IN THE SUPREME COURT OF OHIO

Bria Bennett, *et al.*, **Relators,** **v.** **Ohio Redistricting Commission, *et al.*,** **Respondents.**	**Case No. 2021-1198** Original Action Filed Pursuant to Ohio Constitution, Article XI, Section 9(A) *[Apportionment Case Pursuant to S. Ct. Prac. R. 14.03]*

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I. Introduction

Respondents dispute few, if any, of the facts Relators have alleged. Respondents do not dispute that Speaker Cupp and President Huffman excluded other Commissioners from the map-drawing process and oversaw map-drawers who used partisan data to draw the adopted General Assembly Plan (the "2021 Plan" or the "Plan"). They do not dispute that statewide proportional representation requires roughly 54% Republican-leaning districts and 46% Democratic-leaning districts. They do not dispute that the Section 8(C)(2) statement's analysis and methodology was reverse-engineered as a post hoc justification of the Plan. And they do not dispute that a more proportional map *could* have been drawn. Instead, they agree it was "easy" for Dr. Jonathan Rodden and Dr. Kosuke Imai to draw proportional maps because they (unlike the Commission) made proportionality a criterion. Brief of Respondents Huffman and Cupp ("Legislative Br.") 35.

Respondents do not dispute the facts because the facts are indisputable. The Commission passed maps drawn primarily to advantage Republicans that does not correspond to Ohio voters' statewide preferences, in violation of Section 6 of the Ohio Constitution. The Plan is indefensible under the plain language of Section 6. So, in their briefs, both sets of Republican Commissioners[1] go on offense, offering a raw assertion of power. They contend that Section 6 is toothless, that the Court is powerless to intercede, and that Ohioans were hoodwinked into thinking that the Fair Districts Amendments would prevent partisan gerrymandering. This is an insult to Ohio voters, who overwhelmingly approved redistricting reforms in 2015 to reject the old regime of partisan gerrymandering. It is also baseless as a matter of law and fact. The Court should strike down the 2021 Plan and order the Commission to do its job and follow the law.

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[1] Relators refer to Speaker Cupp and President Huffman as the "Republican Legislative Commissioners" and to Governor DeWine, Secretary LaRose, and Auditor Faber as the "Statewide Commissioners" (collectively, the "Republican Commissioners").

II. Legal Background

The Republican Legislative Commissioners suggest that Section 6 is "vague" and has no "judicially manageable standard[s]." Legislative Br. 31, 34. Not so. By its plain language, Section 6 mandates that the Commission "shall attempt to draw a general assembly district plan that meets" three standards. The section further provides that "[n]othing in [Section 6] permits the commission to violate the district standards described in Section 2, 3, 4, 5, or 7 of [Article XI]." *Id.* Thus, the Commission must meet Section 6's standards, except where, in good faith, the Commission finds that deviation is necessary to comply with other listed sections. If the Commission can draw a plan that complies with all of Article XI, including Section 6, it must do so.

Sections 6(A) and 6(B) set forth clear, independent judicially manageable requirements. Section 6(A) states that "[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party." A violation of this requirement can be demonstrated through direct and circumstantial evidence of partisan intent as well as objective metrics showing partisan advantage. *See* Relators' Merits Brief ("Relators' Br.") 39-45. Section 6(B) articulates a specific measure to ensure against partisan bias: Using the "statewide state and federal partisan general election results during the last ten years," the map-drawer must confirm that the "statewide proportion of districts" under the proposed plan that "favor each political party" "correspond[s] closely" to the "statewide preferences" of Ohio voters as demonstrated by the proportion of votes received by candidates for the two parties. *See* Relators' Br. 27-30. The requirement that a proposed plan "correspond closely" to statewide voter preferences reflects that deviation from partisan proportionality *is* permitted—but only to the extent necessary to comply with Sections 2, 3, 4, 5, or 7.[2]

[2] Contrary to the Statewide Commissioners' argument, *see* Brief of Respondents DeWine, LaRose, and Faber ("Statewide Br.") 22, Section 6(B) is not in tension with Section 6(C), which requires

Section 6 is violated when, as here, the Commission outright refuses to attempt to draw a map that meets the enumerated standards. The Commission's blatant disregard for Section 6 makes this an easy case. Future redistricting cycles may present harder questions, including whether one could bring a Section 6 challenge *in spite of* a future commission's claims that it attempted to comply with Section 6's provisions. In such a case, one might prove a Section 6 violation if the evidence shows that (1) the challenged plan violates one or more of Section 6's standards, and (2) the deviations are unnecessary to comply with Sections 2, 3, 4, 5, or 7. But that is not the scenario presented here: In this case, and in this cycle, the Commission admittedly did not even try.

III. Standard of Review

The material facts are not in dispute. Based on those facts, the Plan is unconstitutional regardless of this Court's standard of review. If the Court finds it necessary to reach the issue, Relators here agree with the Ohio Organizing Collaborative ("OOC") Relators that the Court should review the 2021 Plan without presuming its constitutionality. OOC Merits Brief 20-22.

