IN THE SUPREME COURT OF OHIO

LEAGUE OF WOMEN VOTERS OF OHIO, *et al.* ***Relators,*** ***v.*** **OHIO REDISTRICTING COMMISSION, *et al.*,** ***Respondents*.**	**Case No. 2021-1449** **Original Action Filed Pursuant to Ohio Const., art. XIX, § 1(C)(3)**

RELATORS' RESPONSE TO RESPONDENTS' MOTION TO DISMISS, TO STAY THE CASE, AND TO STAY THE DISCOVERY

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INTRODUCTION

Unable to defend their unconstitutional partisan gerrymander, Respondents seek to obfuscate the merits and delay the production of relevant documents through a diversionary motion. Just as in the litigation over the General Assembly map, Respondents do not want to disclose what happened here. Respondents' attempt to repeat that failed playbook here through this improper motion fails on all counts.

First, Respondents seek to dismiss Relators' entire action related not to the causes of action set forth in the Complaint but on an alleged flaw in the Prayer for Relief. There isn't one. Relators have in fact stated claims upon which relief can be granted. And they have appropriately requested remedies that are constitutionally required. But even if there were a need to clarify the Prayer for Relief, it is easily done. Civil Rule 15 authorizes Relators to amend this Complaint as of right. Accordingly, to permit the parties to focus on the substance of this case and not technical quibbles, Relators are submitting an amendment to their Complaint concurrently with this brief.

Second, Respondents seek to dismiss the claims against the individual commissioners for lack of standing. All elements of standing are satisfied here: the alleged injury is fairly traceably to the commissioners' failure to perform their constitutionally required duties. And, under Article XIX, Section 3(B)(2) of the Ohio Constitution, that injury is redressable by an order directing the commissioners to remedy this injury should the General Assembly fail to do so within 30 days of a favorable judgment.

Third, Respondents seek to stay this action merely because another party has also filed suit against their gerrymandered district map, *i.e.*, the relators in *Adams, et al. v. DeWine, et al.*, No. 2021-1428 (hereafter "*Adams*"). Regardless of the claims of the *Adams* relators, the two organizations and eight individual voters that have alleged their own specific injuries are entitled

to a hearing and remedy. Put simply, the mere fact that *someone else* has been injured does not eliminate the right to have one's own injuries adjudicated. And here, given the exigencies of the schedule, a "stay" amounts to the termination of this case.

Finally, Respondents seek to have discovery stayed in this action. As Respondents concede, however, Relators' discovery requests have imposed no incremental burden. Indeed, Relators made a significant effort not to impose *any* burden on Respondents by requesting the exact same discovery that relators requested in *Adams*.

ARGUMENT

I. Respondents' Motion to Dismiss Is Baseless.

Respondents attempt to dismiss this suit, outright, based on a faulty understanding of fundamental black letter law and a mischaracterization of Relators' Complaint.

A. Relators have stated a claim upon which relief can be granted.

Respondents' motion to dismiss boils down to the following point: Relators' failure to explicitly name the General Assembly in its Prayer for Relief requires dismissal of the Complaint in its entirety. That argument, however, provides no legal basis for dismissal under Civ. R. 12(B)(1) or 12(B)(6).

For purposes of a Rule 12(B)(6) motion, a party has stated a claim upon which relief can be granted "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover." *York v. Ohio State Highway Patrol*, 60 Ohio St. 3d 143, 145, 573 N.E.2d 1063, 1065 (1991); *see also Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d 190, 192, 532 N.E.2d 753, 756 (1988) ("before we may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts warranting a recovery"). And in considering a motion which claims lack of jurisdiction over the subject matter pursuant to Civ.R. 12(B)(1), "a similar principle controls: the question is whether the plaintiff has alleged any cause of action

cognizable by the forum." *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 611, 433 N.E.2d 572, 575 (1982) (internal citation and modification omitted).

