IN THE SUPREME COURT OF OHIO

THE OHIO ORGANIZING COLLABORATIVE, *et al.*, *Relators*, *v.* OHIO REDISTRICTING COMMISSION, *et al.*, *Respondents*.	:	Case No. 2021-1210 **APPORTIONMENT CASE** Filed pursuant to S.Ct.Prac.R. 14.03(A) and Section 9 of Article XI of the Ohio Constitution to challenge a plan of apportionment promulgated pursuant to Article XI.

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GLOSSARY OF CITATIONS TO EVIDENCE

Citation	Description
DEPO_ [deponent]	Deposition transcripts and exhibits, submitted in volumes with the Stipulation of Evidence (Depositions transcripts and exhibits), by page number. The name of the deponent appears in brackets. For example: (DEPO_01583-01584 [Cupp])
Docs., Vol. _, Item _, [Bates]	Documents produced in discovery, submitted in volumes with the Affidavit of Freda J. Levenson, by volume, item, and Bates number.
HIST_	Historical records such as legislative history, submitted in one volume with the Affidavit of Derek Clinger, by page number.
Imai Aff. ¶ _	Affidavit of Dr. Kosuke Imai, submitted in one volume with the Affidavit of Danielle Stewart (Affidavits of Additional Expert Witnesses), by paragraph number.
OOC_	Affidavits of relators/witnesses and expert affidavit of Dr. Michael S. Latner, submitted in one volume with the Affidavit of Danielle Stewart, by page number.
RESP_	Responses to written discovery, submitted in volumes with the Affidavit of Freda J. Levenson, Evidence of Relators, Written Discovery Responses, by page number.
Rodden Aff. ¶ _	Affidavit of Dr. Jonathan Rodden, submitted in one volume with the Affidavit of Danielle Stewart (Affidavits of Additional Expert Witnesses), by paragraph number.
STIP_	Hearing transcripts, minutes, and other items posted by the Ohio Redistricting Commission on its website, submitted in volumes with the Stipulation of Evidence filed on October 19, 2021, by page number.

INTRODUCTION

In pursuit of a more perfect form of government, the people of Ohio have adopted their state constitution to establish a representative democracy. In Ohio, democracy means that "[a]ll political power is inherent in the people" and that government exists for the people's "equal protection and benefit." Ohio Constitution, Article I, Section 2. It means that the people have the right to "freely speak" and "assemble together * * * to consult for their common good." Ohio Constitution, Article I, Sections 3 & 11. And, it means that Ohioans come together as equals at the ballot box to choose their representatives in the halls of government. Ohio Constitution, Article I, Section 2.

Yet partisan gerrymandering has all too often debased these fundamental rights of self-governance. Partisan gerrymanders involve the systematic manipulation of electoral districts to advantage the voters of one political party. An effective gerrymander thus gives greater weight to voters who support the favored political party, and leaves disfavored voters hamstrung in joining together to advance their political beliefs. In short, gerrymandering undermines the basic principle that governmental power derives from the people.

Recognizing Ohio's recent history of partisan abuses, in 2015, the people of Ohio sought to further perfect their union by taking partisan gerrymandering head on. Ohioans resoundingly approved—on a bipartisan basis and with more than 71 percent of the vote—a constitutional amendment intended to create a "fair, bipartisan, and transparent" redistricting process. (HIST_0098) Among other key reforms, voters directed the Ohio Redistricting Commission to follow specific partisan fairness standards when drawing maps. *See* Ohio Constitution, Article XI, Section 6(A), (B). They also granted this Court new Article XI jurisdiction and remedies to address violations of the Ohio Bill of Rights and other constitutional provisions during

redistricting. *See* Ohio Constitution, Article XI, Sections 3(B)(2), 9(D)(3). Thus, Article XI protects and creates a vehicle for enforcing Ohioans' right to vote on equal terms and to associate together to advance their political objectives, both of which are implicated when a map favors some voters over others on the basis of political party.

Flouting the intent of the voters in amending Article XI, the Ohio Redistricting Commission passed a General Assembly district plan that violates the Ohio Constitution in multiple respects. Drawn in private by Republican legislative caucus staff under the direction of the Senate President and House Speaker, introduced nine days after the relevant deadlines, and passed along a 5-2 party-line vote, the plan entrenches a veto-proof Republican supermajority in both chambers of the General Assembly for the next four years. It achieves this result by targeting and disadvantaging Democratic voters and cracking and packing them into gerrymandered House and Senate districts.

The results are stark: the same vote share that would give Republicans a veto-proof supermajority in the House would fail to give Democrats even a simple majority. And by the Commission's own calculations, Republicans are expected to win 64 percent of General Assembly seats even though they won only 54 percent of the vote in statewide elections held over the past decade. These results cannot be explained by chance or by Ohio's political geography. Rather, the plan's partisan bias renders it an extreme outlier when compared with other maps that comply with the Ohio Constitution.

To justify these skewed maps, Republicans on the Commission put forward the explanation that a Republican supermajority map was constitutional because Republicans had won 81 percent of statewide races since 2012—an explanation so bizarre that one of the Republican members called it "asinine" in private. (DEPO_00158)

This cynical power grab is precisely what the voters tried to stop—and they amended Article XI to create a safeguard against such abuses in this Court. The remedy under the Ohio Constitution is clear. This Court should declare the enacted General Assembly district plan invalid and order the Commission to draft a new plan in accordance with the Ohio Constitution.

STATEMENT OF FACTS

I. Redistricting Under the Ohio Constitution

The Ohio Constitution has long recognized individual rights that are essential ingredients of representative democracy. Ohio's existing Bill of Rights dates back to 1851, when voters ratified the results of a constitutional convention. Section 2 of Article I provides that all political power resides in the people, that government is "instituted for their equal protection and benefit," and that they have a "right to alter, reform, or abolish" their government. Ohio Constitution, Article I, Section 2. Ohio was the first State in the nation to combine principles of equality with the affirmative right to alter or reform the government. Ohio's Constitution further provides that the people have the right to assemble together, for their common good, to instruct their representatives, and to speak freely. Ohio Constitution, Article I, Sections 3 & 11.

The Constitution of 1851 also included Article XI, which took the power to draw electoral districts away from the General Assembly and reposed that power in an apportionment board. The people's objective "was the *prevention* of gerrymandering." (Emphasis added.) *State ex. rel. Herbert v. Bricker*, 139 Ohio St. 499, 509, 41 N.E.2d 377 (1942). In other words, Article XI's objective was to create a system and procedure that would lead to fair districts and *prevent* abuses of power by political parties. The people's prophylactic objective—to create a system that produces fair maps in the first instance—at times proved elusive. Notwithstanding Article XI, map drawers have deployed their ingenuity to create unfair partisan plans. But this has not been a

reason to abandon the overarching objective. Instead, instituting government for the equal protection and benefit of the people has required continued effort—and enforcement.

In 1967, for example, Ohioans amended Article XI of the Ohio Constitution to implement the principle that each vote should have equal value. *See State ex rel. King v. Rhodes*, 11 Ohio St.2d 95, 100, 228 N.E.2d 653 (1967); *Nolan v. Rhodes*, 251 F.Supp. 584, 586 (S.D.Ohio 1965). Specifically, Article XI required that House and Senate districts should "be apportioned on a substantially equal-population basis." *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 72 (McGee Brown, J., dissenting). And since 1967, this Court has had original jurisdiction over all cases arising under Article XI.

Thus, in 1992, this Court considered a challenge to a Senate district whose population fell below the equal-population requirements of former Section 4 of Article XI. *Voinovich v. Ferguson*, 63 Ohio St.3d 198, 200, 586 N.E.2d 1020 (1992) (per curiam). The Court held that this shortfall was reasonably attributable to the apportionment board's effort to comply with other conflicting provisions. Because those provisions were "coequal" and "irreconcilable," a per curiam majority held that the board effectively had discretion to choose how to carry out irreconcilable commands. *See id.* In a single-judge concurrence, Justice Holmes opined that the board was entitled to the deferential *mandamus* standard of review, albeit without acknowledging that he was importing the mandamus standard of review into a case over which the Court had original jurisdiction under then-Section 13 of Article XI.

In 2012, in *Wilson v. Kasich*, this Court considered whether Article XI required "political neutrality" and whether the apportionment board's General Assembly district plan otherwise violated Article XI. The Court held that Article XI, as it then existed, did not mandate political neutrality. *Wilson* at ¶ 16. The Court also held that Article XI's provisions were in conflict and

therefore conferred discretion on the board to choose among them. And, in considering the relators' burden of proof and the legal standard for evaluating claims under Article XI, the Court quoted from Justice Holmes' solo concurrence in *Voinovich*, 63 Ohio St.3d at 204, which had in turn quoted the Court's 1891 mandamus decision in *State ex rel. Gallagher v. Campbell*, 48 Ohio St. 435, 27 N.E. 884 (1891). *See Wilson* at ¶ 17. Under this deferential "mandamus" framing, the Court held that "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." *Wilson* at ¶ 24.

In the wake of *Wilson*, the people of Ohio wanted *enforceable* constitutional rights against partisan gerrymandering. Accordingly, in 2014, the General Assembly adopted a joint resolution to propose amendments to Article XI (HIST_0015), which appeared before the people as Ballot Issue 1 (*e.g.*, HIST_0096). The intent of these reforms was clear. The amendments to Article XI specifically deleted constitutional language that this Court had regarded as creating discretion in *Wilson*. For instance, the 2015 amendments eliminated former Section 7(D), which had required the apportionment board to adopt a prior plan's boundaries "to the extent reasonably consistent" with former Section 3, an equal-population provision. The 2015 amendments also created express new remedies for violation of the Ohio Bill of Rights, by incorporating compliance with the Ohio Constitution into Article XI as a redistricting standard, *see* Ohio Constitution, Article XI, Section 3(B)(2)), and defining new mandatory remedies for non-compliance, *see* Ohio Constitution, Article XI, Section 9(D)(3). And of course, the 2015 amendments explicitly required the Ohio Redistricting Commission to meet specified partisan fairness standards, unless doing so would violate other provisions of Article XI. Specifically, pursuant to Section 6, "No general assembly district plan shall be drawn primarily to favor or disfavor a political party," and "The statewide proportion of districts whose voters, based on

statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio." Ohio Constitution, Article XI, Section 6(A), (B).

The Ohio Ballot Board published arguments for and against Ballot Issue 1 in a newspaper of general circulation and the official arguments also appeared on the Ohio Secretary of State's website. The official arguments in favor of Ballot Issue 1 stated in part, "Voting YES on Issue 1, will make sure state legislative districts are drawn to be more competitive and compact, and ensure that no district plan should be drawn to favor or disfavor a political party." (Emphasis sic.) (HIST_0098) The arguments continued, "Voting YES on Issue 1 will establish fair and balanced standards for drawing state legislative districts, including that no district plan should favor a political party." (HIST_0098)

In November 2015, when Ohioans arrived at the voting booth, their ballot told them that the proposed amendment would, among other things, "End the partisan process for drawing Ohio House and Senate districts * * *." (HIST_0096) Ohio voters approved Ballot Issue 1 with more than 71 percent of the vote, thereby amending Article XI of the Ohio Constitution as proposed in the joint resolution. (HIST_0121) In doing so, they resoundingly rejected the redistricting regime that existed as of 2015, as construed by *Wilson*.

II. The Ohio Redistricting Commission's 2021 General Assembly District Plan

Respondents are the Commission and its seven members. The two Co-Chairs are House Speaker Robert Cupp and Senator Vernon Sykes. The other five Commissioners are Governor Mike DeWine, Secretary of State Frank LaRose, Auditor of State Keith Faber, Senate President Matt Huffman, and House Minority Leader Emilia Sykes.

A. The Commission Fails to Propose a Plan by the September 1 Deadline

Article XI of the Ohio Constitution requires the Commission to "draft the proposed plan in the manner prescribed in [Article XI]." Ohio Constitution, Article XI, Section 1(C). After drafting the plan, the Commission shall introduce the plan to the public as a "proposed plan." *Id.* Next, the Commission must conduct three public hearings to present the plan and receive public input. *Id.* Finally, the Constitution must adopt a plan by September 1 with a bipartisan vote. *See id.*, Section 1(B)(3). The Commission failed to meet these requirements.

The Ohio Redistricting Commission held its first meeting on August 6, 2021. (STIP_0001-0002) The meeting lasted seven minutes. (STIP_0002) The U.S. Census Bureau delivered census data to the Commission on August 12, 2021. (Docs., Vol. 3, Item 42, GOV_000297; DEPO_01509 [Glassburn]) The Commission held hearings across the State between August 23 and August 27, and met again on August 31, 2021—the day before the deadline to adopt a final plan under Section 1(C) of Article XI. (STIP_0160-0168) The Commission did not introduce a proposed plan to the public on that date. In fact, it had not made any effort to draw one. Rather, the Commission outsourced to partisan legislative staff its constitutional obligation to draft a General Assembly district plan.