The Republican Legislative Commissioners argue for a presumption that Commission plans are constitutional, which can be overcome only upon a showing "beyond reasonable doubt" that a plan violates Article XI. Legislative Br. 24-25 (quoting *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 22). This was the standard of review articulated in *Wilson* with respect to the 2011 plan approved by the Apportionment Board. But not only is the Apportionment Board no longer the body responsible for legislative redistricting, the Fair Districts

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the Commission to attempt to draw compact districts. First, the evidence shows that one can draw maps that are both more proportional and more compact than the 2021 Plan. (*See* Aff. of J. Rodden ¶ 101.) Second, the drafters' and voters' decision to put compactness and partisan proportionality on the same footing in Section 6 does not force the Commission "to achieve incommensurate goals." *See* Statewide Br. 22. It gives the Commission two independent requirements: one to achieve a plan-wide metric and another that guides its drawing of individual districts.

Amendments abrogated the judicial underpinnings for *Wilson*'s deference. In deferring to the Apportionment Board's 2011 plan, the *Wilson* court looked to the very permissive language that (at the time) was found in Article XI. *Id.* at ¶ 30. Much of this language was eliminated in response to *Wilson*. *Compare* Ohio Constitution, Article XI, Sections 3 & 4 (2021), *with* Ohio Constitution, Article XI, Sections 3, 7, 9 (1967, repealed 2021). The new amendments limit the Commission's redistricting authority, prescribing the number of years a plan may be in effect depending on how many votes it receives, requiring the Commission to explain how it calculated statewide voter preferences if a simple-majority map is passed, and setting forth requirements for holding public hearings before approving a plan. Ohio Constitution, Article XI, Sections 1 & 8.

This was purposeful. In approving the Fair Districts Amendments, the people of Ohio chose to ensure robust judicial review of Commission plans. (*See* HIST_0120 (Fair Districts Handout) (stating that Fair Districts Amendments would keep Ohio's redistricting process "accountable" by "creat[ing] a process for the Ohio Supreme court to order the commission to redraw the map if the plan favors one political party").) This is also consistent with the understanding of at least one Commissioner who voted for the 2021 Plan. At the September 15 Commission meeting, Governor DeWine remarked: "I'm not judging the bill one way or another. That's . . . up to a court to do." (STIP_0398 (9/15/2021 Commission Hearing).) Relators simply ask the Court to take up that task. By approving the Fair Districts Amendments, the voters of Ohio codified their agreement with Justice Pfeifer's dissent in *Wilson*, expressing that this Court should function not as a "rubber stamp" for Commission plans, but as the "guardian of the constitution that it is designed to be." *Wilson*, 2012-Ohio-5367 at ¶ 57 (Pfeifer, J., dissenting).

This Court should reject the Republican Commissioners' invocation of *Wilson*'s bygone deference and not presume the 2021 Plan's constitutionality. Regardless, there is no reasonable

doubt that the Commission failed to make any attempt to comply with Section 6's criteria.

IV. Argument

Given the undisputed facts, the *only* way that the Republican Commissioners can prevail—under any standard—is by this Court holding that Section 6 is toothless. But it is not, and the Republican Commissioners' failure to even attempt to meet its standards dooms their case.

A. Article XI, Section 6 is enforceable.

The Republican Commissioners' entire argument rests on the faulty premise that Article XI, Section 6 is unenforceable because Section 9 of the same article does not set forth a specific remedy for its violation. This crabbed reading not only ignores the history of the Fair Districts Amendments, but also distorts Article XI's text. Section 9(A) provides that "[t]he supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this article." Section 9(B) provides for the Commission's reconstitution if any plan or district is deemed invalid. And Section 9(D)(3) sets forth that "[i]f 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," proceeding to list three remedies. Nowhere does Section 9 preclude judicial review of standalone Section 6 violations.

First, although the Statewide Commissioners claim to focus on the "explicit command" of the Constitution's text, they conspicuously read the word "only" into Section 9(D)(3), *see* Statewide Br. 18, and likewise, the Republican Legislative Commissioners describe Section 9(D)(3) as providing "the exclusive remedies that may be ordered." Legislative Br. 5. Yet nothing in Section 9(D)(3)'s text purports to set forth the *only* or *exclusive* remedies for any potential violation of Article XI. Rather, Section 9(A) gives this Court "exclusive, original jurisdiction in all cases arising under this article," whereas Section 9(D)(3) lists only *specific* remedies for *specific*

violations—violations of Sections 2, 3, 4, 5, or 7. The inclusion of some remedies for some violations does not suggest that the Court cannot issue appropriate remedies for other violations. Indeed, it is undisputed that the Court had jurisdiction to review violations under Article XI's predecessor (which included no remedy provision at all).[3]