Under either Rule 12(B)(1) or Rule 12(B)(6), Relators have pleaded two causes of action that would allow for recovery and are cognizable by this forum. *First*, Relators allege that the plan passed by the General Assembly and signed by the governor ("the Enacted Plan") "unduly" favors the Republican Party in violation of Article XIX, Section 1(C)(3)(a). Compl. ¶ 4. In support of this cause of action, Relators allege that despite the Republican Party's predicted vote share of 55%, the Enacted Plan would allocate them a minimum of 67%, and likely even 80%, of total congressional seats for the next four years. *Id.* ¶¶ 2, 3, 4. *Second*, Relators allege that the Enacted Plan unduly splits governmental units in violation of Section 1(C)(3)(b). *Id.* ¶ 7. In support of this separate cause of action, Relators allege that the Enacted Plan unduly splits governmental units in the urban and suburban areas of southwestern and northeastern Ohio, particularly counties and communities in Hamilton, Cuyahoga, and Summit—noting that these splits are unnecessary for any purpose other than to minimize the efficacy of Democratic votes. *Id.* But Relators did not stop there. As Respondents acknowledge, Relators submitted *evidence* in support of their allegations. *See, e.g.*, Compl., Ex. 1, Report of Dr. Christopher Warhsaw at 19–20 (explaining that all four established partisan metrics demonstrates that the Enacted Plan *advantages* the Republicans and *disadvantages* the Democrats). Thus, Relators have clearly alleged facts sufficient to support their claims that the Enacted Plan violates either Section 1(C)(3)(a) or Section 1(C)(3)(b), or both. Nor is there any doubt that if either violation was proven, Relators would be entitled to relief. *See* Ohio Const., art. XIX, § 3(A). Moreover, this Court has jurisdiction over both causes of action, *see id.* § 3(B), and thus these claims are cognizable by the Court, *see Blankenship*, 69 Ohio St. at 611. Thus, Relators have stated claims

upon which relief can be granted, and these claims cannot be dismissed under Rule 12(B)(1) or 12(B)(6).

Instead of challenging the merits of Relators' claims, or the substance of Relators' pleadings, Respondents' motion focuses on an irrelevant factor. They conflate a failure to state a claim upon which relief can be granted with a failure to state the proper relief or remedy. In doing so, Respondents misstate the function of a motion to dismiss. "[A] Rule 12(b)(6) motion properly targets *claims*, not remedies," thus making the requested remedy *irrelevant* to the adjudication of a Rule 12(b)(6) motion. *Goodman v. J.P. Morgan Inv.. Mgmt., Inc.*, No. 2:14-CV-414, 2015 WL 965665, at *6 (S.D. Ohio Mar. 4, 2015) (unpublished).[1] Indeed, *Goodman* is particularly instructive here, as it held that a motion to dismiss will not be granted "merely because a plaintiff requests a remedy to which he or she is not entitled. It need not appear that plaintiff can obtain the specific relief demanded as long as the court can ascertain from the face of the complaint that some relief can be granted." *Id.* (internal quotations, citation, and alteration omitted).

In other words, courts have *not* stated, as Respondents suggest, that Relators' purported defect in their Prayer for Relief negates their underlying claims upon which relief may be granted. To the contrary, this Court has held that "even if the relief demanded in a civil complaint . . . may be inappropriate, the complaint should not be dismissed except where there is a failure to state a claim upon which some relief, *not limited by the request in the complaint*, can be granted." *Baxter v. Jones*, 83 Ohio App. 3d 314, 319, 614 N.E.2d 1094, 1098–99 (1992)

[1] "Because the Ohio Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal law interpreting the federal rule is appropriate and persuasive authority in interpreting a similar Ohio rule." *Felix v. Ganley Chevrolet, Inc.*, 2015-Ohio-3430, ¶ 24, 145 Ohio St. 3d 329, 333, 49 N.E.3d 1224, 1230.

(emphasis added); *see also Lambert v. Clancy* 2010-Ohio-1483, ¶ 16, 125 Ohio St. 3d 231, 235, 927 N.E.2d 585, 589–90 (finding that a motion to dismiss was inappropriate even though appellee's prayer for relief failed to name the necessary public body or office at issue).

Moreover, the cases on which Respondents rely—*Binder v. Cuyahoga Cty*. and *Riveredge Dentistry P'ship v. City of Cleveland*—are inapposite. In *Binder*, the plaintiffs sought recovery based purely on statutory violations, thus requiring that the statute at issue provide for the right of action. 161 Ohio St. 3d 395, 399, 2020-Ohio-5126, 163 N.E.3d 554. Unlike this case, where the Constitution *provides* for Relators' right of action, the statute in *Binder* contained "no language . . . demonstrating the General Assembly's intent to authorize a civil action." *Id.* at 400. Respondents' second case, *Riveredge*, fares no better. 8th Dist. Cuyahoga No. 110275, 2021-Ohio-3817 (unpublished slip copy). There, the Ohio Court of Appeals granted the motion to dismiss because the moving party (1) was immune from suit, *id.* ¶ 42; (2) was not responsible for any of the events that gave rise to the flooding at issue, *id.* ¶ 38; and (3) had no authority or legal obligation to remedy the flooding at issue, *id.* ¶ 43. Here, all three factors weigh in the opposite direction: the Ohio Constitution (1) explicitly authorizes the present action, Ohio Const., art. XIX, § 3(B); (2) charges Respondents with the responsibility of creating a valid redistricting plan, *id.* § 1(B); and (3) should this Court find in Relators' favor, charges Respondents with passing the remedial map if the General Assembly fails to do so on its first pass, *id.* § 3(B)(2). Thus, *Riveredge* has no application to this case.