At the August 31 hearing, Minority Leader Emilia Sykes asked the Co-Chairs "when the Commission will put forth a map that people and members of the public can comment on." (STIP_0163) Speaker Cupp replied that "a map is, is being developed carefully, with regard to the data and the constitutional requirements * * *" but that it was unlikely to be available by September 1. (STIP_0163) Speaker Cupp was referring to the partisans who were drafting a plan on behalf of the Republican Party, not the Commission itself, because he clarified that "*the commission itself is not drawing a map* * * *." (Emphasis added.) (STIP_0164) Senate President Huffman elaborated that in his view, each political party caucus could and would submit a

proposed plan for the Commission's consideration, and that the Commission would select one of those submitted plans (or one submitted by a member of the public), to release to the public as the Commission's proposed plan. (STIP_0164-0165) The other Commissioners confirmed at their depositions what Speaker Cupp and Senate President Huffman had made clear: that the Commission never drafted, or even attempted to draft, a plan. (DEPO_76-79 [LaRose]; DEPO_00220-00221 [DeWine]; DEPO_00411-00412 [E. Sykes]; DEPO_00997 [Faber])

September 1 came and went. The Commission did not introduce a proposed plan, and Senate President Huffman communicated to the other commissioners "that he didn't want to submit a map until * * * later in September." (DEPO_00923 [V. Sykes]) The Commission's failure to adopt a final plan by September 1 triggered an "impasse" procedure under Section 8 of Article XI of the Ohio Constitution. That procedure permitted the Commission to introduce a plan by a partisan majority vote of the Commission. Ohio Constitution, Article XI, Section 8(A)(1). It also required the Commission to propose the plan to the public, "hold a public hearing concerning the proposed plan," and adopt a final plan by September 15, 2021. *Id.*, Section 8(A)(2), (A)(3). If the Commission did not adopt a *bipartisan* plan on September 15, however, then it was required to include a statement explaining how the Commission met the proportionality standard set forth in Section 6(B) of Article XI. *See id.*, Section 8(C)(2).

B. The Republican Party Caucus Drafts a Partisan Plan to Give Greater Weight to Republican Voters Than to Democratic Voters

Senate President Huffman and Speaker Cupp took responsibility for overseeing the development of the General Assembly district plan on behalf of the Republican caucus. (DEPO_01583-01584 [Cupp]) Senate President Huffman assigned map-drawing duties to Ray DiRossi, the Ohio Senate finance director and staff to the Senate Majority Caucus. (DEPO_01715 [Huffman]; DEPO_00476-00477 [DiRossi]) Mr. DiRossi is an experienced map-

drawer for Ohio Republicans. (DEPO_00024-00026 [LaRose]; DEPO_00473-00477 [DiRossi]; *see Ohio A. Philip Randolph Inst. v. Householder*, 373 F.Supp.3d 978, 995-997 (S.D.Ohio 2019), *vacated on other grounds sub nom. Chabot v. Ohio A. Philip Randolph Institute*, 140 S.Ct. 101, 205 L.Ed.2d 1 (2019)) In drawing the plan at issue here, Mr. DiRossi worked with Blake Springhetti, the Ohio House director of finance (DEPO_00482-00483 [DiRossi]; DEPO_01307 [Springhetti]), who was assigned by Speaker Cupp to work on the maps. (DEPO_01578 [Cupp])

Other Commissioners—specifically Secretary LaRose and Auditor Faber—requested a chance to work directly with the Republican caucus mappers. (DEPO_00034 [LaRose]; DEPO_01018-01020 [Faber]; DEPO_01613 [Cupp]) But Senate President Huffman and Speaker Cupp did not allow the other Commissioners to provide direct input. (DEPO_01784-01785 [Huffman]; DEPO_01593-01594, 01613 [Cupp]) According to Senate President Huffman, "[i]t was a question of Ray DiRossi worked for me and not any of the other six commissioners." (DEPO_01784-01785 [Huffman]) Speaking of Mr. DiRossi, Senate President Huffman stated, "in terms of reporting, he was my employee and nobody else's." (DEPO_01716 [Huffman]) Ultimately, the other Commissioners played no role in drafting the introduced maps. (DEPO_00180 [DeWine]; DEPO_00073-00074 [LaRose]; DEPO_00997 [Faber]; RESP_0293 [V. Sykes]; RESP_0361 [E. Sykes])

Months before the Commission convened, Mr. DiRossi calculated the total number of votes that Democrats and Republicans had won in 16 statewide elections from 2014 to 2020. (DEPO_00715 [DiRossi Dep. Ex. 1]) Mr. DiRossi calculated that as between the two major parties, Democrats had won 45.90 percent of the vote, while Republicans had won 54.10 percent. (DEPO_00715) Mr. DiRossi's spreadsheet also showed with green highlighting that Republicans won 13 of the 16 statewide elections—that is, 81 percent of the elections. (DEPO_00544-00545,

00553-00554, 00715 [DiRossi]) He shared his spreadsheet with Mr. Springhetti. (DEPO_01307 [Springhetti]; DEPO_01354 [Springhetti Dep. Ex. 2])

Senate President Huffman and Speaker Cupp never tasked Mr. DiRossi and Mr. Springhetti with ensuring compliance with the requirements of Article XI, Section 6 of the Ohio Constitution. (DEPO_01731 [Huffman]; DEPO_01622-01623 [Cupp]) Mr. DiRossi understood that he was not to consider whether the maps complied with Article XI, Section 6. (DEPO_00603, 00609-00610 [DiRossi]) According to Mr. DiRossi, compliance with Article XI, Section 6 "was not my responsibility." (DEPO_00609-00610 [DiRossi])

But while the Republican staff responsible for producing the caucus's maps were not tasked with complying with Section 6, they nevertheless accessed and used partisan data during the map-drawing process. Mr. DiRossi and Mr. Springhetti used mapping software that allowed them to see the Republican and Democratic voting percentages for each district in a display window. (DEPO_00468-00469 [DiRossi]; DEPO_01294-01296 [Springhetti]) If they changed the district lines, the percentages in the display window would change as well. (DEPO_00470 [DiRossi]; DEPO_01296 [Springhetti]) Mr. DiRossi and Mr. Springhetti discussed with each other the partisan leanings of the districts. (DEPO_01308 [Springhetti]) They also discussed the partisan leanings of the districts with Senate President Huffman and Speaker Cupp. (DEPO_00510-00511 [DiRossi]; DEPO_01300-01301 [Springhetti]; DEPO_01601-01602, 01604 [Cupp])

On September 8, 2021, Senate President Huffman and Speaker Cupp gave the other Commissioners a brief look at the maps under development by Mr. DiRossi and Mr. Springhetti. Secretary LaRose received a ten-minute "cursory overview." (DEPO_00019-00021 [LaRose]) Secretary LaRose described what he received as a "printout" and "not a particularly detailed

copy." (DEPO_00019 [LaRose]) He asked about the expected partisan performance of the map, but Mr. DiRossi claimed he did not have any information to share on partisan performance. (DEPO_00021-00022 [LaRose]) Secretary LaRose "expressed some concern that the map needed a lot of work." (DEPO_00026 [LaRose])

Auditor Faber had a similar experience. According to him, "[t]hey showed us up on a big board what the map was. And we didn't get a copy of it, and we were showed to look at the map." (DEPO_00998-00999 [Faber]) Senate President Huffman showed the map to Senator Sykes and Minority Leader Sykes during the evening of September 8. (DEPO_00361-00364 [E. Sykes]) Senate President Huffman showed them a few poster-sized maps and explained what Mr. DiRossi planned to present the next day. (DEPO_00362 [E. Sykes])

That same day, September 8, the Commission announced a meeting for the next morning, September 9, at 10 a.m. "to hear testimony on state redistricting plans" and asked those interested to "complete and submit a witness information form" in advance of the hearing. (DEPO_00142-00143 [LaRose Dep. Ex. 1]) At the September 9 meeting, Senate President Huffman introduced the Republican caucus plan (STIP_0170) and Mr. DiRossi presented the plan. (STIP_0170-0175) Following Mr. DiRossi's presentation, Senator Sykes asked, "I'd like to know, and you didn't mention this in your presentation, how you satisfy the new requirement in Section 6(B) of the Constitution that deals with the statewide proportion of districts whose voters based on statewide and federal partisan general election results during the last 10 years favor each political party shall correspond closely to the statewide preferences of the voters of Ohio." (STIP_0173) Mr. DiRossi responded, "We are conducting an analysis of the election data contemplated by the Constitution. That analysis is ongoing, is not complete as of today, and it is ongoing." (STIP_0174) Mr. DiRossi later admitted during his deposition that "I don't know if we

ever completed the analysis" (DEPO_00589 [DiRossi]), which accords with Mr. DiRossi's testimony that Section 6(B) compliance was not his responsibility (DEPO_00603, 00609-00610 [DiRossi]).

Because the September 9 hearing was announced with only one day's notice and without an introduced map (DEPO_00142-00143 [LaRose Dep. Ex. 1]), members of the public expressed concern about the Commission's procedures, which deprived witnesses of the time that many needed to review the plan and provide feedback. (STIP_0175 [Melissa Sull]; STIP_0178 [Debra Saunders]; STIP_0181-0182 [Jen Miller]; STIP_0185-0186 [Mindy Hedges]; STIP_0194-0195 [Susanne Dyke]) At a second meeting held just a few hours later on September 9, the Republican members of the Commission voted on party lines to introduce the Republican plan as the Commission's proposed plan. (STIP_0204-0205)

Following the introduction of the proposed plan on September 9, the Commission held three public hearings: one on September 12 (STIP_0228-0259), another on September 13, (STIP_0260-0338), and a third on September 14, 2021 (STIP_0339-0391). The public participants' verdict on the proposed plan was virtually, if not entirely, unanimous: the plan was a partisan gerrymander and failed to comply with the Ohio Constitution.[1]

Between September 9 and September 15, Senate President Huffman and Speaker Cupp again excluded the other Commission members from discussing possible changes to the plan

[1] *See, e.g.*, STIP_0230 (Dick Gunther), STIP_0232 (Dr. Derrick Forward), STIP_0236 (Christine Corba), STIP_0239 (Mike Erhardt), STIP_241 (Darryl Fairchild), STIP_0252 (Mia Lewis), STIP_0264 (Debbie Dalke), STIP_0277 (Mark Griffiths), STIP_0278 (Robert Howard), STIP_0278-0279 (Tom Jackson), STIP_0280 (Barbara Kaplan), STIP_0282 (Caitlin Johnson), STIP_0285 (Dale Miller), STIP_0295 (Katie Paris), STIP_0298-0299 (Rob Thompson), STIP_0324-0325 (Justin Evaristo), STIP_0326-0327 (Lori Kumler), STIP_0343 (Rachel Bowman), STIP_0347 (Kobie Christian), STIP_0355 (Scott DiMauro), STIP_0373-0374 (Katy Shanahan), STIP_0383 (Tim O'Hanlon).

directly with the Republican staff tasked with drawing the maps. The other Republican members of the Commission were limited to working with the Democratic caucus mappers, as arranged by Senator Sykes and Leader Sykes. (DEPO_00100-00101, 00104 [LaRose]; DEPO_01018-01021 [Faber]; DEPO_00879, 00889-00890 [V. Sykes]) Secretary LaRose explained that "[t]he opportunities for those conversations were more frequent with members of the minority caucuses. They just presented more opportunities to sit down and talk." (DEPO_00071-00073 [LaRose]) He added, "[i]t was a point of frustration for me that I was never given that opportunity to work with the mapmakers that worked on behalf of the Republican caucuses for both the House and Senate." (DEPO_00073-00074 [LaRose]) Auditor Faber recalled, "when Vern Sykes introduced his map, I asked to meet with him and his staff at a computer to understand how he arrived at this map. He and his staff were very gracious." (DEPO_01018-01019 [Faber]) He added, "I asked to do the same thing with Huffman and Cupp and was told that wasn't going to happen." (DEPO_01019-01020 [Faber]) "[T]he Democrats leaders welcomed us into their map drawing * * * sanctum and let us go through the programs. Because, remember, we didn't have any of that. The Republicans never gave us that access." (DEPO_01021 [Faber])

C. The Commission Adopts the Republican Caucus Plan and Provides a Post-Hoc Rationalization for Giving More Voting Power to Republican Voters

On September 15, 2021, the Commission convened at 10:30 a.m. and immediately recessed at the request of Senate President Huffman. (STIP_0392) During the recess, Secretary LaRose sent a text message to his chief of staff, Merle Madrid, to convey information the ACLU of Ohio had posted on Twitter urging the Commission to adopt a fair map and listing the office phone numbers of the Commissioners. (DEPO_00157 [LaRose] Dep. Ex. 2) Madrid responded that staff had been "talking to folks all day" and that "[i]t's going to the courts anyway." (*Id.*)

Senator Sykes engaged in conversations with Secretary LaRose during the recess and testified at his deposition, "I was particularly miffed by Secretary of State LaRose because he admitted that the plan they submitted was not fair; but he said unless we -- unless they, the majority would agree on a fair map, he was going to have to vote with them." (DEPO_00930-00931 [V. Sykes])