The history of HJR 12 confirms Relators' reading. In the House-approved version of what became Section 9, the remedies set forth applied to "a general assembly district plan adopted by the commission [that] does not comply with *the standards set forth in this article*." (HIST_0014 (H.J.R. 12 (as adopted by the House).) Had that been the final text, it might indeed suggest that the Section 9(D)(3) remedies were the only ones available for *any* violation of Article XI. But the final version of HJR 12 (now codified in Article XI) did not include that broader language. Instead, it explicitly cabined Section 9(D)(3), providing that the specific remedies in Section 9 apply to "a general assembly district plan adopted by the commission [that] does not comply with the requirements of Section 2, 3, 4, 5, or 7 of this article." Thus, both the text itself and the legislative history support a finding that the drafters' intention was to limit the remedies available only for violations of Sections 2, 3, 4, 5, and 7, but to leave the Court with discretion to consider and impose other remedies for other types of Article XI violations. If the drafters wanted to constrain the Court's authority to issue remedies in all circumstances, as the Republican Commissioners suggest, they knew how to do so: In the immediately preceding provisions, Section 9(D)(1) & (2), the drafters limited the Court's authority with negative language ("No court shall order"), whereas in 9(D)(3), they use affirmative language ("If the supreme court of Ohio determines").

[3] The Statewide Commissioners cite a federal case discussing federal law and a dissent from this Court for the proposition that jurisdiction and remedial power are distinct. *See* Statewide Br. 33. Yet they fail to explain why Article XI's drafters would provide a sweeping grant of jurisdiction and immediately thereafter include provisions that are allegedly unenforceable in this Court.

Second, the Republican Commissioners' reading renders Section 6 meaningless—not to mention Sections 1 and 8. For example, under the Republican Commissioners' interpretation, Ohioans would have no recourse if the Commission violated Section 1 by never holding a single hearing—undeniably thwarting the voters' intent to ensure that Ohioans would play a meaningful role in the redistricting process—simply because Section 1 is unmentioned in Section 9(D)(3). By the same token, Section 6 sets forth an obligation to attempt to comply with three requirements. *See infra* Part IV.B. If the Court had no authority to enforce that obligation, Section 6, too, would be superfluous. *See State v. Moore*, 154 Ohio St.3d 94, 2018-Ohio-3237, 111 N.E.3d 1146, ¶ 13, citing *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373, 116 N.E. 516 (1917) ("[W]e avoid construing a statute in a way that would render a portion of the statute meaningless or inoperative."); *see also Miami Cty. v. Dayton*, 92 Ohio St. 215, 223, 110 N.E. 726 (1915) (explaining that rules of construction for statues apply to Constitution).

This is the fatal flaw with the Statewide Commissioners' suggestion that Section 6 has teeth only in the context of making it easier to throw out a 4-year plan enacted pursuant to Section 8's impasse procedure. To support that reading, they point to Section 9(D)(3)(c), which provides a specific remedy when a 4-year plan violates Sections 2, 3, 4, 5, or 7 "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." However, if Section 9(D)(3)(c) is the only remedy for any violation of Section 6, then Section 6 is entirely superfluous. Nothing about Section 6's own language provides a basis for such a reading.[4]

[4] The Statewide Commissioners strain to give some meaning to Section 6 by explaining that each Commissioner safeguards it by their oath to uphold the Constitution. But in *Miller v. State*, 3 Ohio

The Republican Legislative Commissioners' reading is even *less* anchored in Section 6's text. They conflate Section 6's standards with the additional and distinct goal of bipartisanship, which is set forth in Sections 1 and 8. *See* Legislative Br. 30. But Section 6 applies independently of whether the Commission passes a 4-year simple majority or a 10-year bipartisan plan. Besides, the "political remedy" of a simple-majority map only lasting four years is itself toothless without judicial review, as, under the Republican Legislative Commissioners' own telling, the Commission could pass yet another plan that ignores Section 6 in four years without facing any consequences.

Accepting either set of Republican Commissioners' arguments would also lead to absurd results: The Commission could issue an 8(C)(2) statement that it drew a plan with the overriding purpose of favoring Republicans because Section 6 was not worth the paper on which it was printed and the Commission had no intention of attempting to comply. So long as the Commission complied with the rest of Article XI, the Republican Commissioners tell the Court, Ohioans would have *no recourse*. This is absurd. *See State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, 896 N.E.2d 979, ¶ 58 (explaining that "courts have a duty to construe constitutional and legislative provisions to avoid unreasonable or absurd consequences").[5]

St. 475 (1854), the only case (the holding of which has since been limited by *Hoover v. Bd. of Franklin Cty. Commrs.*, 19 Ohio St.3d 1, 6, 482 N.E.2d 575 (1985)) in which a majority of the Court held that it could not "assume" the strength or weakness of the General Assembly's "sense of duty" and "obligation of an oath," the Court held that "where a statute is on its face plainly unconstitutional, it is [the Court's] duty so to declare it." *Id.* at 484. Even assuming that *Miller* applies, the Court's duty is surely clear here.