B. Relators have sought appropriate relief.

Even if a defect in the Prayer for Relief could constitute a basis for dismissal, Relators have adequately pleaded appropriate and alternative relief. Respondents attack the Prayer for Relief on the basis that Relators have sought a remedy *solely* from the Commission pursuant to

Article XIX, Section 3(B)(2), thus bypassing the General Assembly. That argument, however, is wrong for four reasons.

First, Relators' Prayer for Relief does not bypass the General Assembly, should this Court find the Enacted Plan unconstitutional. For context, the Complaint makes clear that any remedy to an unconstitutional map consists of two steps: (1) the General Assembly shall pass a new plan no later than the 30th day after this Court's order requiring a revision of an enacted plan; and (2) if a new map is not passed in accordance with Section 3(B)(1), the Commission shall reconvene to adopt a congressional district plan pursuant to Section 3(B)(2). Compl. ¶¶ 50–51.

Second, by its express terms, the Prayer itself does not bypass the General Assembly.

- Paragraph A request seeks declaratory judgment regarding the constitutional validity of the Enacted Plan under Article XIX: that is relief squarely directed at the General Assembly.

- Paragraph C seeks a permanent injunction barring Respondents from, *inter alia*, holding any elections under the unconstitutional Enacted Plan. "Respondents" here includes Speaker Cupp and Senate President Huffman, *i.e.*, members of the General Assembly; thus, the relief is not limited in any way to actions of the Commission.

- Paragraph D asks that this Court order that hearings be held in the service of the enactment of a new plan—and in the alternative ("or") direct the Commission to enact plans that are adopted. By the plain meaning of the text, the General Assembly would also be subject to such an order.

Third, to the degree that certain portions of the Prayer (*e.g.*, Paragraph B) focus on the Commission, that is not the basis for dismissal—even if that aspect of the Prayer were improper (which it is not). *See Goodman*, 2015 WL 965665, at *6 (finding that in the context of a motion to dismiss, a plaintiff's allegedly inappropriate request for relief was irrelevant so long as *some* kind of relief could be granted).

Fourth, the adequacy of Relators' Prayer for Relief is further underscored by Paragraph G, which states that this Court may grant "*such other or further relief . . .* [*it*] *deems appropriate*." *Id.* ¶ G (emphasis added). That request makes clear that Relators have not sought *exclusive* relief from the Commission as Respondents suggest. *See Baxter*, 83 Ohio App. 3d at 320 (finding that a motion to dismiss was inappropriate where appellant had requested "any other appropriate relief" even though several of his other requests for relief were unavailable). By any interpretation of Paragraph G, appropriate relief would necessarily include relief against the first entity that is required to draw a new plan should this Court find the Enacted Plan unconstitutional. Indeed, the body of the Complaint, *e.g.*, Compl. ¶¶ 50–51, leaves no doubt that this includes the General Assembly when that was in fact what transpired, *id.* ¶ 82.

C. Respondents' motion is moot in light of Relators' amended complaint.

Even if this Court were to credit Respondents' technical pleading objection to the Prayer for Relief, Relators amend their complaint as of right pursuant to Rule 15. *See* Civ. R. 15(A) ("A party may amend its pleading once as a matter of course . . . within twenty-eight days after service of a motion under Civ. R. 12(B)."). In particular, the amended complaint makes clear that the Prayer for Relief explicitly seeks remedies against both the General Assembly and the Commission by virtue of their complementary, yet mandatory, constitutional duties. Thus, Respondents' motion, while dubious in its merits, is nevertheless moot. Relators should not have needed to go through this exercise, but they have done so in the interests of judicial economy, so that the parties (and this Court) can focus on the substance of this dispute.

II. Respondents' Standing Arguments as to the Individual Commissioners Lack Merit.

Save for one fleeting reference in their motion (and not in their memorandum of law in support), Respondents do not even attempt to substantiate an argument that Relators lack standing to sue the Commission Respondents, let alone incorporate by reference any standing

arguments articulated in their parallel motion to dismiss in the *Adams* suit. *See Adams*, Case No. 2021-1428, Mot. to Dismiss (Nov. 29, 2021). Even assuming that Respondents had incorporated those standing arguments, they fail, as Relators' injury is both traceable and redressable with respect to conduct of the Commission Respondents.