Senate President Huffman had stated that the Commission would stand in recess until 3:00 p.m., but the Commission did not resume proceedings until 11:15 p.m. (OOC_0047 [Turcer Aff. ¶¶ 12-13]) Between 8:00 p.m. and 11:00 p.m., the Commissioners entered and exited a side room next to the main meeting room in the Statehouse, out of public view so the negotiations could continue "behind the scenes." (DEPO_00937 [V. Sykes]; *see* OOC_0048-0049 [Turcer Aff. ¶¶ 14-15]) Upon reconvening, the Commission had less than an hour to pass a final map under the constitutional deadline. (OOC_0048-0049 [Turcer Aff. ¶¶ 14-15]; STIP_0394) At that time, Senate President Huffman introduced an amendment to the proposed plan, revising several district boundaries. (STIP_0393-0394) Within 10 minutes of its introduction, the Commission passed the amendment along party lines. (STIP_0394-0395)

Just after midnight, on September 16, 2021, the Commission adopted—again along party lines—that amended plan as the final General Assembly district plan. (STIP_0395-0402) Despite public condemnation of the proposed plan, the amendments "didn't fix it at all." (DEPO_00933 [V. Sykes]) As Auditor Faber put it, "at the end of the day, this was the map that was originally introduced by the Republicans." (DEPO_01074 [Faber]) Two other members of the Commission—who cast deciding votes to adopt the final plan—also cast doubt on its constitutionality and asked this Court to decide whether the plan is constitutional. To wit:

- Secretary of State LaRose stated, "I'm casting my Yes vote with great unease. I fear, I fear, we're going to be back in this room very soon. This map has many

shortcomings, but they pale in comparison to the shortcomings of this process. It didn't have to be this way. It didn't have to be this way." (STIP_0398)

- Governor DeWine stated, "I will vote to send this matter forward. But it will not be the end of it. We know that this matter will be in court. *I'm not judging the bill one way or another. That's up for, up to a court to do*. What I do, what I am sure in my heart is that this committee could have come up with a bill that was much more clearly, clearly, constitutional. I'm sorry we did not do that." (Emphasis added.) (STIP_0398)

Auditor Faber, for his part, stated, "I'm going to vote yes with some apprehension * * *." (STIP_401) He also noted, "This has been an interesting process. To say it has gone like I anticipated is probably not just an overstatement, but frankly, a great disappointment." (STIP_0399) The two Democratic members of the Commission voted against the final plan, stating on the record that it "egregiously violates the anti-gerrymandering provisions of the Ohio Constitution." (STIP_0420)

Because the plan was passed along party lines, Section 8(C)(2) of Article XI required the Commission to "include a statement explaining what the commission determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party corresponds closely to those preferences, as described in division (B) of Section 6 of this article."

Accordingly, at the final meeting held overnight from September 15-16, 2021, Senate President Huffman introduced a statement to comply with Section 8(C)(2). (STIP_0399, 0402) Senate President Huffman was not aware that the Commission needed to issue a Section 8(C)(2)

statement until his staff raised it with him in the late afternoon of September 15. (DEPO_01772-01773 [Huffman]) Senate President Huffman does not know who on his staff drafted the Section 8(C)(2) statement. (DEPO_01742, 01774-01775 [Huffman]) Speaker Cupp testified that he saw a draft of the Section 8(C)(2) statement for the first time on September 15, but the version he saw was not complete—it still had blanks for numbers to be inserted. (DEPO_01631-01632 [Cupp])

After Senate President Huffman introduced the Section 8(C)(2) statement, the Commission voted to accept it into the record. (STIP_0408) In the Section 8(C)(2) statement, the Commission found that the statewide proportion of voters favoring statewide Republican candidates was 54 percent and the statewide proportion of voters favoring statewide Democratic candidates was 46 percent. (STIP_0418) The Commission also found that 64.4 percent of districts in the Commission's plan favored Republicans, while 35.6 percent of districts favored Democrats. *Id.* Despite calculating this 10-point gap between Republican vote share and the proportion of districts expected to favor Republicans, the Commission concluded, "the statewide proportion of districts whose voters favor each political party corresponds closely to the statewide preferences of the voters of Ohio." (STIP_0418)

The Commission justified this conclusion by counting the number of statewide state and federal partisan general elections won by each party during the last ten years. (STIP_0418) The Commission found that Republican candidates won 13 of 16 such elections, or 81 percent, during that period. (STIP_0418)

While the Commission discussed the Section 8(C)(2) statement on the record, Secretary LaRose exchanged text messages with Merle Madrid, his chief of staff:

LaRose: This rationale is asinine

I should vote no

Madrid: It will be cited in the court against the GOP

Probably not worth it

LaRose: That was my intention

But yes. It's a temper tantrum vote for no reason

None the less it's asinine.

Second asinine thing I'm voting for tonight

(DEPO_00158 [LaRose Dep. Ex. 2]; *see* DEPO_00064 [LaRose])

During his deposition, Governor DeWine also disclaimed the rationale of the Section 8(C)(2) statement, stating "What I would not agree with is the reference to 81 percent. I don't think that could have—that 81 percent is a—any kind of mark that would indicate statewide preferences." (DEPO_00241 [DeWine]) He added, "I voted for it because I felt it was the rationale that had been put forward by the republican legislative leaders." (DEPO_00241 [DeWine])

Auditor Faber, who sponsored the 2015 amendment that requires a Section 8(C)(2) statement for a plan adopted along party lines, stated, "Look, I will tell you, when we drafted this, nobody anticipated that the number 80 percent would ever show up at a redistricting discussion." (DEPO_01118-01119 [Faber])

LEGAL FRAMEWORK

As described above, in 2015, the people of Ohio amended the Constitution to repudiate partisan gerrymandering and bring fairness and transparency to the redistricting process. Article XI now prescribes a process that encourages bipartisanship and establishes new criteria for General Assembly district plans. These criteria are mandatory and binding on the Commission and, if violated, give rise to mandatory judicial remedies, reflecting the public's overarching goal of creating strong and enforceable checks against partisan gerrymandering. As now written, Article XI creates two distinct pathways for this Court to invalidate partisan gerrymanders, each under its "exclusive, original jurisdiction." Ohio Constitution Article XI, Section 9(A).

First, new language in Section 3(B)(2) of Article XI states: "Any general assembly district plan adopted by the Commission shall comply with all applicable provisions of the constitutions of Ohio and the United States and of federal law." Thus, pursuant to this 2015 amendment, review of a General Assembly district plan under this Court's Article XI jurisdiction must include its compliance with the rights enshrined in the Ohio Bill of Rights, including the right to vote on equal terms and to associate and assemble. The amendment also codified a new set of "available remedies" for violations of such rights under Section 3(B)(2). *See* Ohio Constitution, Article XI, Section 9(D)(3) (providing "available remedies" if a plan "does not comply with the requirements of Section 2, 3, 4, 5, or 7").

Second, voters specified new partisan fairness standards for the enacted plan. Section 6 of Article XI directs that, to the extent possible without violating other district standards articulated in Article XI, the Commission "shall attempt to draw a general assembly district plan" that meets three requirements:

(A) No general assembly district plan shall be drawn primarily to favor or disfavor a political party.

(B) The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.

(C) General assembly districts shall be compact.

Ohio Constitution, Article XI, Section 6. An enacted plan's compliance with these criteria are likewise subject to this Court's exclusive, original jurisdiction. Ohio Constitution, Article XI, Section 9(A).

Sections 3(B)(2) and 6 are complementary, but distinct, provisions. *See State ex rel. Toledo v. Lucas Cty. Bd. of Elections*, 95 Ohio St.3d 73, 78, 765 N.E.2d 854 (2002) ("'Where provisions of the Constitution address the same subject matter, they must be read *in pari materia* and harmonized if possible.'" (quoting *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 292, 737 N.E.2d 529 (2000))). Section 3(B)(2) creates new mechanisms to protect and enforce individual rights when an enacted plan burdens those rights, while Section 6 imposes specific partisan fairness and proportional representation standards on the Commission. Section 6 goes beyond what a district plan must do to avoid infringing upon individual constitutional rights, because proportional representation based on statewide voter preferences has not traditionally been an independent constitutional right. *See City of Mobile v. Bolden*, 446 U.S. 55, 75-76, 100 S.Ct. 1490, 64 L.Ed.2d (1980) (plurality opinion). Section 6, together with Section 9, thus strengthen existing constitutional protections and demonstrate unequivocally that this Court must determine whether a plan violates the Ohio Constitution due to partisan bias or disproportionality. *See* Ohio Constitution, Article XI, Sections 6(B) & 9(D)(3)(c).

A gerrymandered map can—and often will—violate both Section 3(B)(2) and Section 6 because partisan gerrymandering can impose multiple and distinct constitutional injuries at the same time. *See Common Cause v. Lewis*, N.C.Super. No. 18 CVS 014001, 2019 WL 4569584, at *122 (Sept. 3, 2019) (finding that North Carolina's map violated the North Carolina constitution's free elections clause, equal protection clause, and freedom of speech and freedom of assembly clauses). Consistent with the purpose of the 2015 amendment, Section 3(B)(2) and Section 6 work together to provide all Ohioans, no matter their race, ethnicity, or party affiliation, with broad protections against discriminatory redistricting and partisan gerrymandering, protections that relators now invoke.

ARGUMENT

I. Proposition of Law No. 1: This Court Should Review the General Assembly District Plan Independently, Without Presuming Its Constitutionality

We begin with the legal standard that this Court should apply in deciding whether to declare that the General Assembly district plan is invalid, as relators have requested. Two key points inform that analysis. First, this Court sits in this apportionment case as a court of original jurisdiction, akin to a trial court, not a court of appellate review or even a court of equity sitting in mandamus. Apportionment cases are *sui generis*. Second, the voters unquestionably intended to take discretion away from the map-drawers and create enforceable anti-gerrymandering rules when they amended the Constitution in 2015. A highly deferential legal standard for reviewing the plan would restore that very discretion, thus thwarting the will of the voters.

To be sure, in *Wilson v. Kasich*, a majority of this Court quoted from a concurrence in a prior case that had, in turn, quoted from a mandamus action to impose a deferential standard. 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 17. And it held that "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." *Id.* at ¶ 24. But the voters abrogated these rulings in imposing non-discretionary standards on the Commission, deleting the provisions and language on which the *Wilson* majority had based its conclusions, and creating mandatory Article XI remedies for violations of fundamental constitutional rights. *See* above at pp. 4-7, 18-21. Such a deferential standard of review is especially inappropriate where, as here, commissioners who voted to pass the plan disparaged it and expressly disclaimed making any independent determination of the plan's constitutionality. *See* above at pp. 14-17.

Moreover, the 2015 amendments make clear that the Commission itself is the *regulated entity* under the Ohio Constitution, and the Court should not defer to the object of the people's regulatory action. Especially when the Commission cannot reach a bipartisan agreement that includes at least two members of each of the two major political parties, the Ohio Constitution imposes requirements that presume that a partisan majority will act in its self-interest, if not subject to detailed requirements and judicial enforcement. As noted, if a plan is adopted by a partisan majority, the majority must explain exactly *how* it complied with Section 6(B)'s proportional representation standard. *See* Ohio Constitution, Article XI, Section 8(C)(2). And any significant violation of the Ohio Constitution requires a new plan if the violation also causes a violation of Section 6(B). *See* Ohio Constitution, Article XI, Section 9(D)(3)(c). These requirements facilitate judicial review of a partisan plan, but have little purpose if the people envisioned only a "rubber stamp" form of review when they voted for Ballot Issue 1. *Wilson*, at ¶ 57 (Pfeifer, J., dissenting).

Accordingly, as a court sitting in original jurisdiction, this Court should find the facts as it would in an ordinary civil case—by a preponderance of the evidence. *See, e.g.*, *Household Fin. Corp. v. Altenberg*, 5 Ohio St.2d 190, 192, 214 N.E.2d 667 (1966) ("'[T]here is no doctrine of

the law settled more firmly than the rule which authorizes issues of fact in civil cases to be determined in accordance with the preponderance or weight of the evidence.'" (quoting *Jones, Stranathan & Co. v. Greaves*, 26 Ohio St. 2, 4 (1874))). If the Court should determine that it cannot find facts without an evidentiary hearing, then it may order one. *See* S.Ct.Prac.R. 14.03(C)(1). This Court, not the Commission, determines the meaning of the Ohio Constitution. *See, e.g.*, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 505, 715 N.E.2d 1062 (1999). After finding the relevant facts and construing the Ohio Constitution, this Court should apply law to the facts, and then, for the reasons explained below, hold that the plan is invalid and order a new one.

II. Proposition of Law No. 2: The Plan Violates Article XI, Section 3 of the Ohio Constitution

The enacted plan violates Article XI, Section 3(B)(2) because it violates Ohioans' right to vote on equal terms and their right to assemble and associate to advance political objectives under the Ohio Constitution. *See* Ohio Constitution, Article I, Sections 2, 3, & 11.

As a matter of both sovereignty and ordinary statutory interpretation, the Ohio Constitution has "independent force." *State v. Moore*, 154 Ohio St.3d 94, 2018-Ohio-3237, 111 N.E.3d 1146, ¶ 40 (Fischer, J., concurring in judgment only, joined by O'Connor, C.J.). Thus, this Court "can and will interpret [the Ohio] Constitution to afford greater rights to our citizens when [the Court believes] such an interpretation is both prudent and not inconsistent with the intent of the [Ohio] framers." *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21 (plurality opinion). "[S]tate courts are unrestricted in according greater civil liberties and protections to individuals and groups" than exist in the federal constitution. *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993).

