violates the Ohio Constitution. In pursuing this renewed challenge, Petitioners contend that this Court should move the goalposts. Now that there are significantly fewer remaining seats leaning Democratic by 51% or less, they assert that the relevant measure is ***52%*** or less, and then complain that many Democratic-leaning seats still fall within this expanded range. They further

assert that this Court should essentially mandate an alternative plan—one that contains ***fewer*** Democratic-leaning General-Assembly seats than the Commission-approved plan.

The Court should overrule Petitioners' objections and uphold the February 24 Plan. Ultimately, given the Court's prior holdings in this litigation that Article XI, Section 6 is enforceable on its own, the question before this Court now is whether the Court should pick and choose between competing plans that assign different weight among the three distinct and potentially conflicting goals set forth in Section 6. The Court should not engage in such an exercise. The February 24 Plan satisfies proportionality without compromise, while at the same time significantly reducing the number of seats leaning Democratic by less than 51%. These are the two principal concerns that the Court identified in its prior opinions in this matter. The Court should uphold the February 24 Plan and reject Petitioners' efforts to find new reasons to delay Ohio's upcoming elections.

STATEMENT OF FACTS

Rather than repeat the Commission's statement of facts in its response to Petitioners' previous objections and the Commission's background facts in response to this Court's order to show cause, the Commission's incorporates those statements herein and provides additional updated facts.

On February 24, 2022, the Commission, by a 4-3 vote, adopted a newly revised plan. The February 24 Plan achieves strict proportionality, with 54 Republican-leaning seats in the Ohio House of Representatives and 18 Republican-leaning seats in the Ohio Senate. The February 24 Plan further reduces the number of House seats leaning Democratic by less than 51% from 12 to five. This was the same number as the plan that Leader Russo had moved into consideration on February 17, 2022. Likewise, in the February 24 Plan, only two Senate seats lean Democratic by less than 51%.

ARGUMENT

A. Standard of Review.

In its First Opinion, this Court adopted the same standard of proof as in *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, ¶ 18-24 (2012). *See* First Opinion ¶ 78. Thus, "the burden of proof on one challenging the constitutionality of an apportionment plan is to establish that the plan is unconstitutional beyond a reasonable doubt. In the absence of evidence to the contrary, [the Court] must presume that the apportionment board performed its duties in a lawful manner." *Id*. Petitioners fail to meet their high burden to prove that the February 24 Plan is unconstitutional beyond a reasonable doubt. As this Court clarified, challenges to district maps "are not ordinary civil cases," and as such "it is well-settled that the challenging party faces the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt." First Opinion ¶ 78.

B. The February 24 Plan Achieves Strict Proportionality.

In its First Opinion, this Court held that to determine statewide voter preferences, the relevant measure is the "percentages of votes received by the candidates of each political party based on the total votes cast in statewide state and federal partisan elections during the preceding ten years." First Opinion ¶ 108. In this case, those percentages correspond to approximately 54% Republican-leaning General-Assembly seats and 46% Democratic-leaning seats. *Id.*

The February 24 Plan achieves those targets exactly. As the Commission explained in its January 28, 2022 Response to Petitioner's Objections, Section 6(B) does not require a plan to achieve strict proportionality in order to be constitutional, and this Court's opinions in this litigation do not hold otherwise. But the acceptable bounds of "close[] correspond[ence]" to proportionality are no longer relevant in this case, because the February 24 Plan achieves strict

proportionality. This achievement, in and of itself, should, at the very least, cast considerable doubt on any claim that the plan violates Sections 6(A) or 6(B).

C. The February 24 Plan Satisfies This Court's Concerns Regarding Political Asymmetry.

In its Second Opinion, the Court found that the Commission's January 22, 2022 Revised Plan did not comply with Section 6(A) and (B) because of political asymmetry. Specifically, the Court found that in the January 22 Plan, 12 House districts leaned Democratic by less than 51%, and nine of those districts leaned Democratic by less than 50.5%, while no Republican-leaning House district leaned Republican by less than 51%.