A. Relators' injury is fairly traceable to the actions of the individual commissioners.

Under Ohio law, any alleged injury must be fairly traceable to the conduct of Respondents. *See Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22. Notably, Respondents do not challenge Relators' standing with respect to Respondents LaRose, Huffman, or Cupp in their official capacities as Secretary of State, President of the Ohio Senate, and Speaker of the Ohio House of Representatives, respectively. Instead, Respondents contend that Relators lack standing to sue the Commission Respondents. *See* MTD at 11–12 (citing, *Adams*, Case No. 2021-1428, Mot. to Dismiss (Nov. 29, 2021)).[2] That argument fails as a matter of law.

The Ohio Redistricting Commission ("the Commission") operates through the acts of its *individual* commissioners, thereby making the *individual* members appropriate respondents here. Indeed, the very text of Article XIX makes that clear. It states that the Commission "*shall* adopt a congressional district plan" "by the affirmative vote of *four members* of the commission, including *at least two members*" of each major political party in the General Assembly. *See* Ohio Const., art. XIX, § 1(B) (emphases added). In other words, the conduct of *individual* members is directly contemplated—and in fact required—within the context of a prescribed Commission duty.

[2] To the extent Respondents claim that Relators have failed to state a claim as to the Commission Respondents, *see* MTD at 11, that argument fails for the same reasons that Relators have stated a claim upon which relief may be granted. *See supra*, Section I.A.

In the same breadth, Section 1(B) requires the Commission to pass a plan by October 31, should the General Assembly fail to pass a plan by September 30. *See* Ohio Const., art. XIX, § 1(B) ("the Commission "shall adopt a congressional district plan"); *see also Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 534, 539 2010 Ohio 622, P16, 925 N.E.2d 116 ("shall' is 'construed as mandatory unless there appears a clear and unequivocal legislative intent' otherwise"). That is exactly what happened here. The General Assembly failed to pass a plan by September 30, thereby requiring the Commission to fulfill its constitutional duty to pass a plan by October 31. Compl. ¶ 65. And despite calls from the community and members of the Commission to enact a plan, the Commission failed to do just that. In refusing to carry out its constitutional duty, the Commission, by and through its members, failed to (1) hold a single public meeting until three days before the constitutional deadline for passing a plan; (2) submit any Commission-proposed maps; and (3) vote on any proposed map before October 31. *Id.* ¶ 66. It is because of the Commission's deliberate failure to fulfill its constitutional duty, that the General Assembly was then required to take control of the map-drawing process and ultimately voted to pass the Enacted Plan. *See* Ohio Const., art. XIX, § 1(C)(1) ("the general assembly shall pass a congressional district plan" "[i]f the Ohio redistricting commission does not adopt a plan not later than" October 31, 2021); *see also* Compl. ¶¶ 66–67. Put simply, the Commission's conduct was a necessary precondition to the ultimate enactment of the congressional district map that was adopted by the General Assembly. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992); *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 2014-Ohio-2382, 13 N.E.3d 1101 (explaining that traceability requires a "causal connection between the injury and the conduct complained of").

B. The alleged injury is redressable by an order directed to the Commission.

Respondents fare no better with respect to their purportedly incorporated arguments on redressability. As explained above, the Complaint makes clear that there are two steps in the remedial process, should the Court find the Enacted Plan unconstitutional. *See* Ohio Const., art. XIX, § 3(B)(1). Specifically, if the General Assembly fails to enact a new plan within 30 days of an order of this Court invalidating the Enacted Plan, the Commission "*shall* adopt a congressional district plan." *Id.* § 3(B)(2) (emphasis added). Thus, contrary to Respondents' assertions, *see Adams*, Mot. to Dismiss, at 7 (Nov. 29, 2021), the text makes clear that the Commission, by and through its individual members, have "duties" that they are required to fulfill. Accordingly, any remedial order issued by this Court must run against the individual Commissioners so as to be binding on the Commission in the event the General Assembly is once again unable to pass a constitutionally valid congressional district plan.