In the context of protecting fundamental rights from the harms posed by partisan gerrymandering, the Ohio Constitution exerts "independent force" in several ways. Article XI, Section 9 specifically grants this Court jurisdiction over apportionment cases and creates mandatory remedies for the violation of constitutional rights during redistricting. And Section 6 of Article XI imposes partisan fairness standards on the Ohio Redistricting Commission, absent from the federal constitution, which this Court must take into account in determining whether a partisan, four-year plan is invalid because of a violation of fundamental rights. *See* Ohio Constitution, Article XI, Section 9(D)(3)(c). The federal constitution does not have such clear direction to adjudicate partisan gerrymandering claims. *See Rucho v. Common Cause*, _U.S._, 139 S.Ct. 2484, 2506, 204 L.Ed.2d 931 (2019) ("[T]he fact that such gerrymandering is 'incompatible with democratic principles' does not mean that the solution lies with the federal judiciary." (quoting *Arizona State Legislature v. Arizona Independent Redistricting Comm.*, 576 U.S. 787, 791, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015))).

Moreover, under the Ohio Constitution, both the right to vote on equal terms and the right to assemble and associate to advance political objectives have "language and a historical background that are substantially different" from those of their federal counterparts. *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St. 3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 43 (Fischer, J. concurring). These differences provide a clear textual basis for concluding that Ohio's Constitution affords protection to its citizens against partisan gerrymandering injures.

For similar reasons, state courts in North Carolina, Pennsylvania, and Florida have interpreted their States' constitutions to protect their residents against partisan gerrymandering. *See Lewis*, 2019 WL 4569584, at *122; *League of Women Voters v. Commonwealth*, 645 Pa. 1, 97, 178 A.3d 737 (2018); *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (Fla.

2015). This Court should likewise find that Article I, Sections 2, 3, and 11 of the Ohio Constitution, as incorporated into Article XI, Section 3(B)(2), provide for judicially enforceable rights that have been violated by the partisan gerrymander enacted by the Ohio Redistricting Commission.

A. The Ohio Constitution Protects Its Citizens' Rights to Vote on Equal Terms and Associate Together to Advance Political Objectives

1. The Ohio Constitution Gives Citizens the Right to Vote on Equal Terms to Alter or Reform Their Government

The Ohio Constitution gives citizens an affirmative right to vote on equal terms to alter or reform their government. Article I, Section 2 of the Ohio Constitution provides:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Ohio Constitution, Article I, Section 2.

The plain language of this provision shows that "all political power"—not some, or most, but "all"—resides with the people. Ohio Constitution, Article I, Section 2. Ohio citizens thus have an affirmative "right" to alter, reform, or abolish their government, which is instituted for their equal protection and benefit and which includes, of course, the General Assembly. The most common way in which the people alter or reform their government is by voting for representatives who will enact different policy preferences into statutory law. Thus, the affirmative right to vote for representatives or otherwise choose a particular form of self-government is one that Article I, Section 2 protects and guarantees. *See City of Hamilton v. Fairfield Twp.*, 112 Ohio App.3d 255, 275, 678 N.E.2d 599 (12th Dist.1996) ("[T]he right to

vote or otherwise choose whether to form a municipal corporation is a fundamental right which is guaranteed by Section 2, Article I of the Ohio Constitution.").

This right is burdened whenever the power of some citizens' votes is diluted. The principle that all voters are equal and should have an equal opportunity to elect government representatives is, or ought to be, beyond dispute. *See State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 55 ("Ours is still a representative democracy in which legislators derive their authority from the citizens of our state * * *."). Otherwise, Ohio's government would be instituted not for the equal protection and benefit of the people, but for a favored class of voters.

Partisan gerrymanders are inconsistent with this principle of voter equality because equal participation "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Rucho*, 139 S.Ct. at 2514 (Kagan, J., dissenting) (quoting *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)); *see also Lewis*, 2019 WL 4569584, at *116 ("There is nothing 'equal' about the 'voting power' of Democratic voters when they have a vastly less realistic chance of winning a majority in either chamber under the enacted plans."). Ohio courts have recognized that "the right to vote includes the right to have one's vote counted on equal terms with others." *State ex rel. Skaggs v. Brunner*, 120 Ohio St.3d 506, 2008-Ohio-6333, 900 N.E.2d 982, ¶ 58 (quoting *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir.2008)). Thus, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bd. of Lucas Cty. Comm'rs v. Waterville Twp. Bd. of Trustees*, 171 Ohio App.3d 354, 2007-Ohio-2141, 870 N.E.2d 791, ¶ 32 (quoting *Bush v. Gore*, 531 U.S. 98, 104-105, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000)). "Equal

protection applies not just to the initial allocation of the franchise, but also to the manner of its exercise." *State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596, ¶ 34 (O'Connor, C.J., concurring in judgment only); *see also Branch v. Smith*, 538 U.S. 254, 266, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) (plurality opinion) ("scheme governing apportionment" relates to the "manner" of holding elections).

Consistent with this case law and Ohio's independent, positive protections for voters, this Court should hold that a redistricting plan adopted under Article XI burdens a voter's right to vote on equal terms if it values one person's vote over that of another.

2. The Ohio Constitution Gives Citizens the Right to Assemble and Associate Together to Elect Their Representatives

The Ohio Constitution also guarantees citizens the right to associate together to express their views on government, instruct their representatives, and petition for redress of grievances. In particular, the Ohio Constitution provides that "[t]he people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their representatives; and to petition the general assembly for the redress of grievances." Ohio Constitution, Article I, Section 3. And it provides that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." Ohio Constitution, Article I, Section 11.

As indicated, the Ohio Constitution grants affirmative rights to its citizens when it provides that the people "have the right" to assemble, consult, instruct, and petition (Ohio Constitution, Article I, Section 3) and that every citizen "may" freely speak (Ohio Constitution, Article I, Section 11). As the highest courts of other States have concluded in interpreting their own constitutions, language providing that people have a right to "assemble together" and

"consult for their common good" guarantees the right of association. *See Libertarian Party of North Carolina v. State*, 365 N.C. 41, 49, 707 S.E.2d 199 (2011); *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 177, 75 P.3d 733 (2003). The federal constitution, on the other hand, is prohibitive, not affirmative. It provides that "Congress shall make no law * * *." U.S. Constitution, Amendment I; *see Lobato v. State*, 218 P.3d 358, 370-371 (Colo. 2009) (en banc) (contrasting affirmative and prohibitive constitutional rights).

With respect to the Ohio Constitution's free speech provisions, while this Court has never considered them in the context of redistricting, in some instances it has interpreted these provisions as coextensive with federal law. *Eastwood Mall v. Slanco*, 68 Ohio St.3d 221, 222, 626 N.E.2d 59 (1994). Accordingly, we may turn to First Amendment case law to illuminate the scope of Ohio's independent provisions. The U.S. Supreme Court—in interpreting the First Amendment to the federal constitution—has recognized that the freedom to speak and petition the government "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). Thus, individuals have a right "to associate for the advancement of political beliefs." *Anderson v. Celebrezze*, 460 U.S. 780, 787, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). This freedom of association "includes partisan political organization." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986).

Partisan gerrymandering interferes with these associational rights because it impairs the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects, including by translating popular support into legislation. *Common Cause v. Rucho*, 318 F.Supp.3d 777, 829 (M.D.N.C. 2018), *rev'd on other grounds*,

Rucho v. Common Cause, 139 S.Ct. 2484. As the three-judge district court found in *Rucho*, *supra*, partisan gerrymanders can make it difficult for individuals to raise money, recruit candidates, and mobilize support for their issues. *See id.* at 829-830; *see also Lewis*, 2019 WL 4569584, at *123-124 (concluding that North Carolina's gerrymandered "plans adversely affect the individual Plaintiffs' associational rights."). And what is true for individuals is also or "'triply'" true for organizations whose very purpose is to mobilize support for public policy. *See Rucho*, 318 F.Supp.3d at 830 (quoting *Gill v. Whitford*, 138 S.Ct. 1916, 1939, 201 L.Ed.2d 313 (2018) (Kagan, J., concurring)). The right to associate for advancement of political goals means little if a redistricting plan denies the association's agenda or candidates an equal opportunity to win votes. Following this persuasive reasoning, this Court should find that the Ohio Constitution establishes the right to assemble together and associate for the purpose of advancing political objectives, and that this right is implicated when a map is drawn so as to disadvantage members of one political party.

B. Under Either of Two Well-Established Tests, the Enacted Plan Violates Relators' Rights to Vote on Equal Terms and to Associate

State courts have struck down partisan gerrymanders on the ground that they violate various provisions of their respective state constitutions. And, prior to the Supreme Court's ruling in *Rucho*, so did numerous federal district courts, which relied on the Fourteenth Amendment's Equal Protection Clause, the First Amendment's Free Speech and Association Clauses, or both. In doing so, courts traditionally have applied one of two well-established tests. One test balances the constitutional burdens imposed by the redistricting plan against the state's justification for imposing those burdens. *See* Part II.B.1. The other test looks to whether the redistricting plan has the intent and effect of discriminating on a partisan basis and strikes down

plans that do so without sufficient justification. *See* Part II.B.2. Under either test, the enacted plan violates the Bill of Rights, and therefore violates Section 3(B)(2) of Article XI.

1. The Enacted Plan Is Invalid Because It Imposes Severe Burdens on Relators' Rights to Vote on Equal Terms and Associate, Without Justification

This Court can apply a balancing test in evaluating relators' constitutional claims in the redistricting context. A balancing test recognizes, on the one hand, that drawing lines to value one group of voters over another infringes upon voters' fundamental rights. On the other hand, a balancing test also recognizes that map drawers may have legitimate and sometimes compelling reasons for drawing lines in a certain way, even when those lines have the effect of favoring one political party over another, including remedying racial discrimination and ensuring that there are meaningful opportunities for minority communities to elect candidates. With balancing, there is no "litmus test" for evaluating partisan gerrymandering. *Cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008). The absence of a litmus test is not a reason to give up; rather, the very nature of balancing requires the Court to make the "hard judgment" that constitutional litigation demands. *Id.*

When federal courts adjudicate constitutional claims in the elections and voting rights context, the balancing test they apply is often called "*Anderson-Burdick*" balancing. Named for two key U.S. Supreme Court decisions, *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), the balancing test applies to a broad range of election laws. *Obama for America v. Husted*, 697 F.3d 423, 429 (6th Cir.2012); *see Daunt v. Benson*, 956 F.3d 396, 407 (6th Cir.2020) (applying the balancing test to a law restricting membership of the body that draws electoral boundaries).

Balancing is appropriate in this context because of the presence of constitutionally cognizable interests on both sides in election-related disputes. As Chief Justice O'Connor has stated in considering both First Amendment and Equal Protection challenges, "where a plaintiff alleges that the state has burdened voting rights through disparate treatment, the *Anderson/Burdick* balancing test is applicable." *State ex rel. Brown*, 142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596, ¶ 35. Under that standard, to determine whether a redistricting plan is unconstitutional, the Court should:

(1) consider the character and magnitude of the asserted injury to the rights protected by the Ohio Constitution and then

(2) weigh the character and magnitude of that constitutional injury against the precise interests put forward by the State as justifications for the burden imposed by its redistricting plan.

State ex rel. Brown, 142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596, ¶ 32 (O'Connor, C.J., concurring in judgment only); *see also Libertarian Party of Ohio v. Husted*, 10th Dist. Franklin No. 16AP-496, 2017-Ohio-7737, 97 N.E.3d 1083, ¶ 51 (applying *Anderson-Burdick* balancing to claims based on the Ohio Equal Protection Clause).

a. The Enacted Plan Severely Burdens Relators' Rights

The enacted plan severely burdens relators' right to vote on equal terms to alter or reform their government under the Ohio Constitution, as well as relators' right to assemble and associate under the Ohio Constitution. This burden on relators' fundamental rights is substantial even without considering the considerable evidence, detailed below in Part II.B.2, that the Commission's targeting of Democratic voters was intentional.

(1) The Enacted Plan Severely Burdens Relators' Right to Vote on Equal Terms Because It Gives More Weight to Republican Votes Than to Democratic Votes

The enacted plan systematically dilutes the votes of relators and other Democratic voters, to the advantage of Republican voters, creating a substantial and statistically significant partisan bias. This unequal weighting or dilution of votes is demonstrated through a partisan symmetry analysis, a broadly accepted political science metric drawn from the principles "that an electoral system should treat voters equally regardless of with which party they choose to associate, and that the party that wins the most votes should win the most seats." (OOC_0072-0073 [Latner ¶¶ 43, 45]) *See also Householder*, 373 F.Supp.3d at 1105-1107; *Rucho*, 318 F.Supp.3d at 893; *Lewis*, 2019 WL 4569584, at *116.