Regarding Section 6(A), the Court concluded that "[w]hile the Constitution does not require exact parity in terms of the vote share of each district, the [C]ommission's adoption of a plan in which the ***quality*** of partisan favoritism is monolithically disparate is further evidence of a Section 6(A) violation." *Id*. at ¶ 40. "In other words, in a plan in which every toss-up district is a 'Democratic district,' the [C]ommission has not applied the term 'favor' as used in Section 6(B) equally to the two parties." *Id*. "The [C]ommission's adoption of a plan that absurdly labels what are by any definition 'competitive' or 'toss-up' districts as 'Democratic-leaning'—at least when the plan contains no proportional share of similar 'Republican-leaning' districts—is demonstrative of an intent to favor the Republican Party." *Id*.

Regarding Section 6(B), the Court held that, based on the same comparison of districts leaning Democratic by less than 51% versus districts leaning Republican by the same measure, "the quality and degree of favoritism in each party's allocated districts is grossly disproportionate." *Id*. at ¶ 61. "When 12 of the 42 'Democratic-leaning' House districts (i.e., more than 25 percent) are very close 'toss-up districts' yet there are [zero] 'Republican-leaning' districts that are similarly close, the proportion of districts whose voters 'favor' each party is not

being assessed properly." *Id*. Nonetheless, the Court made clear that it does "not read Section 6(B) as prohibiting the creation of competitive districts." *Id*. at ¶ 62. "But competitive districts—which the 12 districts identified by [Petitioners' expert] Dr. Imai surely are, under any reasonable measure—must either be excluded from the proportionality assessment or be allocated to each party in close proportion to its statewide vote share." *Id*.

In response to these holdings, the Commission adopted a newly revised plan that addresses the Court's concerns regarding political asymmetry. While the January 22 Plan contained 12 districts leaning Democratic by less than 51%, the February 24 Plan reduced this number to five Districts. As this Court held, the Ohio Constitution does not "prohibit[] the creation of competitive districts." *Id*. Rather, such districts must be "allocated to each party in close proportion to its statewide vote share." *Id*. Under that analysis, the February 24 Plan removes seven of the 12 previously identified Democratic-leaning competitive districts, resulting in only five remaining Democratic-leaning competitive districts. This is sufficient to address the Court's political-asymmetry concerns.

To achieve this new result, the Commission increased the Democratic lean of several districts, moving them from under 51% to over 51%. In response, Petitioners now claim that any district that leans Democratic by less than 52% is similarly flawed. But nothing in the Court's opinions suggested that the measure identifying districts as "competitive" is adjustable to include whatever range opponents of an adopted plan choose in an effort to challenge the plan. In response to the Court's concerns, the Commission adopted a map that reduced the competitiveness of several Democratic seats, making them less competitive and safer for Democrats. Petitioners ignore this progress and simply claim that the Commission's adopted plan still is not good enough.

Ultimately, in challenging the February 24 Plan, Petitioners ask this Court to pick and choose between conflicting principles within Section 6. On the one hand, as this Court's First Opinion made clear, the goal is to adopt a plan that, if possible, closely corresponds to the strict-proportionality standard set forth in that Opinion. On the other hand, as this Court's Second Opinion explained, a plan may be unconstitutional if the number of "competitive" districts leaning in favor of one party is significantly higher than the number of competitive districts leaning in favor of the other party. Taking this guidance into account, the Commission adopted a plan that achieved strict proportionality as this Court defined the concept. Further, the Commission significantly reduced the number of "competitive" Democratic-leaning districts as the Court defined ***that*** concept. Petitioners prefer a different division among these competing concepts. They would prefer ***fewer*** Democratic-leaning seats, and that the remaining Democratic-leaning seats be less competitive. But the Ohio Constitution does not require this result. Rather, as explained in earlier briefing, the Commission must be allowed some degree of deference in choosing a plan that takes into account the potentially divergent goals set forth in Section 6. If an adopted plan is among those that fall within the constitutional boundaries of such a choice, then this Court should not engage in the exercise of considering whether it would choose a different plan.