[5] The cases that the Statewide Commissioners cite purporting to preclude a remedy here do no such thing. *See* Statewide Br. 19. *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 22, emphasizes the importance of "how the language would have been understood by the voters who adopted the amendment," which may involve review of "the history of the amendment and the circumstances surrounding its adoption, the reason and necessity of the amendment, the goal the amendment seeks to achieve, and the remedy it seeks to provide," all of which here point to enforceable partisan fairness requirements. *See* Relators' Br. 49-50. The Court's refusal in *Raudabaugh v. State*, 96 Ohio St. 513, 514, 118 N.E. 102 (1917), to read in an

In the alternative, and at the very least, even if Section 9 constrains the Court's remedial authority as the Republican Commissioners suggest, Section 6 still has force. All parties agree that the Court has authority to issue a remedial order for violations of Section 3. Per Section 3(B)(2), "[a]ny 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." Section 6 is a "provision[] of the constitution[] of Ohio" that applies to General Assembly plans. Just as Section 9(D)(3) provides remedies for violations of the federal Constitution's prohibition on racial gerrymandering—which the Statewide Commissioners concede, *see* Statewide Br. 36—it provides remedies for violations of the Ohio Constitution's prohibition on partisan gerrymandering. That reading is consistent with the Constitution's overall structure and text, and it effectuates the will of the supermajority of voters that passed the Fair Districts Amendments. Those voters were told, in no uncertain terms, that the Fair Districts Amendments would "protect[] against gerrymandering by prohibiting any district from primarily favoring one political party" and "require[] districts to closely follow the statewide preferences of voters." (HIST_0120 (Fair Districts Handout).)

This Court has a "duty to give a construction to the Constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions." *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 59 (citation omitted); *see also State ex rel.*

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implied remedy against the state relied on principles of sovereign immunity, inapplicable here. In *Jones v. VIP Dev. Co.*, 15 Ohio St.3d 90, 103, 472 N.E.2d 1046 (1984) (Wm. Brown, J., dissenting), the remedy being discussed was "irreconcilable with the plain language" of the Ohio Constitution, unlike here. The same was true in *Johnson v. BP Chems., Inc.*, 85 Ohio St.3d 298, 313, 707 N.E.2d 1107 (1997) (Cook, J., dissenting). *State ex rel. Ebersole v. Delaware Cnty. Bd. of Elections*, 140 Ohio St.3d 487, 2014-Ohio-4077, 20 N.E.3d 678 ¶ 29, explained only that referendum powers, which the people cannot exercise beyond what the Constitution affords, are limited, but says nothing of the Court's powers to issue remedies. Finally, *Haight v. Minchak*, 146 Ohio St.3d 481, 2016-Ohio-1053, 58 N.E.3d 1135, ¶ 13–14, read into an amendment only those limitations that were explicitly incorporated into the amendment's text.

McGinty v. Cleveland City Sch. Dist. Bd. of Educ., 81 Ohio St.3d 283, 288, 690 N.E.2d 1273 (1998) (explaining that this Court seeks to "avoid constitutional infirmities"). This Court should decline the Republican Commissioners' invitation to ignore Section 6 altogether, especially where, as here, it can easily give that section effect without upsetting the rest of Article XI.

B. Article XI, Section 6 is mandatory.

The Court can similarly make short work of the Republican Commissioners' claim that "Section 6 is not mandatory," Legislative Br. 28, and that the Commission has "discretion . . . to interpret and implement the provisions of Section 6," *id.* at 31. Section 6 sets forth mandatory requirements that afford the Commission little discretion. It mandates that the Commission "shall attempt to draw a general assembly district plan that meets" the standards set forth in Sections 6(A) and 6(B). As courts have repeatedly recognized: "Shall means must. And 'the word 'must' is mandatory. It creates an obligation." *Wilson v. Lawrence,* 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶ 13; *see also State ex rel. Republic Steel Corp. v. Ohio Civil Rights Comm'n,* 44 Ohio St.2d 178, 180, 339 N.E.2d 658 (1975) (interpreting "shall endeavor" to require a "completed attempt"). Section 6's use of "shall attempt," rather than "shall," reflects the section's relation to Article XI's other substantive requirements—excusing compliance only when the Commission tries to comply in good faith, but cannot meet Section 6's standards because of Sections 2, 3, 4, 5 or 7's requirements. *See supra* Part II. That is, the Commission is *required* to draw a plan that meets Section 6's standards *as closely as possible* given the constraints of other sections, making its standards both "aspirational," as described by Representative Clyde, *see* Legislative Br. 1, and mandatory insofar as they do not conflict with Article XI's other requirements.[6] This interpretation

[6] The Republican Commissioners repeatedly quote Representative Clyde on this point. However, "[n]o resort to an examination of the legislative history is warranted" when dealing with an

gives meaning to all provisions of Article XI and avoids absurd results. *See supra* Part IV.A.