Partisan symmetry means that the number of seats won by a party when it receives a certain percentage of the statewide vote will be the same for each party. (OOC_0073 [Latner ¶ 44]) Conversely, a plan exhibits partisan asymmetry if one party would win more seats than the other party with the same share of votes. Applying these metrics, Dr. Latner finds a "substantial and statistically significant" amount of partisan asymmetry in the enacted plan. (OOC_0074-0075 [Latner ¶ 49]) The enacted House map "show[s] an approximate 15 percent seat advantage for Republican voters," while the enacted Senate map shows "a 15 to 17 percent seat advantage for Republican voters." (OOC_0074-0075, 0080 [Latner ¶¶ 49, 58])

Put simply, under the enacted plan, if Democrats won 54 percent of the statewide vote, they would likely win only 49 House seats. By contrast, with 54 percent of the statewide vote, Republicans would likely win 64 seats in the House. (OOC_0075 [Latner ¶ 50]) Thus, under the enacted plan, the same vote share that would secure a veto-proof supermajority for Republicans would not even be enough to secure a bare majority for Democrats. (OOC_0075 [Latner ¶ 50]) The story is much the same with the Senate. A 54 percent statewide vote share would likely yield

Democrats 18 of 33 seats (or 55 percent) in the Senate. (OOC_0081 [Latner ¶ 59]) With that same vote share, however, Republicans likely would be awarded 24 of 33 seats (or 73 percent) in the Senate. (OOC_0081 [Latner ¶ 59]) The enacted plan thus makes it far easier for Republicans to transform votes into seats than it does for Democrats, diluting the voting power of the relators and other Democratic voters and burdening their right to vote on equal terms.

The enacted plan's level of partisan bias renders it an extreme gerrymander under any possible measure. For example, Dr. Kosuke Imai compared the enacted plan with 5,000 simulated plans that are at least as compliant with Article XI as the enacted plan. The enacted plan showed greater partisan bias than *any* of these 5,000 simulated plans according to all four partisan bias metrics considered. (Imai Aff. ¶¶ 3, 20, 27-39 (measuring the efficiency gap, mean-median gap, symmetry in vote-seat curve, and declination)) And as Dr. Latner observed, the enacted House map "is more biased than nearly three-quarters of state legislative maps drawn in the 2011 redistricting cycle" across the States. (OOC_0074-0075, 0080 [Latner ¶¶ 49, 58])

Dr. Latner also analyzes the plan's partisan effect by assessing the packing and cracking of districts across the State. (OOC_0083-0084 [Latner ¶ 63]) In Franklin County, for example, the enacted House map generates an additional Republican seat by packing Democratic voters in Districts 1, 2, 3, and 7. (OOC_0084-0085 [Latner ¶¶ 65-66]) Likewise, by packing Democratic voters in Districts 18, 20, and 21, the plan squeezes two additional Republican House seats out of heavily Democratic Cuyahoga County. (OOC_0086-0088 [Latner ¶¶ 67-68]) This pattern repeats itself in Hamilton County (two additional Republican seats created by packing Districts 24, 25, and 26); Montgomery County (one additional Republican seat created by packing District 38); and Lucas County (one additional competitive district created by packing District 41). (OOC_0088-0092 [Latner ¶¶ 69-71]) This bias continues into the Senate map, where "the most

Democratic House seats are largely incorporated into the most Democratic Senate seats," which functions to "pack Democratic voters into districts that dilute the strength of their votes relative to Republican voters." (OOC_0088-0092 [Latner ¶¶ 69-71])

(2) The Plan Severely Burdens Relators' Rights to Assemble and Associate Together to Elect Their Representatives

The submitted evidence also establishes that the enacted plan's partisan bias and lack of statewide proportionality severely burdens relators' rights to assemble and associate together to pursue shared political interests and goals. As Dr. Latner explains, partisan gerrymandering is "associated with the disfavored party contesting fewer districts, with candidates for the disadvantaged party having weaker resumes, and with lower donor support." (OOC_0059 [Latner ¶ 14]) Thus, "gerrymandering severely shrinks the geography, and the number of communities, where meaningful inter-party political competition takes place." (OOC_0059 [Latner ¶ 14]) Partisan gerrymandering also leads to distorted ideological representation in districts, which in turn "shapes the composition of legislatures and the policies that they produce," and leads to less responsiveness to the needs of statewide constituencies. (OOC_0059 [Latner ¶ 15])

Relators have experienced these harms in their own political and associational activities over the past decade living under the gerrymandered 2011 General Assembly district plan. For example, the Ohio Organizing Collaborative describes how, in its experience, voters it seeks to organize around policy reform become "discouraged" and are less likely to register and participate in elections when they "learn that their representative is neither accessible to them nor aligned with their interests on many issues," and that "popular support for a policy is largely irrelevant if voters who live in other districts oppose it." (OOC_0003 [Shack ¶ 4]) Because registering discouraged voters is difficult, the Ohio Organizing Collaborative must "spend more

time and resources on outreach," which makes its get-out-the-vote campaigns "more challenging for elections at all levels." (OOC_0005 [Shack ¶ 9]) CAIR-Ohio, a Muslim advocacy and civil rights organization, similarly described how in its experience "Muslim voters become apathetic towards policy advocacy and civic engagement efforts" when individual elected officials in "safe non-competitive districts" feel "no obligation" to be responsive to the needs of their Muslim constituents. (OOC_0012 [Abidi ¶ 9])

Relators also must divert "time, energy, and resources" from their preferred activities to oppose unpopular bills that would not gain traction in the absence of partisan gerrymandering. (OOC_0004-0005 [Shack ¶ 8]; *see also* OOC_0018 [Dougherty ¶ 10 (describing how the gerrymandered map hinders the Ohio Environmental Council's efforts to overturn House Bill 6, a position supported by 7 out of 10 voters)]) And individual relators who are active in the Democratic Party describe increased difficulty raising money and supporting candidates under the existing gerrymander. (OOC_0022 [Talley ¶ 6]; OOC_0025 [Gresham ¶ 4]; OOC_0028-0029 [Aboukar ¶ 4]; OOC_0033 [Lee ¶ 6]; OOC_0036 [Haney ¶ 4]; OOC_0039-0040 [Bryant ¶ 4])

Finally, the organizational relators detail challenges will face in organizing communities of interest divided artificially by partisan gerrymandering. CAIR-Ohio, for example, details how the enacted plan splits the Ohio Muslim community such that Ohio Muslims living in the same neighborhood cannot aggregate their voting power behind a single representative. (OOC_0008-12 [Abidi ¶¶ 2, 4-9]) This "greatly reduce[s] the efficacy of activities like letter-writing campaigns." (OOC_0011 [Abidi ¶ 7])

b. The Commission's Justifications Cannot Satisfy Any Level of Review

Under a constitutional balancing test, the appropriate level of scrutiny depends on the magnitude of the burden imposed on relators' rights. Where, as here, a plan severely burdens relators' constitutional rights, this Court should subject the plan to strict scrutiny and strike it

down unless it is narrowly tailored to advance a compelling state interest, such as remedying the effects of historic discrimination against racial and language minorities. *See State ex rel. Brown*, 142 Ohio St.3d 370, 2014-Ohio-4022, 31 N.E.3d 596, ¶ 14. But even if the plan imposed a "slighter" burden on relators' rights, "it must still be outweighed by some legitimate state interest that the law furthers." *Id.* at ¶ 51 (O'Connor, J., concurring in judgment only). Respondents cannot point to any legitimate state interest to justify the plan—let alone an interest strong enough to outweigh the severe burden on relators' rights. The plan therefore violates Article I, Sections 2, 3, and 11 of the Ohio Constitution, and thereby violates Article XI, Section 3(B)(2).

Respondents have no legitimate justification for producing a plan with such severe partisan bias. The record is clear that it was both feasible and practical for the Commission to draw a map that was proportional and did not disfavor Democrats while still complying with the other requirements found in Article XI, such as the county- and city-split requirements in Sections 3 and 4. Dr. Imai, for example, used an algorithm-based approach to draw 5,000 maps—all of which perform better in terms of partisan bias—that are equally or more compliant with Sections 3 and 4 than the enacted plan. (Imai Aff. ¶¶ 28-29) Similarly, Dr. Jonathan Rodden drew a map that is "relatively similar to the Commission's Plan in [its] deference to traditional redistricting criteria emphasized in the Ohio Constitution," while also "com[ing] much closer to achieving the required partisan proportionality." (Rodden Aff. ¶¶ 52-53) Rodden's demonstrative map and Imai's set of simulated maps were also both at least as compact as the enacted plan, as required by Section 6(C). (Rodden Aff., Table 2; Imai Aff. ¶ 28) Nor was the enacted plan's partisan gerrymander necessary to avoid racial discrimination or to comply with the provisions of the Voting Rights Act. (Rodden Aff. ¶ 45) The Republican map-drawers did not even consider racial or demographic data when producing the plan. (DEPO_01736-01737 [Huffman])

The Commission also received alternative maps that did not dilute the votes of Democratic voters or burden their right to assembly (OOC_0065-0066 [Latner ¶ 25]), and were no less compact than the enacted plan. (OOC_0099 [Latner ¶ 83]) The Commission could have used one or more of these alternative plans as a starting point to help it produce maps that complied with Article XI—including the requirement to provide all Ohioans the rights to vote on equal terms and to assemble and associate together to elect their representatives. Instead, the Commission introduced and subsequently adopted a Republican-drafted plan that built in substantial bias and disproportionality.

Ultimately, respondents enacted the plan, not because of Ohio's line-drawing requirements, but because they sought to secure a durable, veto-proof Republican supermajority in both chambers of the General Assembly. *See* Part II.B.2, at pp. 36-40. Such a desire is not a legitimate state interest and therefore cannot outweigh the severe burden on relators' rights.

2. The Enacted Plan Is Invalid Because It Was Drawn with the Intent to Discriminate and Has the Effect of Discriminating Against Democratic Voters, Without Justification

As noted, in striking down partisan gerrymanders that violate equal protection rights and associational rights, courts have applied one of two well-established tests. In addition to a balancing test that looks to the constitutional injury and the purported justification for that injury, *see* Part II.B.1, at pp. 29-30, this Court alternatively can assess relators' constitutional claims by analyzing whether there was: (1) intent to discriminate on a partisan basis; (2) a discriminatory partisan effect on the gerrymandered districts; and (3) lack of justification for the discrimination. *See Whitford v. Gill*, 218 F.Supp.3d 837, 884 (W.D.Wis. 2016), *vacated and remanded on other grounds*, 138 S.Ct. 1916 (2018); *Benisek v. Lamone*, 348 F.Supp.3d 493, 522 (D.Md. 2018),

vacated and remanded on other grounds by Rucho v. Common Cause, 139 S.Ct. 2484; *Lewis*, 2019 WL 4569584, at *114.[2]

"'[D]iscriminatory purpose may often be inferred from the totality of the relevant facts * * *.'" *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040 (1976)). Accordingly, in the context of partisan gerrymandering, discriminatory purpose or intent can be found in "the timeline and logistics of the map-drawing process, the map drawers' heavy use of partisan data, contemporaneous statements made by the map drawers about their efforts, the characteristics of the map itself (including the irregular shape of the districts, their lack of compactness, and the high number of county and municipality splits), and finally, the outlier partisan effects that the map has produced since its enactment." *Householder*, 373 F.Supp.3d at 1099. Here, the totality of the evidence shows that the enacted plan intentionally discriminates against relators and other Democratic voters on a partisan basis.

First, expert evidence demonstrates that the design of the enacted plan itself reflects its partisan intent. "In determining whether an 'invidious discriminatory purpose was a motivating factor' behind the challenged action, evidence that the impact of the challenged action falls 'more heavily' on one group than another 'may provide an important starting point.'" *Rucho*, 318

[2] Courts have varied as to whether partisan discrimination must be the predominant purpose of the intent to gerrymander or merely a motivating factor. *Compare Rucho*, 318 F.Supp.3d at 860-868 (predominant-purpose test), *with Whitford*, 218 F.Supp.3d at 887 (motivating-factor test). The predominance standard comes from racial gerrymandering cases, but the U.S. Supreme Court has concluded these cases are analytically distinct from vote dilution claims. *See Whitford*, 218 F. Supp. 3d at 887, n.171; *Rucho*, 318 F.Supp.3d at 863. In *Whitford*, the court relied on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), to hold that plaintiffs need only demonstrate that partisan intent was a motivating factor in map drawing, not the sole intent or even the dominant or primary one. *Whitford*, 218 F.Supp.3d at 887–888. Here, the substantial evidence of intent meets either standard.

