IN THE SUPREME COURT OF OHIO

Meryl Neiman, *et al.*, **League of Women Voters of Ohio, *et al.*,** **Petitioners,** **v.** **Secretary of State Frank LaRose, *et al.*,** **Respondents.**	**Case No. 2022-298** **Case No. 2022-303** ***Consolidated*** Original Action Filed Pursuant to Ohio Constitution, Article XIX, Section 3(A)

NEIMAN PETITIONERS' APPLICATION OF DISMISSAL

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Pursuant to Supreme Court Practice Rule 4.05, the Neiman Petitioners respectfully request that the Court dismiss their case. Per this rule, "a party who filed the case may at any time file an application for dismissal of the case." The party applying for dismissal "shall briefly state the reasons requesting dismissal of the case and shall comply with the service requirements of S.Ct.Prac.R. 3.11(C)." This application has been properly served, and the Neiman Petitioners seek dismissal for the reasons briefly summarized below.

The Court is familiar with the long procedural history of this case, but because history provides important context for this application, Petitioners ask the Court's brief indulgence as they summarize key aspects of it. In an earlier case, *Adams v. DeWine*, Case No. 2021-1428, the Court struck down the congressional districting plan originally adopted after the 2020 Census (the "November 20 Plan"), concluding that it (1) unduly favored the Republican Party and its incumbents and (2) unduly split political subdivisions. *See generally Adams v. DeWine*, 167 Ohio St.3d 499, 2022-Ohio-89 (2022), at ¶ 77, 101.

Thereafter, on March 2, 2022, pursuant to the remedial procedures set out in Article XIX, Section 3, the State of Ohio adopted a new congressional plan (the "March 2 Plan"). While the March 2 Plan made some changes to the November 20 Plan in response to *Adams*, the *Neiman* Petitioners challenged this new plan, primarily on the grounds that it still reflected undue favoritism for the majority party. On July 19, 2022, after considering the parties' briefing in the matter, the Court agreed and struck down the March 2 Plan. *Neiman v. LaRose*, 169 Ohio St.3d 565, 2022-Ohio-2471, ¶¶ 3-4. Nevertheless, given that the primary election had already been held on May 3, 2022, the March 2 Plan was used for purposes of the 2022 congressional election.

Meanwhile, Respondents appealed the Court's July 19 decision, seeking certiorari before the U.S. Supreme Court. Respondents' theory was that under the so-called "independent state

legislature" doctrine, this Court lacked the authority to enforce the Ohio Constitution's provisions regulating congressional redistricting. *See generally Huffman v. Neiman*, No. 22-362, Petition for a Writ of Certiorari (Oct. 14, 2022). The U.S. Supreme Court held the matter pending its resolution of *Moore v. Harper*. The U.S. Supreme Court decided *Moore* on June 27, 2023, and in that decision it emphatically rejected the independent state legislature theory, holding that "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review," *Moore v. Harper*, 143 S. Ct. 2065, 2081 (2023), and thus "whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution," *id.* at 2083. The U.S. Supreme Court then granted review in this matter, vacated the Court's July 19, 2022, opinion, and remanded for further proceedings in light of *Moore*.

This Court has asked for supplemental briefing on the impact of the U.S. Supreme Court's order on continued proceedings in this case. This question is an academic one if the matter is dismissed, but the answer is simple: nothing in *Moore* disturbs this Court's prior opinion. The U.S. Supreme Court thoroughly rejected the argument that state courts cannot hold congressional redistricting maps to requirements in the state's own constitution. That is all this Court has done. Article XIX states that a congressional redistricting plan passed by simple majority cannot unduly favor a political party and its incumbents. Article XIX, Section 1(C)(3)(a). The November 20 Plan was passed by a simple majority of the General Assembly, and the Court found that plan violated Article XIX and ordered the State to pass a plan "that complies in full with Article XIX of the Ohio Constitution and is not dictated by partisan considerations." *Adams* at ¶ 102. The Court was clear that, per Article XIX, Section 3(B)(2), a remedial plan "shall remedy any legal defects in the previous plan identified by the court but

shall include no other changes to the previous plan other than those made in order to remedy those defects." When the Court was called upon to review the subsequent March 2 Plan, and found that it violated Article XIX, it again did nothing more than interpret that Article's plain text consistent with the past precedent of *Adams*, and apply that interpretation to the record evidence that was before it. *Neiman* at ¶¶ 32-60. This is the basic stuff of judicial review, entirely in line with *Moore*'s endorsement of the role that state courts have to play in cases where a congressional map is alleged to violate the state's own constitution.[1]

The most significant impact that *Moore* has on this case is a procedural one. Because following *Moore*, the U.S. Supreme Court vacated this Court's decision invalidating the March 2 Plan, further proceedings would be required for Petitioners to obtain the relief that they have requested—namely revisions of that plan to remedy its violations of Article XIX. But the circumstances in September 2023 are different than they were when Petitioners filed this case in March 2022. The March 2 Plan partially remedied the undue partisan bias reflected in district lines used in some parts of the State in the November 20 Plan, and the Court found it did cure the undue subdivision splits of that earlier plan.

Under mandatory operation of Article XIX, the map must be redrawn after 2024. Per Article XIX, as previously noted, the March 2 Plan now in effect was passed in response to *Adams*; it is a Section 3 plan. As such, per Article XIX, Section 1(c)(3)(e), that plan "shall remain effective until two general elections for the United States house of representatives have occurred under the plan, except as provided in Section 3 of this article." In other words, the March 2 Plan is "effective" only through the 2024 election.

Eighteen months following adoption of the March 2 Plan that remedied some, although

[1] Dissenting Ohio Supreme Court Justices disagreed with the majority's analysis, and would have held "that the March 2 plan is constitutional and order its use for the 2024 primary and general elections." *Neiman* at ¶ 81.

not all, of the significant deficiencies in the November 20 Plan there are additional factors for Petitioners to consider to obtain further meaningful relief for the one remaining election under the plan. It would require all of the following happening very quickly: First, the Court would need to reinstitute its prior opinion or issue a new opinion in Petitioners' favor, with or without additional merits briefing. Assuming a ruling in Petitioners' favor, the General Assembly would then have 30 days to redraw the map. *See* Article XIX, Section 3(B)(1). If it failed to do so, the Redistricting Commission would have 30 days to redraw the map. *Id.* Even assuming Respondents acted with the utmost diligence to draw a new plan (it took 49 days to adopt a new map after *Adams*), and even if the new plan fully corrects the existing deficiencies (the March 2 Plan didn't), this means that Ohioans would remain in limbo, for months at least, as to what map will be used in 2024. There may then be further judicial proceedings, including petitions to the U.S. Supreme Court.

For all of these reasons, given that the March 2 Plan is at least a *partial* remedy, and given the substantial costs and uncertainty that further litigation would entail, Petitioners have decided to no longer pursue their challenge to the March 2 Plan. They strongly believe this is the best result under the circumstances for the people of Ohio who deserve certainty about the congressional map that they will be voting under in this cycle, at the very least.

Petitioners therefore ask the Court to grant their application to dismiss this case, without costs or fees to any party.

Dated: September 5, 2023

Respectfully submitted,

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I hereby certify that the foregoing was sent via email this 5th day of September, 2023 to the following:

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