Section 6's meaning and operation is clear: The Commission has a mandatory obligation to attempt to meet the substantive standards set forth therein. Deviation is permitted only if required by Sections 2, 3, 4, 5, or 7. And despite the Republican Legislative Commissioners' contention that Article XI authorizes the Commission to exercise unreviewable discretion as to the meaning of Section 6, *see* Legislative Br. 31-36, this Court is "the ultimate arbiter of the meaning of the Ohio Constitution." *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21; *see also* Ohio Constitution, Article XI, Section 9(A) (conferring on this Court "exclusive, original jurisdiction in all cases arising under" Article XI).

The standards at issue here are clear and judicially manageable. Section 6(A) sets forth a standard similar to those presented in other gerrymandering cases.[7] *See* Relators' Br. 39-40, 41-44 (citing cases). If anything, Section 6(B) is even more easily applied: It provides a precise formula for comparing a proposed plan's partisan breakdown to statewide voter preferences. *See* Relators' Br. 28. Section 6(B) provides that a proposed plan must "correspond closely" to statewide voter preferences, reflecting the fact that Section 6's standards are mandatory except to the extent necessary to comply with other substantive requirements. The word "closely" recognizes that while "perfect" or "exact" correspondence is the starting point, it may not always be achievable

"unambiguous" provision such as Section 6. *See State ex rel. Brinda v. Lorain Cty. Bd. Of Elections*, 115 Ohio St.3d 299, 2007-Ohio-5228, 874 N.E.2d 1205, ¶ 25; *see also* Relators' Br. 45-48 (arguing Section 6 is mandatory). That said, the Republican members of the General Assembly agreed to include Section 6—and its purpose should be given effect by the Court.

[7] The Republican Legislative Commissioners erroneously cite *Rucho v. Common Cause* to argue that "no court has been able to decipher" partisan proportionality standards. Legislative Br. 35 (citing 139 S. Ct. 2484, 2501 (2019)). But the *Rucho* Court explicitly recognized that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" in partisan gerrymandering cases, specifically citing amendments to the Florida constitution akin to those in this case. *See Rucho*, 139 S. Ct. at 2501.

because of Article XI's other requirements. A comprehensive reading of the language in Section 6 clearly demonstrates that the Commission is required to attempt to achieve full compliance with all applicable sections—including the proportionality standard in Section 6(B).

Section 8(C)(2) confirms this reading of Section 6(B). It requires the Commission, when enacting a plan under Article XI's impasse procedure, 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 partisan allocation of the plan "corresponds closely to those preferences, as described in [Section 6(B)]." This requisite facilitates judicial review of a plan enacted by simple majority, by requiring the Commission to provide the figures used for the mechanical application of Section 6(B) and set forth why any deviation was necessary based on other requirements of Article XI.

The Republican Commissioners' claim of discretion to interpret Section 6 is all the more ludicrous in light of the Commission's failure to interpret Section 6 at all. The Republican Legislative Commissioners and their map-drawers testified that they did not attempt to comply with Section 6, *see* Relators' Br. 38, and the majority of Commissioners testified that they were not involved in drawing the Plan, *see id.* at 13-14, and believe the reasoning in the 8(C)(2) statement was incorrect, *see id.* at 26-27. Ultimately, the Republican Commissioners have offered no substantive interpretation of Section 6 other than the professed authority to ignore it altogether.

C. The Commission did not satisfy its constitutional requirements because it did not attempt to comply with Section 6's standards.

Section 6 begins with a simple command: "The Ohio redistricting commission shall attempt" to draw maps that are not primarily drawn to favor or disfavor any political party, reflect the statewide proportion of Ohio voters' partisan preferences, and contain compact districts.

Consistent with their overall failure to recognize the Fair Districts Amendments' mandate, the Republican Commissioners ask this Court to find that attempting to cut a backroom political

deal is good enough when it comes to complying with Section 6. *See* Legislative Br. 10; Statewide Br. 10-15. The Republican Legislative Commissioners even express "disappoint[ment]" that a counteroffer the Democratic Commissioners made on September 14 contained (consistent with Section 6's requirements) a near-proportional number of Republican and Democratic-leaning districts. *See* Legislative Br. 12. But Section 6's command to attempt to draw a map that is proportional to voters' statewide partisan preferences cannot be satisfied with an attempt to negotiate the best bipartisan deal for Republican state legislators. Contrary to Respondents' implication, the bargaining positions of the two Democratic Commissioners has no bearing on whether the majority of the Commissioners had the ability to draw a map compliant with Section 6, which they clearly did. Their brief thus reveals their failure to take Section 6 seriously during the Commission process; they viewed it as imposing no constraints on politics as usual.[8]