F.Supp.3d at 862 (quoting *Arlington Heights*, 429 U.S. at 266); *Householder*, 373 F.Supp.3d at 1099 (noting that discriminatory intent can be found in "the characteristics of the map itself"). Dr. Latner's various metrics reveal the substantially greater value that the Commission's plan gives to Republican votes. In particular, as Dr. Latner details, the enacted plan reflects a series of "discretionary choices that the map drawers made to increase Republican voters' advantage over Democratic voters" in particular districts. (OOC_0057 [Latner ¶ 9]) This targeted cracking and packing of Democratic voters "did not occur by chance or accident." (OOC_057, 083-096 [Latner ¶¶ 9, 63-77]) As noted, under the enacted plan Republicans would likely win 64 seats in the House and 24 seats in the Senate—strategically entrenching a veto-proof supermajority. (OOC_0057, 0075, 0081 [Latner ¶¶ 8, 50, 59])

Comparison to simulated alternative plans further demonstrates that the enacted plan is an extreme outlier with respect to partisan bias and disproportionality, making it implausible that such an outcome would have occurred unintentionally. Dr. Imai demonstrated that the enacted plan is "more biased" across four partisan bias metrics than *any* of the 5,000 plans his algorithm generated. (Imai Aff. ¶¶ 3, 31-39) The plan likewise showed a greater degree of disproportionality than any of the simulated maps. (Imai Aff. ¶¶ 3, 40-44) The plan's partisan bias is also apparent at the local level, where the design of the Commission's plan targeted Democratic voters to create Republican safe seats in the districts that determine legislative control. For example, Dr. Imai showed that in Hamilton County, 99.5 percent of the same 5,000 simulated plans yield a lower average of Republican House seats. (Imai Aff. ¶¶ 57–60, Fig. 13)

Second, the process the Commission used to adopt the plan further shows intent to discriminate. *Householder*, 373 F.Supp.3d at 1099 (holding that "evidence of the timeline and logistics of the map-drawing process" was relevant to finding partisan intent). Ohioans structured

the Commission with bipartisan membership and a mix of statewide officials and members of the legislature. But the map-drawing process here was controlled exclusively by the two Republican legislative leaders—Senate President Huffman and Speaker Cupp. (DEPO_01784-01785 [Huffman]; DEPO_01593-01594, 01613 [Cupp]; DEPO_00180 [DeWine]; DEPO_00034-0035, 00073-00074 [LaRose]; DEPO_00997 [Faber]; RESP_0293 [V. Sykes]; RESP_0361 [E. Sykes]) Senate President Huffman in turn hired a Republican mapmaker—Ray DiRossi—with a track record of producing maps in which "partisan intent predominated." *Householder*, 373 F.Supp.3d at 1099, 1115. Thus, the most ardent partisans, with the most self-interest in gerrymandering the maps, controlled the entire map-drawing process from top to bottom. And "when a single party exclusively controls the redistricting process, 'it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.'" *Rucho*, 318 F.Supp.3d at 869 (quoting *Davis v. Bandemer*, 478 U.S. 109, 129, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986)).

Strikingly, the Commission chose to introduce the map produced by the Republican Party caucus as its own, rather than hiring an independent non-partisan map-drawer or using any of the dozens of other publicly submitted maps as a starting point. And, although the Republican statewide officials on the Commission had grave reservations about Senate President Huffman and Speaker Cupp's plan—to the point of calling it "asinine" and apologizing for it—they acquiesced in the partisan plan because their political party sponsored it. (STIP_0398, 0401; DEPO_00241 [DeWine]; (DEPO_00158 [LaRose Dep. Ex. 2])

Third, the Commission's contrived Section 8(C)(2) statement evidences its discriminatory intent. In explaining its compliance with Section 6(B), the Commission claimed that the "statewide preferences of the voters of Ohio" could be evaluated by considering the number of contests won by a given party over the past ten years, which in this case is 81 percent

in favor of Republicans. (STIP_0418) The Commission's reasoning is indefensible. As Dr. Latner observes, "Neither election science nor any reasonable definition of the phrase 'statewide preferences of the voters of Ohio' supports the Commission's conclusion that the Enacted Plan is proportional." (OOC_0070 [Latner ¶ 38]) "[T]o say that the ultimate *outcome* of a statewide election reflects the statewide preferences of the voters is to disregard all the *voters* who cast a vote for the candidates who did not win." (OOC_0070-0071 [Latner ¶ 40]) Under the Commission's theory, if the Republican Party won 100 percent of statewide elections with 50.1 percent of the vote, it would be a proportional outcome for Republicans to win 100 percent of General Assembly districts. Such "asinine" logic evinces discriminatory intent. (DEPO_00158 [LaRose Dep. Ex. 2]; *see* DEPO_00064 [LaRose])

Turning to the rest of the operative analysis, the remaining two elements—effect and lack of justification—are satisfied for the reasons explained above. The discriminatory effect of the enacted plan is clear from the fact that it systematically dilutes the votes of relators and other Democratic voters, to the advantage of Republican voters, creating a substantial and statistically significant partisan bias. *See* Part II.B.1.a.(1), at pp. 30-32. The plan also severely burdens relators' rights to assemble and associate together to pursue shared political interests and goals. *See* Part II.B.1.a.(2), at pp. 32-34. And respondents have no legitimate justification for producing a plan with such severe partisan bias—the record is clear that it was both feasible and practical for the Commission to draw maps that were proportional and did not disfavor Democrats while still complying with other requirements found in Article XI, such as the county- and city-split requirements in Sections 3 and 4. *See* Part II.B.2, at pp. 34-36.

III. Proposition of Law No. 3: The Plan Violates Article XI, Section 6 of the Ohio Constitution

The Commission failed to comply with the Section 6 standards and offered no sound reason why it could not comply with those requirements. Accordingly, its plan is invalid.

A. Section 6 Imposes Mandatory Requirements on the Commission

Section 6 of Article XI provides that the Commission "shall attempt to draw a general assembly district plan" that meets all of the standards listed in that section. The section lists three standards. Then it concludes: "Nothing in this section permits the commission to violate the district standards described in Section 2, 3, 4, 5, or 7 of this article." Ohio Constitution, Article XI, Section 6. Read together, these provisions establish that Section 6's standards are mandatory, but subordinate to Sections 2, 3, 4, 5 and 7: the Commission must draw a district plan that meets Section 6's standards, *unless* following them would create a conflict with the other listed sections, in which case the standards described in those sections prevail.

This construction is the only one consistent with the plain text of Section 6. The term "shall" is a command, not a term that confers discretion on the object of the command. This Court "generally construe[s] a statute containing the word 'shall' as mandatory." *In re K.M.*, 159 Ohio St.3d 544, 2020-Ohio-995, 152 N.E.3d 245, ¶ 19; *see also Maine Community Health Options v. United States*, 140 S.Ct. 1308, 1320, 206 L.Ed.2d 764 (2020). The term "attempt" simply acknowledges that the constitutional instruction to meet Section 6 standards may need to yield to other elements of Article XI.

This Court regularly interprets the phrase "shall attempt" as mandatory, requiring an attempt to fulfill a law's other provisions. In *State v. White*, for example, the Court construed R.C. 2929.14, which provides in part that the "clerk *shall attempt* to collect the costs from the person convicted." (Emphasis added.) 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393,

¶ 14. This statute conferred no discretion on the clerk: "[t]he clerk is therefore *required* to certify a bill of costs and attempt collection from nonindigent defendants." (Emphasis added.) *Id.*

Likewise, in *State ex rel. Republic Steel Corp. v. Ohio Civil Rights Commission*, the Court considered a statute providing that the Civil Rights Commission "shall endeavor" to eliminate discriminatory practices through conciliation and persuasion before serving a complaint on the respondent. 44 Ohio St.2d 178, 180, 339 N.E.2d 658 (1975). The Court held that "a completed and unsuccessful attempt by the Ohio Civil Rights Commission" was "a jurisdictional prerequisite to the issuance of a complaint by the commission" and affirmed an order granting a writ of prohibition to restrain the Commission from continuing proceedings. *Id.* at 184. In other words, the attempt was mandatory, not discretionary.

Just as courts determine whether the Ohio Civil Rights Commission made an "attempt" to pursue conciliation (R.C. 4112.05(A)(2)), this Court should determine whether the Ohio Redistricting Commission complied with its mandatory duty to "attempt" to meet Section 6 standards. The Constitution provides the test for measuring compliance because it includes the only valid reasons for drawing a plan that does *not* meet Section 6 standards, *i.e.*, if meeting Section 6 standards would violate other district standards described in Section 2, 3, 4, 5 or 7. Thus, this Court should hold that relators may establish a violation of Section 6 by showing that (1) the General Assembly district plan adopted by the Commission does not comply with one or more of the listed Section 6 standards, and (2) the Commission made no determination and offered no valid explanation as to why complying with the Section 6 standards would conflict with other district standards.

B. The Plan Violates Section 6(B) Because the Plan's Proportion of Districts Whose Voters Favor Each Party Does Not Correspond Closely to the Statewide Preferences of Ohio Voters

Section 6(B) mandates that the Commission comply with the following standard when drawing a plan for the General Assembly: "The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio." Ohio Constitution, Article XI, Section 6(B). Put another way, this standard requires the Commission to "compar[e] how the proportion of votes cast for a party relates to the proportion of seats that the party would be expected to win." (OOC_061 [Latner ¶ 18])

The process that must be followed to make this comparison, as dictated by the plain text of Section 6(B), is straightforward: First, calculate the statewide preferences of the voters of Ohio, based on statewide state and federal partisan general election results during the last ten years. (OOC_062 [Latner ¶ 20]) Second, calculate the statewide proportion of districts whose voters favor each political party, based on the same set of statewide elections for which data is publicly available. (OOC_062 [Latner ¶ 20]) Third, to determine whether the two figures produced in steps one and two "closely correspond" to each other, calculate the difference between them. (OOC_062-063 [Latner ¶ 20])

Applying this method, Dr. Latner calculated the average statewide results for Democrats and Republicans as 45.9 percent and 54.1 percent, respectively (OOC_0062 [Latner ¶ 21]), and found that the proportion of districts favoring Republicans under the Commission's plan was 64.6 percent in the House and 73 percent in the Senate, respectively (OOC_0064, 0067 [Latner ¶¶ 23, 29]). This leads to a difference in relative seat share of 11 percent (10 seats) in the House and 19 percent (6 seats) in the Senate. (OOC_0064, 0067 [Latner ¶¶ 24, 29]) This level of disproportionality is unusually high by any established standard. (OOC_0068 [Latner ¶ 33])

Indeed, both the House and Senate maps are less proportional than Ohio's 2012-2020 General Assembly district plan, which was enacted before the Ohio Constitution was amended to expressly require proportionality and which was one of the most biased plans in the country that decade. (OOC_0066-0068 [Latner ¶¶ 26, 31]) Nor is the plan's disproportionality required by Ohio's political geography. Dr. Rodden's demonstrative map and each of Dr. Imai's 5,000 simulated maps were more proportional than the enacted plan. (Rodden Aff. ¶¶ 51–54; Imai Aff. ¶¶ 40-44, 51-55)

As reflected in its own Section 8(C)(2) Statement, the Commission has no credible argument to the contrary. Using a different data source than Dr. Latner, the Commission calculated that 64.4 percent of districts in the enacted plan favor Republicans. (STIP_0418) When this figure is compared with the Commission's own measurement of votes cast for Republicans statewide over the past decade—54 percent (STIP_0418)—the difference is still 10 percent (64 – 54 = 10). The Commission's only justification for the map's disproportionality is to compare it with the percentage of *elections* won by Republicans, which, as explained in Part II.B.2 (pp. 36-40), runs contrary to common sense and Section 6(B)'s plain text, as well as the meaning of proportionality in meaning of proportionality in political science.

C. The Plan Violates Section 6(A) Because It Was Drawn Primarily to Favor the Republican Party

Section 6(A) mandates that the Commission comply with the following standard when drawing a plan for the General Assembly: "No general assembly district plan shall be drawn primarily to favor or disfavor a political party." Ohio Constitution, Article XI, Section 6(A). For the reasons explained above, *see* Part II.B.2, at pp. 36-40, the enacted plan had both the intent and effect of primarily favoring the Republican Party and disfavoring the Democratic Party. Nor

was such bias necessary to comply with any other element of Article XI. The enacted plan therefore also violates Section 6(A).

D. The Commission Offered No Valid Reason Why It Could Not Comply With Section 6

The Commission has offered no valid reason why it could not comply with the requirements of Section 6. As discussed above, expert evidence—including a demonstrative map drawn by Dr. Rodden and a set of 5,000 simulated maps produced by Dr. Imai—conclusively show that respondents could have enacted a more proportional map without compromising on the other district standards found in Article XI. Specifically, these plans complied with the county- and city-split requirements found in Sections 3 and 4 at least as well as the enacted plan, and were at least as compact as the enacted plan, as required by Section 6(C).

It is not surprising that respondents could have—but did not—pass a more proportional plan. They didn't think they had to. Respondents' own statements—made throughout the map drawing process and repeated on the record over the course of this litigation—make clear that they believed that Section 6 was "primarily aspirational." (DEPO_01075 [Faber]) For that reason, Senate President Huffman expressly disclaimed any obligation to attempt to comply with Section 6. (DEPO_01768, 01810-11 [Huffman]) That admission alone is enough to show that respondents did not "attempt" to comply with Section 6.

But respondents are wrong. They were required to comply with Section 6 unless such compliance would require violating one of the district standards set forth in Sections 2, 3, 4, 5, or 7. Nothing prevented respondents from complying with Section 6. Because the enacted plan was drawn primarily to favor the Republican Party, and the statewide proportion of districts whose voters favor a political party does not correspond closely to the statewide preferences of the voters of Ohio, the plan violates Section 6(A) and 6(B).