III. The Pendency of the *Adams* Litigation Provides No Basis to Stay This Case.

Respondents contend that Relators' case is a "carbon copy of *Adams*." MTD at 10. Yet in support, Respondents cite only the paragraphs relating to the causes of action alleged. *See id.* (*comparing* Compl. ¶¶ 113–25 *with Adams* Compl. ¶¶ 131–45). That cursory comparison, however, misses the point. Relators in this action are wholly distinct—in identity *and* injury alleged—from the relators in *Adams*. They are thus entitled to remedies for their injuries. For example, Relators in this case include eight individual Ohio voters from Districts 1, 5, 6, 7, 9, 10, 14, and 15, Compl. ¶¶ 28–35, *as well as* two statewide organizations—the Ohio chapters of the League of Women Voters ("LWVO") and the A. Philip Randolph Institute ("APRI"), *id.* ¶¶ 13, 21. Both organizations assert injury on the basis of the resources they have expended and diverted in light of the gerrymandered congressional map enacted by Respondents. *See, e.g.*,

Compl. ¶¶ 17–18 (explaining that LVWO has diverted finances and staff and member efforts to an advocacy campaign for fair districts); *id.* ¶¶ 24–25 (alleging that the gerrymandered map has impaired APRI's mission to engage Ohio voters and has forced APRI to divert resources to educate Ohioans' on "packing" and "cracking"). Both LWVO and APRI are suing on their own behalf as organizations as well as in their capacities as representatives of their members and volunteers—many of whom are registered Ohio voters whose votes are at risk of being diluted under the Enacted Plan. *Id.* ¶¶ 20, 27. Those distinct injuries—as to the two organizational relators and their members—have not been alleged in the *Adams* complaint. Even when comparing the individual relators across the two complaints, there is not perfect correlation. There is not an overlap in the identity of any of the relators; nor is there perfect overlap in the congressional districts that they cover.[3]

In spite of these apparent differences, Respondents argue that a merits decision in *Adams* will "resolve the legal issues here." MTD at 10. But the Ohio Constitution makes clear that if each "person" has the right to seek a remedy for her injuries. *See* Ohio Const., art. I, § 16 (establishing that "every person, for an injury done him . . . shall have remedy by due course of law, and shall have justice administered without denial or delay"); *id.* at § 2(3) (establishing that "[n]o law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court"); *State ex rel. Ohio Democratic Party v. Blackwell*, 2006-Ohio-5202, ¶¶ 29-32, 111 Ohio St. 3d 246, 252 (explaining that a grant of original jurisdiction is "for the benefit of the litigant") (quoting 2 Proceedings and Debates of the Constitutional Convention [1912] 1831).

[3] Relators in this action reside in Districts 1, 5–7, 9–10, 14–15. Compl. ¶¶ 28–35. By contrast, the *Adams* relators reside in Districts 1, 3, 5–12. *Adams* Compl. ¶¶ 28–38.

Nor do the interests of judicial economy warrant a stay. Under the Court's expedited scheduling order, the parties are not engaged in a lengthy discovery process. Briefing will be completed by December 20, 2021. And if Respondents believe that the same legal arguments are presented in the briefs in *Adams* and in this case, they can either file one brief addressing both or incorporate the relevant points by reference. The "burden" or "inefficiency" at issue is nothing more than a few keystrokes on their computers. And to the degree that Respondents are suggesting that it is somehow burdensome for the Court to read an additional brief, they have put any such notion to rest by suggesting that Relators should be free to submit their filings as *amici*. While that suggestion is improper, it nonetheless eviscerates Respondents "efficiency" argument.

IV. Relators Targeted and Relevant Discovery Should Not Be Stayed.

The Commission Respondents do not articulate a burden or relevance concern in their motion but vaguely incorporate those arguments via a parallel motion to dismiss in *Adams*. *See Adams*, Case No. 2021-1428, Mot. to Dismiss, at 7 (Nov. 29, 2021). Those incorporated arguments lack merit for at least two independent reasons.

First, Respondents' discovery burden claims are belied by the facts. Although Relators are certainly entitled to seek depositions of the Commission Respondents, they have chosen not to. Instead, Relators seek only document discovery as to the Commission Respondents—thus minimizing any purported discovery burden upon them. While Respondents bemoan their purported discovery burdens, they simultaneously criticize the Relators' discovery requests as being identical to those issued in *Adams*. MTD at 4. Both assertions, however, cannot be true. Indeed, by Respondents' own admission, the lack of discrepancies between the discovery requests in this suit and the *Adams* suit inherently removes any burden in producing relevant documents here.

Second, Respondents' contention that discovery should be stayed because the issue is purely legal in nature, *see* MTD at 4–5, is contravened by this Court's prior finding that the parties are entitled to commence discovery through December 8. *See* 12/01/2021 Case Announcements #2, 2021-Ohio-4207. Indeed, this Court granted broad discovery in a similar redistricting case just two months ago. *See Bria Bennett v. Ohio Redistricting Commission*, Case No. 2021-1198, *10/07/2021 Case Announcements #2*, 2021-Ohio-3607. The Court should reach that same decision here.

CONCLUSION

For the foregoing reasons, the Court should deny Respondents' motion and allow this case to proceed to the merits against all Respondents.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was served via electronic mail upon counsel of record on December 3, 2021:

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