The Republican Commissioners, again, offer no argument or evidence that they attempted to comply with Section 6. Instead, they argue that much of the Plan's Republican skew can be attributed to the state's natural geography. Citing previous work by Relators' expert Dr. Rodden, the Republican Commissioners claim that what might be seen as partisan gerrymandering is actually an "unintentional gerrymander" driven by the way the population is distributed across the state. Of course, this is not true. Even the Republican Legislative Commissioners acknowledge that if one sets out to draw a plan that achieves statewide proportionality, one "can easily draw . . . maps after the fact that provide exact proportionality by making exact proportionality one of [the] criteria for drawing maps." Legislative Br. 35. The failure to achieve proportionality cannot

[8] The Republican Legislative Commissioners tacitly acknowledge the distinction between bipartisan agreement and the requirements of Section 6 elsewhere in their brief, as they suggest that a plan with acceptable outcomes for the two major parties may nevertheless be actionable by a third party. *See* Legislative Br. 41.

credibly be attributed to natural population groupings. The Plan does not achieve it because the map-drawers chose *not* to make proportionality a criterion for drawing maps.

Moreover, Dr. Rodden himself reviewed the evidence submitted in this case and, applying the very research upon which the Republican Commissioners purport to rely, concludes that the Plan's advantage to Republicans *cannot* be explained by political geography. (*See* Aff. of J. Rodden.) Rather, the Plan's map-drawers made line-drawing choices, especially in urban areas, that subordinated traditional redistricting criteria in favor of partisan gain. (*Id.* ¶ 100.) The 2021 Plan inexplicably cracks communities, especially in dense urban areas, to maximize Republican vote share. (*Id.* ¶¶ 101-103.) Dr. Rodden drew his own plan that complied with all constitutional requirements, met or outperformed the Plan on other objective measures, and was markedly more proportional. (*Id.* ¶¶ 39, 51.) Dr. Imai, using a different methodology, likewise showed that the Plan is an extreme Republican-leaning outlier. (*See* EXPERT_0244-324 (Aff. of K. Imai).)

The Republican Commissioners have no response to any of this. Instead, they advance two distractions from the way the map-drawers purposefully and artfully drew districts to crack and pack Democrats. First, the Republican Legislative Commissioners spend 8 pages critiquing a Democratic Caucus Plan that the Republican Legislative Commissioners ignored when it was proposed to them and which is not before the Court for consideration. Second, they argue that they *had* to systematically draw Republican-leaning districts in Democratic-leaning areas (Northeast Ohio as well as Franklin, Montgomery, Hamilton Counties) because to do otherwise would be to unfairly dilute Republican votes. In doing so, they cite voter preferences in each area, using the vote share measure of proportionality that Relators and the Constitution use statewide.

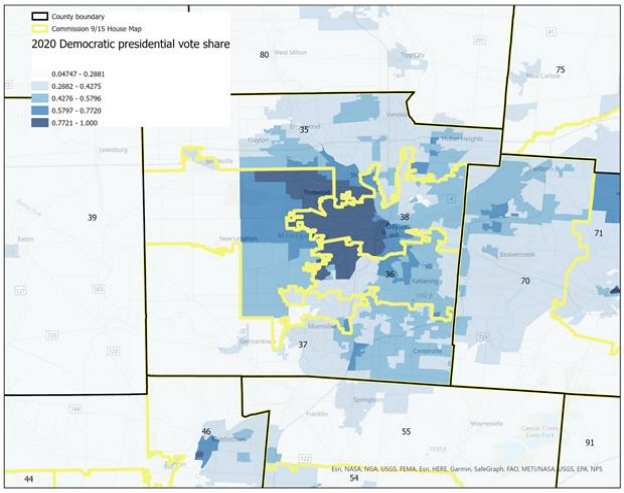
It is ironic that the Republican Legislative Commissioners deride Section 6(B) proportionality as inscrutably vague and unenforceable, yet then rely on it as a principal foundation

of their argument. But more importantly, Section 6 requires consideration of the partisan proportionality of districts on a statewide basis, not just in localized areas where Democrats happen to be in the majority. And the fact that the other provisions of Article XI led to Republican-leaning districts in less-populous counties carries no legal weight here—the voters knowingly adopted a *statewide* proportionality provision alongside those other requirements. As such, the Statewide Commissioners' assertion that an "independent requirement of proportionality would *mandate* gerrymandering" in favor of Democrats in populous, Democratic-leaning counties, *see* Statewide Br. 4, 27-28, is ultimately just a complaint that they do not like how the requirement of proportionality constrains the raw exercise of political power by the Republican majority. In any event, none of the Commissioners dispute that districts in each of those areas can be drawn to maintain Democratic voting power without violating Article XI's line-drawing requirements or traditional redistricting criteria. This is the relevant inquiry, and they have nothing to say about it.