IV. Proposition of Law No. 4: The Plan's Constitutional Violations Require the Court to Invalidate the Plan and Order the Commission to Adopt a New Plan

Section 9 of Article XI includes three distinct provisions that authorize this Court to determine that the Commission's plan is invalid and order the Commission to adopt a new plan that complies with Article XI. Two provisions apply to the Commission's violations of Section 3, and the third applies to the Commission's violation of Section 6.

A. The Plan's Violations of Section 3(B)(2) Require This Court to Order a New Plan under Section 9(D)(3)(b)

Article XI provides "available remedies" if the Court determines that a plan "does not comply with the requirements of Section 2, 3, 4, 5, or 7 of this article." Ohio Constitution, Article XI, Section 9(D)(3). Thus, if the Court determines that the plan violates Section 3(B)(2) of Article XI because the plan violates the Ohio Constitution, then the Court "shall" impose one of the available remedies. *Ibid.* The "available remedies" under Section 9(D)(3) depend on whether the plan contains only "isolated" violations or instead violations that require multiple amendments. "If the court finds that it is necessary to amend not fewer than six house of representatives districts to correct violations of those requirements, to amend not fewer than two senate districts to correct violations of those requirements, or both, the court *shall* declare the plan invalid and *shall* order the commission to adopt a new general assembly district plan in accordance with this article." (Emphasis added.) Ohio Constitution, Article XI, Section 9(D)(3)(b).

To correct the constitutional violations that relators have identified would require amendment of at least six house districts and at least two senate districts. (OOC_0083-0096 [Latner ¶¶ 63-77 (detailing cracking and packing of multiple districts across five counties)]) Accordingly, under Article XI, the proper remedy is invalidation of the plan with instructions for the Commission to adopt a new plan that complies with the Ohio Constitution.

B. The Plan's Violations of Section 3(B)(2) Require This Court to Order a New Plan under Section 9(D)(3)(c)

Article XI creates another pathway for judicial redress for cases in which the Commission resorted to the "impasse procedure" under Section 8 because it failed to adopt a bipartisan plan by September 1. In such a case, if the Court determines that two specified propositions are true, then "the court *shall* order the commission to adopt a new general assembly district plan * * *." (Emphasis added.) Ohio Constitution, Article XI, Section 9(D)(3)(c). The two propositions both relate to the proportionality standard forth in Section 6(B) of Article XI. One is forward-looking and is phrased in terms of the plan's "ability" to contain districts that result in approximately proportional representation in future elections; the other is backwards-looking, in terms of the data considered, and mirrors the Section 6(B) proportionality standard based on the statewide preferences of the voters over the last ten years. *See* Ohio Constitution, Article XI, Section 9(D)(3)(c).

The inclusion of this additional remedial pathway for cases in which the Commission adopts a partisan, four-year plan reflects a well-founded suspicion that a partisan plan would be more likely to violate Article XI's requirements in a manner that fails to comply with Section 6(B)'s proportionality requirement than a bipartisan plan. Thus, in considering a plan adopted under the Section 8 impasse procedure, this Court need not make findings about how many or which districts the Commission's violations affect, but instead can determine whether the "plan significantly violates those requirements in a manner that materially affects the ability of the plan to [meet the Section 6(B) standard]." Ohio Constitution, Article XI, Section 9(D)(3)(c)(i). Thus, the remedial provision that applies when the Commission resorts to the impasse procedure is simplified. Here, it requires only a showing that the Commission's violation of Section 3(B)(2)

was significant and that the effect of those violations on the plan's ability to meet the Section 6(B) standard was material.

Relators' showing here easily meets that test, just as it meets the others. As demonstrated above, the Commission's plan significantly and substantially burdens fundamental Ohio rights and creates disproportionality in violation of the Section 6(B) standard, based on the statewide preferences of voters over the last ten years and for the next four years. (OOC_057, 064-065 [Latner ¶¶ 10, 23-34]) The enacted plan showed even more disproportionality than the prior decade's plan, which was one of the most biased in the country in 2011. (OOC_066-067 [Latner ¶¶ 26, 31]) Therefore, this Court should order the Commission to adopt a new plan in accordance with Article XI.

C. The Plan's Violations of Section 6 Require This Court to Order a New Plan under Sections 9(A) and (B)

Section 9(D)(3) of Article XI does not provide a specification of mandatory "available remedies" for violations of Section 6; therefore, the remedies available for violation for Section 6 are those arising under this Court's unlimited and exclusive grant of Article XI jurisdiction. Under Article XI, if "any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid by an unappealed final order of a court of competent jurisdiction then, notwithstanding any other provisions of this constitution, the commission shall be reconstituted as provided in Section 1 of this article, convene, and ascertain and determine a general assembly district plan * * *." Ohio Constitution, Article XI, Section 9(B). As this provision establishes, a court of "competent jurisdiction" may determine that a "general assembly district plan made by the Ohio redistricting commission" is "invalid." *Id.* This Court is a "court of competent jurisdiction" to determine whether a General Assembly district plan is invalid because Article XI provides that "[t]he supreme court of Ohio shall have

exclusive, original jurisdiction in all cases arising under this article." Ohio Constitution, Article XI, Section 9(A).

This Court's jurisdiction to invalidate a General Assembly district plan under Article XI is analogous to the Court's jurisdiction to invalidate a congressional district plan under Article XIX of the Ohio Constitution. The "congressional redistricting" article, passed by voters in 2018, similarly provides that this Court has jurisdiction in all cases arising under that article and that a court of competent jurisdiction may determine that a congressional district plan is invalid. Ohio Constitution, Article XIX, Section 3(A), (B)(1). The parallel structure of these provisions reflects that the General Assembly and voters selected this language to authorize this Court to review and determine whether a plan is "invalid" under Article XI or Article XIX, as the case may be.

Here, as demonstrated above, the plan is "invalid" because it does not comply with Section 6's mandatory requirement to draw a plan to meet the Section 6 standards, unless doing so would create a conflict with other district standards. Section 6 regulates the conduct of the Commission itself and requires it to adhere to anti-gerrymandering and fairness standards in connection with the plan. Because the Commission did not adopt a plan to comply with those standards, even though it could have, it breached its constitutional duty to relators and the people of the State of Ohio. That breach renders the plan invalid, unconstitutional, unfair, and contrary to the express will of the voters.

CONCLUSION

For the reasons stated above, this Court should declare that the General Assembly district plan adopted by the Commission is invalid, enjoin respondents from using the plan adopted by the Commission, order respondents to adopt a new plan in accordance with the Ohio Constitution, and retain jurisdiction should further relief be necessary.

Dated: October 29, 2021

Respectfully submitted,

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Appendix
(Appx 1 – Appx 18)

APPENDIX TABLE OF CONTENTS


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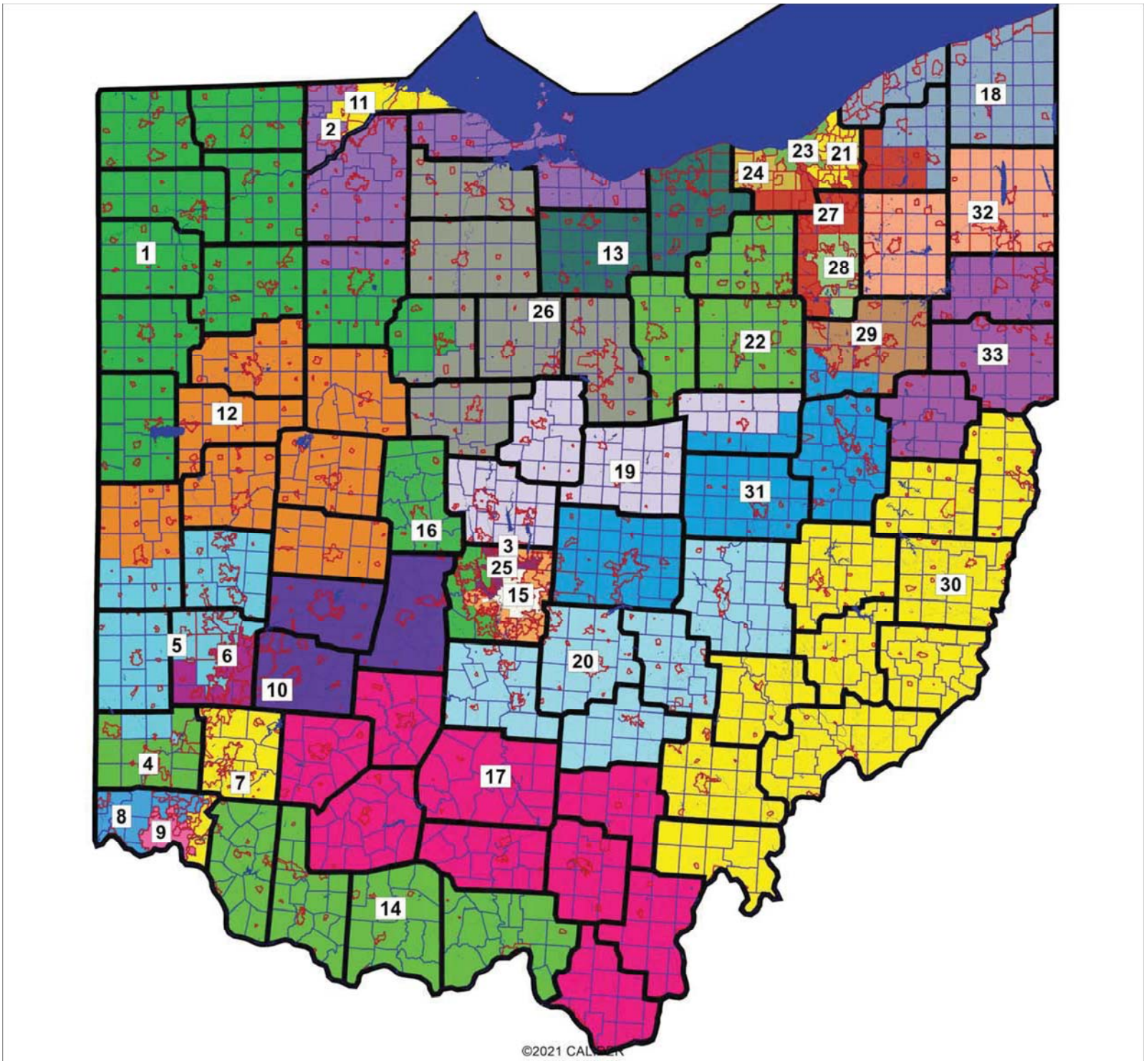
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Article XI, Section 8(C)(2) Statement

Pursuant to Article XI, Section 8(C)(2) of the Ohio Constitution, the Ohio Redistricting Commission issues the following statement:

The Commission determined that the statewide preferences of the voters of Ohio predominately favor Republican candidates.

The Commission considered statewide state and federal partisan general election results during the last ten years. There were sixteen such contests. When considering the results of each of those elections, the Commission determined that Republican candidates won thirteen out of sixteen of those elections resulting in a statewide proportion of voters favoring statewide Republican candidates of 81% and a statewide proportion of voters favoring statewide Democratic candidates of 19%. When considering the number of votes cast in each of those elections for Republican and Democratic candidates, the statewide proportion of voters favoring statewide Republican candidates is 54% and the statewide proportion of voters favoring statewide Democratic candidates is 46%. Thus, the statewide proportion of voters favoring statewide Republican candidates is between 54% and 81% and the statewide proportion of voters favoring statewide Democratic candidates is between 19% and 46%. The Commission obtained publicly available geographic data for statewide partisan elections in 2016, 2018, and 2020. Publicly available geographic data for those elections was not available for elections in 2012 and 2014. Using this data, the Commission adopted the final general assembly district plan, which contains 85 districts (64.4%) favoring Republican candidates and 47 districts (35.6%) favoring Democratic candidates out of a total of 132 districts. Accordingly, the statewide proportion of districts whose voters favor each political party corresponds closely to the statewide preferences of the voters of Ohio.

The final general assembly district plan adopted by the Commission complies with all of the mandatory requirements of Article XI, Sections 2, 3, 4, 5, and 7 of the Ohio Constitution. The Commission's attempt to meet the aspirational standards of Article XI, Section 6 of the Ohio Constitution did not result in any violation of the mandatory requirements of Article XI, Sections 2, 3 ,4, 5, and 7 of the Ohio Constitution.

Constitution of the State of Ohio

Article I Bill of Rights

Section 2 Right to alter, reform, or abolish government, and repeal special privileges.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

Constitution of the State of Ohio

Article I Bill of Rights

Section 3 Right to assemble together.

The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their representatives; and to petition the general assembly for the redress of grievances.

Constitution of the State of Ohio

Article I Bill of Rights

Section 11 Freedom of speech and of the press; libel.

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

Constitution of the State of Ohio

Article XI Apportionment

Section 1 Persons responsible for apportionment of state for members of general assembly.

(A) The Ohio redistricting commission shall be responsible for the redistricting of this state for the general assembly. The commission shall consist of the following seven members:

(1) The governor;

(2) The auditor of state;

(3) The secretary of state;

(4) One person appointed by the speaker of the house of representatives;

(5) One 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;

(6) One person appointed by the president of the senate; and

(7) One 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.