Indeed, in stating a preference for fewer and stronger Democratic-leaning seats, the Petitioners reveal a fundamental flaw in their analysis. Petitioners claim that the February 24 Plan is still unconstitutionally asymmetrical because competitive Democratic-leaning districts (arbitrarily defined as districts leaning Democratic by less than 52%) still significantly outnumber similarly competitive Republican-leaning districts. But they prefer fewer seats that lean Democratic ***at all***, indicating instead a preference for additional ***Republican***-leaning

districts. Of course, one way to achieve this would be to retain an extremely narrow Republican lean in a few additional districts. If the Commission were to adopt such a plan, the number of Republican-leaning seats could be identical to the Petitioners' preferred plan. But when considering political asymmetry, there would be some "competitive" Republican-leaning seats, as defined by Petitioners, to offset the number of so-called "competitive" Democratic-leaning seats. Instead of this path, the Commission adopted a plan that actually moved these seats into the Democratic-leaning column. Because of this, Petitioners contend that the ratio of competitive Democratic- and Republican-leaning seats remains unconstitutional. That cannot be the proper analysis. Certainly, in this circumstance in which the challenge is to find additional opportunities for Democrats to win General-Assembly seats, moving some seats to the Democratic-leaning column is better than moving seats closer to that line without crossing it.

D. This Court Should Reject Petitioners' Proposed Remedies.

Finally, the Court should reject Petitioners' various suggested Remedies that go beyond determining whether the February 24 Plan satisfies the Ohio Constitution. Petitioners ask the Court to either order that the Rodden III Plan they prefer be implemented or, at the very least, indicate (in an advisory opinion) that the Rodden III Plan would satisfy the Ohio Constitution. But the only plan in front of this Court now is the February 24 Plan adopted by the Commission. This Court's task is simply to determine whether that plan satisfies constitutional requirements, not whether the Court itself would prefer some other potential plan. The Ohio Constitution expressly states that "[n]o court shall order, in any circumstance, the implementation or enforcement of any [G]eneral[-][A]ssembly district plan that has not been approved by the [C]ommission." Ohio Const., Art. XI, § 9(D)(1). It further expressly states that "[n]o court shall order the [C]ommission to adopt a particular [G]eneral[-][A]ssembly district plan or to draw a particular district." *Id.* § 9(D)(2). The language cannot be clearer. When Ohioans voted to

amend Article XI, they made clear that among the changes they made to the General-Assembly map-drawing process, those changes did ***not*** include appointing this Court, representing the judiciary branch of Ohio's government, as the ultimate map-drawer. Nonetheless, the Bennett petitioners suggest that these clear limitations on the Court's remedial power should "bend in the moment" (Bennett Objection at 36) to give effect to the remainder of Article XI. This is not a viable option for the Court to consider. The express language of the Ohio Constitution precludes this Court from ordering the adoption of any particular plan. It represents a clear choice by Ohioans to respect separation of powers when it comes to which branch of government should draw General-Assembly plans. Rather, the sole question before this Court is whether the Commission's adopted February 24 Plan is constitutional. That plan achieves strict proportionality and significantly reduces the number of Democratic-leaning districts that lean Democratic by less than 51%. Because the February 24 Plan addresses directly these issues that led the Court to invalidate prior Commission-approved plans, the Court should uphold the February 24 Plan and allow Ohio's elections to move forward.

CONCLUSION

The February 24 Plan responds directly to the principal concerns that this Court raised in its two previous opinions invalidating previous Commission-approved plans. It achieves strict proportionality and significantly reduces the number of seats leaning Democratic by less than 51%. The Court should reject Petitioners' invitation for the Court to engage in additional subjective analysis of choosing any preferred alternative plan over the one the Commission approved. Rather, for the reasons set forth herein, the Commission respectfully requests that the Court overrule Petitioners' objections and hold that the February 24 Plan is constitutional.

Dated: March 3, 2022 Respectfully submitted,

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