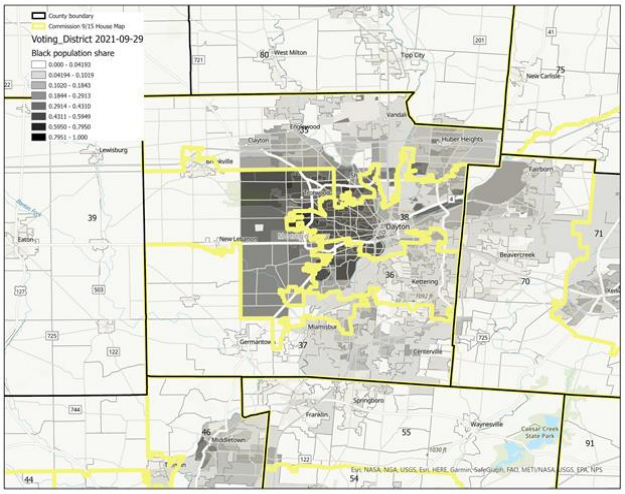
Take the 2021 Plan's treatment of Montgomery County, for example. Montgomery County encompasses the entire Dayton metropolitan region. Roughly 50% of voters in Montgomery County favor Republicans, while 50% favor Democrats. Legislative Br. 21. The map-drawers, however, plainly drew lines to maximize Republican advantage. The Plan carefully packs much of the Democratic vote in Dayton into one district (with a 69% Democratic supermajority) and cracks the rest. This creates three Republican-leaning districts, with partisan indices with solid Republican advantages, and a fifth district that the Republican Legislative Commissioners call a Democratic-leaning district, but which in reality gives Republicans a 49.97% vote share in a fourth seat (House District 36) that is currently represented by a Republican. (*See* Aff. of J. Rodden ¶ 81.) How does the Commission manage to give Republicans a likelihood of winning 60%, and possibly 80%, of the seats in Montgomery County? It wasn't easy, as Dr. Rodden shows: The relatively

compact community of Black voters in the Dayton metropolitan region is cracked into 4 separate districts. (*See id.* ¶ 83.) For example, Trotwood, a primarily Black city outside of Dayton which tends to vote Democratic, is combined with largely rural, white Republican Prebble County—an odd pairing considering their geographic placement. (*Id.* ¶ 84.) In effectively quartering Dayton into 4 districts, the Commission bypassed drawing compact districts in that area, as the following maps illustrate powerfully. (*See id.* Figure 7.)

Partisanship



Race



In contrast, the Democratic Caucus Plan, the Ohio Citizens' Redistricting Commission plan, and Dr. Rodden's plan include House maps with a 3-2 Democratic-Republican ratio, each of which keep large portions of Dayton's Black community whole. (*Id.* at Figure 8.)

This pattern repeats throughout the state: Dr. Rodden shows in detail that one can "rule out the claim that the surprisingly large number of anticipated Republican seats associated with the Commission's plan were somehow driven by the confluence of Ohio's political geography, the requirements of the Ohio Constitution, and a focus on traditional redistricting principles." (*Id.* ¶ 106.) Rather, the Plan disproportionately favors Republicans because the map-drawers "always attempted to string together groups of proximate Republicans to carve out majority-Republican districts within urban counties." (*Id.* ¶ 103.) It is no wonder that the Republican Legislative

Commissioners attack the Democratic Caucus Plan rather than defend their own.

D. The Commissioners' various additional arguments that the Court should defang Article XI are unavailing.

1. Requiring the Commission to follow the Ohio Constitution does not violate the Fourteenth Amendment of the federal Constitution.

The Republican Legislative Commissioners' disdain for the Fair Districts Amendments reaches its apogee in their argument that complying with Section 6 would violate the Fourteenth Amendment's Equal Protection Clause. Legislative Br. 38-43. In their view, Section 6(B)'s command that the Commission attempt to draw a plan with a partisan breakdown that "correspond[s] closely" to the "statewide preferences of voters of Ohio" would "discriminat[e] against Republican voters in the state's most urban counties," raising (they claim) Fourteenth Amendment concerns. Legislative Br. 42. The Court should dismiss this argument out of hand.

First, the Republican Legislative Commissioners threaten the Court with the kind of federal partisan gerrymandering claim that *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), foreclosed. That said, *Rucho* took pains to emphasize that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507. This exercise in judicial federalism, the Court explained, helps ensure that "complaints about districting" do not "echo into a void." *Id.* at 2484. The Republican Commissioners ask the Court to cast Ohio into the void.

Second, even if *Rucho* did not entirely foreclose the Republican Legislative Commissioners' novel Fourteenth Amendment argument, the claim is unmoored from any precedential support. They first cite to *Gaffney v. Cummings*, a case that rejected arguments almost identical to the Republican Legislative Commissioners' Fourteenth Amendment argument here, holding that a Connecticut redistricting plan drawn with an eye toward achieving proportionality did *not* violate the one-person-one-vote principle or any other federal constitutional guarantee. 412 U.S. 735 (1973). In that case, the plaintiffs argued that the plan was "invidiously discriminatory

because a 'political fairness principle' was followed in making up the districts in both the House and Senate." *Id.* at 752. The U.S. Supreme Court disagreed, concluding that "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats," and noted that a "politically mindless approach" in which party is not considered in drawing districts may lead to "the most grossly gerrymandered results." *Id.* at 753-54. *Gaffney* establishes that attempts at proportionality are not only lawful, but laudable.[9]

Moreover, the notion that drawing a plan in which districts closely correspond to statewide partisan vote share "discriminates" against Republicans is illogical. Proportionality, by its nature, requires *equal treatment* of Democrats and Republicans regardless of where they reside, to ensure they receive equal representation at the statewide level. The Republican Legislative Commissioners' real gripe with this requirement is that it hinders their ability to gerrymander certain portions of the state. That is not discrimination.