No appointed member of the commission shall be a current member of congress.

The legislative leaders in the senate and the house of representatives of each of the two largest political parties represented in the general assembly, acting jointly by political party, shall appoint a member of the commission to serve as a co-chairperson of the commission.

(B)

(1) Unless otherwise specified in this article or in Article XIX of this constitution, a simple majority of the commission members shall be required for any action by the commission.

(2)

(a) Except as otherwise provided in division (B)(2)(b) of this section, a majority vote of the members of the commission, including at least one member of the

commission who is a member of each of the two largest political parties represented in the general assembly, shall be required to do any of the following:

(i) Adopt rules of the commission;

(ii) Hire staff for the commission;

(iii) Expend funds.

(b) If the commission is unable to agree, by the vote required under division (B)(2)(a) of this section, on the manner in which funds should be expended, each co-chairperson of the commission shall have the authority to expend one-half of the funds that have been appropriated to the commission.

(3) The affirmative vote of four members of the commission, including at least two members of the commission who represent each of the two largest political parties represented in the general assembly shall be required to adopt any general assembly district plan. For the purposes of this division and of Section 1 of Article XIX of this constitution, a member of the commission shall be considered to represent a political party if the member was appointed to the commission by a member of that political party or if, in the case of the governor, the auditor of state, or the secretary of state, the member is a member of that political party.

(C) At the first meeting of the commission, which the governor shall convene only in a year ending in the numeral one, except as provided in Sections 8 and 9 of this article and in Sections 1 and 3 of Article XIX of this constitution, the commission shall set a schedule for the adoption of procedural rules for the operation of the commission.

The commission shall release to the public a proposed general assembly district plan for the boundaries for each of the ninety-nine house of representatives districts and the thirty-three senate districts. The commission shall draft the proposed plan in the manner prescribed in this article. Before adopting, but after introducing, a proposed plan, the commission shall conduct a minimum of three public hearings across the state to present the proposed plan and shall seek public input regarding the proposed plan. All meetings of the commission shall be open to the public. Meetings shall be broadcast by electronic means of transmission using a medium readily accessible by the general public.

The commission shall adopt a final general assembly district plan not later than the first day of September of a year ending in the numeral one. After the commission adopts a final plan, the commission shall promptly file the

plan with the secretary of state. Upon filing with the secretary of state, the plan shall become effective.

Four weeks after the adoption of a general assembly district plan or a congressional district plan, whichever is later, the commission shall be automatically dissolved.

(D) The general assembly shall be responsible for making the appropriations it determines necessary in order for the commission to perform its duties under this article and Article XIX of this constitution.

Section 2 Method of apportionment of state for members of general assembly.

Each house of representatives district shall be entitled to a single representative in each general assembly. Each senate district shall be entitled to a single senator in each general assembly.

Section 3 Population of each house of representatives district.

(A) The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and by the number "thirty-three" and the quotients shall be the ratio of representation in the house of representatives and in the senate, respectively, for ten years next succeeding such redistricting.

(B) A general assembly district plan shall comply with all of the requirements of division (B) of this section.

(1) The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, and the population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in division (A) of this section. In no event shall any district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the applicable ratio of representation.

(2) Any general assembly district plan adopted by the commission shall comply with all applicable provisions of the constitutions of Ohio and the United States and of federal law.

(3) Every general assembly district shall be composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line.

(C) House of representatives districts shall be created and numbered in the following order of priority. to the extent that such order is consistent with the foregoing standards:

(1) Proceeding in succession from the largest to the smallest, each county containing population greater than one hundred five per cent of the ratio of representation in the house of representatives shall be divided into as many house of representatives districts as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.

(2) Each county containing population of not less than ninety-five per cent of the ratio of representation in the house of representatives nor more than one hundred five per cent of the ratio shall be designated a representative district.

(3) The remaining territory of the state shall be divided into representative districts by combining the areas of counties, municipal corporations, and townships. Where feasible, no county shall be split more than once.

(D)

(1)

(a) Except as otherwise provided in divisions (D)(l)(b) and (c) of this section, a county, municipal corporation, or township is considered to be split if any contiguous portion of its territory is not contained entirely within one district.

(b) If a municipal corporation or township has territory in more than one county, the contiguous portion of that municipal corporation or township that lies in each county shall be considered to be a separate municipal corporation or township for the purposes of this section.

(c) If a municipal corporation or township that is located in a county that contains a municipal corporation or township that has a population of more than one ratio of representation is split for the purpose of complying with division (E)(l)(a) or (b) of this section, each portion of that municipal corporation or township shall be considered to be a separate municipal corporation or township for the purposes of this section.

(2) Representative districts shall be drawn so as to split the smallest possible number of municipal corporations and townships

whose contiguous portions contain a population of more than fifty per cent. but less than one hundred per cent, of one ratio of representation.

(3) Where the requirements of divisions (B), (C), and (D) of this section cannot feasibly be attained by forming a representative district from whole municipal corporations and townships, not more than one municipal corporation or township may be split per representative district.

(E)

(1) If it is not possible for the commission to comply with all of the requirements of divisions (B), (C), and (D) of this section in drawing a particular representative district, the commission shall take the first action listed below that makes it possible for the commission to draw that district:

(a) Notwithstanding division (D)(3) of this section, the commission shall create the district by splitting two municipal corporations or townships whose contiguous portions do not contain a population of more than fifty per cent, but less than one hundred per cent, of one ratio of representation.

(b) Notwithstanding division (D)(2) of this section, the commission shall create the district by splitting a municipal corporation or township whose contiguous portions contain a population of more than fifty per cent, but less than one hundred per cent, of one ratio of representation.

(c) Notwithstanding division (C)(2) of this section, the commission shall create the district by splitting, once, a single county that contains a population of not less than ninety-five per cent of the ratio of representation, but not more than one hundred five per cent of the ratio of representation.

(d) Notwithstanding division (C)(l) of this section, the commission shall create the district by including in two districts portions of the territory that remains after a county that contains a population of more than one hundred five per cent of the ratio of representation has been divided into as many house of representatives districts as it has whole ratios of representation.

(2) If the commission takes an action under division (E)(1) of this section, the commission shall include in the general assembly

district plan a statement explaining which action the commission took under that division and the reason the commission took that action.

(3) If the commission complies with divisions (E)(1) and (2) of this section in drawing a district, the commission shall not be considered to have violated division (C)(l), (C)(2), (D)(2), or (D)(3) of this section, as applicable, in drawing that district. for the purpose of an analysis under division (D) of Section 9 of this article.

Section 4 Population of each senate district.

(A) Senate districts shall be composed of three contiguous house of representatives districts.

(B)

(1) A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the

county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district.

(2) Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation, shall be part of only one senate district.

(3) If it is not possible for the commission to draw representative districts that comply with all of the requirements of this article and that make it possible for the commission to comply with all of the requirements of divisions (B)(1) and (2) of this section, the commission shall draw senate districts so as to commit the fewest possible violations of those divisions. If the commission complies with this division in drawing senate districts, the commission shall not be considered to have violated division (B)(1) or (2) of this section, as applicable, in drawing those districts, for the purpose of an analysis under division (D) of Section 9 of this article.

(C) The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under division (A) of Section 3 of this article.

(D) Senate districts shall be numbered from one through thirty-three and as provided in Section 5 of this article.

Section 5 Change in boundaries.

At any time the boundaries of senate districts are changed in any general assembly district plan made pursuant to any provision of this article, a senator whose term will not expire within two years of the time the plan becomes effective shall represent, for the remainder of the term for which the senator was elected. the senate district that contains the largest portion of the population of the district from which the senator was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the plan shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms.

Section 6 Standard for district boundaries.

The Ohio redistricting commission shall attempt to draw a general assembly district plan that meets all of the following standards:

(A) No general assembly district plan shall be drawn primarily to favor or disfavor a political party.

(B) The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.

(C) General assembly districts shall be compact.

Nothing in this section permits the commission to violate the district standards described in Section 2, 3, 4, 5, or 7 of this article.

Section 7 Change in boundaries after decennial period.

Notwithstanding the fact that boundaries of counties, municipal corporations, and townships within a district may be changed, district boundaries shall be created by using the boundaries of counties, municipal corporations. and townships as they exist at the time of the federal decennial census on which the redistricting is based, or, if unavailable, on such other basis as the general assembly has directed.

Section 8 Boundaries not set by the first day of September of a year ending in the numeral one.

(A)

(1) If the Ohio redistricting commission fails to adopt a final general assembly district plan not later than the first day of September of a year ending in the numeral one. in accordance with Section 1 of this article, the commission shall introduce a proposed general assembly district plan by a simple majority vote of the commission.

(2) After introducing a proposed general assembly district plan under division (A)(1) of this section, the commission shall hold a public hearing concerning the proposed plan, at which the public may offer testimony and at which the commission may adopt amendments to the proposed plan. Members of the commission should attend the hearing; however, only a quorum of the members of the commission is required to conduct the hearing.

(3) After the hearing described in division (A)(2) of this section is held, and not later than the fifteenth day of September of a year ending in the numeral one, the commission shall adopt a final general assembly district plan, either by the vote required to adopt a plan under division (B)(3) of Section 1 of this article or by a simple majority vote of the commission.

(B) If the commission adopts a final general assembly district plan in accordance with division (A)(3) of this section by the vote required to adopt a plan under division (B)(3) of Section 1 of this article, the plan shall take effect upon filing with the secretary of state and shall remain effective until the next year ending in the numeral one, except as provided in Section 9 of this article.

(C)

(1)

(a) Except as otherwise provided in division (C)(1)(b) of this section, if the commission adopts a final general assembly district plan in accordance with division (A)(3) of this section by a simple majority vote of the commission, and not by the vote required to adopt a plan under division (B)(3) of Section 1 of this article, the plan shall take effect upon filing with the secretary of state and shall remain effective until two general elections for the house of representatives have occurred under the plan.

(b) If the commission adopts a final general assembly district plan in accordance with division (A)(3) of this section by a simple majority vote of the commission, and not by the vote required to adopt a plan under division (B) of Section 1 of this article, and that plan is adopted to replace a plan that ceased to be effective under division (C)(l)(a) of this section before a year ending in the numeral one, the plan adopted under this division shall take effect upon filing with the secretary of state and shall remain effective until a year ending in the numeral one, except as provided in Section 9 of this article.

(2) A final general assembly district plan adopted under division (C)(1)(a) or (b) of this section shall include a statement explaining what the commission determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party corresponds closely to those preferences, as described in division (B) of Section 6 of this article. At the time the plan is adopted, a member of the commission who does not vote in favor of the plan may submit a declaration of the member's opinion concerning the statement included with the plan.

(D) After a general assembly district plan adopted under division (C)(1)(a) of this section ceases to be effective, and not earlier than the first day of July of the year following the year in which the plan ceased to be effective, the commission shall be reconstituted as provided in Section 1 of this article, convene. and adopt a new general assembly district plan in accordance with this article, to be used until the next time for redistricting under this article. The commission shall draw the new general assembly district plan using the same population and county, municipal corporation, and township boundary data as were used to draw the previous plan adopted under division (C) of this section.

Section 9 Exclusive, original jurisdiction of the supreme court of Ohio.

(A) The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this article.

(B) In the event that any section of this constitution relating to redistricting, any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid by an unappealed final order of a court of competent jurisdiction then, notwithstanding any other provisions of this constitution, the commission shall be reconstituted as provided in Section 1 of this article, convene, and ascertain and determine a general assembly district plan in conformity

with such provisions of this constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next time for redistricting under this article in conformity with such provisions of this constitution as are then valid.

(C) Notwithstanding any provision of this constitution or any law regarding the residence of senators and representatives, a general assembly district plan made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

(D)

(1) No court shall order, in any circumstance, 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.

(2) No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.

(3) If the supreme court of Ohio determines that a general assembly district plan adopted by the commission does not comply with the requirements of Section 2, 3, 4, 5, or 7 of this article, the available remedies shall be as follows:

(a) If the court finds that the plan contains one or more isolated violations of those requirements. the court shall order the commission to amend the plan to correct the violation.

(b) If the court finds that it is necessary to amend not fewer than six house of representatives districts to correct violations of those requirements, to amend not fewer than two senate districts to correct violations of those requirements. or both, the court shall declare the plan invalid and shall order the commission to adopt a new general assembly district plan in accordance with this article.

(c) If, in considering a plan adopted under division (C) of Section 8 of this article, the court determines that both of the following are true, the court shall order the commission to adopt a new general assembly district plan in accordance with this article:

(i) The plan significantly violates those requirements in a manner that materially affects the

ability of the plan to contain districts whose voters favor political parties in an overall proportion that corresponds closely to the statewide political party preferences of the voters of Ohio, as described in division (B) of Section 6 of this article.

(ii) The statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party does not correspond closely to the statewide preferences of the voters of Ohio.

Section 10 Severability provision.

The various provisions of this article are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

CERTIFICATE OF SERVICE

I, Danielle L. Stewart, hereby certify that on October 29, 2021, I caused a true and correct copy of the foregoing Merits Brief of Relators Ohio Organizing Collaborative, et al. to be served by email upon the counsel listed below:

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