Finally, this argument removes any veil remaining from how the map-drawers drew the Plan. The Republican Legislative Commissioners argue that Republicans' Equal Protection rights are violated unless Republicans in Democratic-leaning areas are drawn into majority Republican districts. The Republican Legislative Commissioners thus confirm they sought to maximize Republican power. Indeed, they assert an Equal Protection right to strongarm their way to more seats because they are the party in power: In their view, it is not only their prerogative, but their

[9] *Larios v. Cox*, meanwhile, is simply inapposite; it concerned a violation of the one-person-one-vote principle. 300 F. Supp.2d 1320, 1357 (N.D. Ga. 2004). Likewise, Republican Legislative Commissioners' feigned concern for Libertarians, Legislative Br. 40-41, is not well taken. They have no standing to assert any such a claim, and it is well-established that states need not grant special solicitude to minor political parties. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367-68 (1997). And, in any event, there is no evidence that the Commission could draw a Libertarian Party district anywhere in the state.

solemn right to maximize Republican power. There is no precedent for this audacious position.

2. The individual Commissioners are proper respondents in this action.

The Statewide Commissioners concede that the Republican Legislative Commissioners hijacked the redistricting process but argue that the Court has no power to strike down a plan they derided publicly and privately. *See* Statewide Br. 17-23. As backup, they argue that they shouldn't be held responsible for the Commission's failures—that they are not proper respondents here and that Relators should have sued only the Commission (which is also a party to this action). Statewide Br. 29-32. No other Commissioners make this argument, and the Court should reject it.

To support this argument, the Statewide Commissioners make much of a slight change in Article XI's provision concerning judicial review—previously Section 13, now Section 9. Under the prior version of Article XI, redistricting fell to the "persons responsible for apportionment," although these "persons" were consistently described as the Apportionment Board. *See, e.g.*, *Wilson*, 2012-Ohio-5367 at ¶ 1. Under the new Article XI, by contrast, the Constitution uses the term "Commission" to describe the group of people responsible for drawing state legislative districts. *E.g.*, Ohio Constitution, Article XI, Section 1(A). Up to this point in their briefs, the Republican Commissioners had gone to great lengths to explain away clear, textual changes created by the Fair Districts Amendments. Now, faced with a minor change in nomenclature that they believe affects their ability to be sued, the Statewide Commissioners suddenly discover a sea change in how reapportionment suits are structured. In their view, the shift from "persons responsible" to "Commission" heralds a new litigation regime, wherein only the Commission may be sued and individual members are no longer the proper subject of suits.

This would be a remarkable change of course, given past practice and the absence of any affirmative indication of change in the text. This Court held in *Wilson* that "it remains better practice in this type of action to name the board and all its members as parties." 2012-Ohio-5367

at ¶ 10. That is to say, under the earlier "persons responsible" regime, this Court recognized that relators should sue both the corporate body and its individual members.

Even setting aside the lack of support for the Statewide Commissioners' position in the text, structure, or history of Article XI, the progress of this litigation underscores that *Wilson*'s "better practice" for naming respondents remains the better practice today. The Commission repeatedly emphasized that it had no documents to produce that were not in the possession of the individual members. *See* Ohio Redistricting Commission's Memorandum in Response to Relators' Motion to Compel Expedited Discovery at 1. The Commission has also consistently deferred to the position of the individual members on all substantive issues, including most recently by filing a merits brief that does nothing more than incorporate the members' arguments by reference. *See* Merit Brief of Respondent of the Ohio Redistricting Commission at 1. The Commission acts through the Commissioners. This Court should therefore stick to the "better practice" articulated in *Wilson* and allow relators to sue both the Commission and its individual members.

V. Conclusion

For the foregoing reasons and those set forth in their opening merits brief, Relators request that this Court declare the 2021 Plan invalid and order the Commission to comply with the requirements of Article XI of the Ohio Constitution. Given the February 3, 2022 filing deadline for candidates seeking General Assembly seats, the Court should give the Commission clear directives for its second "attempt," including but not limited to a directive that the anticipated partisan breakdown of the districts—based on an aggregation of precinct-level vote totals from all statewide federal or state partisan elections over the past decade for which such totals are available—match the 54-46 statewide preference of Ohio voters as "closely" as possible while complying with Ohio's other constitutional mandates.

Dated: November 10, 2021

Respectfully submitted,

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