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

The Court asks the parties to address the following issue: "What impact, if any, does Article XI, Section 8(C)(1) of the Ohio Constitution have on the Supreme Court of Ohio's authority to grant the relief requested by relators when the Ohio Redistricting Commission adopted the district plan by a simple majority vote of the commission?" Entry, Case No. 2021-1198 *12/13/2021 Case Announcements #2*, 2021-Ohio-4381. The short answer is "none."

Relators request that this Court (a) declare the 2021 Plan invalid; (b) enjoin Respondents from holding elections under that plan; (c) order the Commission to comply with the requirements of Article XI, and (d) retain jurisdiction over this matter to ensure that any plan adopted by the Commission complies with the Court's order. Compl. at 35; Bennett Br. at 50. The Court has authority to order such relief under Article XI, Section 9 of the Ohio Constitution. And Section 9 could not be clearer—it provides this Court with "exclusive, original jurisdiction in *all* cases arising under" Article XI and authority to declare a General Assembly plan invalid and order the Commission to reconstitute and enact a new map, "*notwithstanding any other provisions of [the] constitution*." Ohio Constitution, Article XI, Section 9(A) & 9(B) (emphasis added).

Article XI, Section 8(C)(1) does not affect the Court's authority. Indeed, it is telling that Respondents—who have stridently contended that this Court is powerless to address the Commission's blatant disregard for Section 6's constitutional requirements—have at no point argued that *Section 8* strips the Court of authority to afford Relators the relief they seek.

Rather, Section 8(C)(1) merely sets forth the default length of time for which a General Assembly district plan adopted by a simple majority under Section 8's impasse procedure remains in force. The relevance of Section 8 is thus limited where a plan is determined to be invalid. At most, it sets default rules on the length of time that a remedial plan passed by the Commission will remain in effect (depending on how many Commissioners vote for that remedial plan).

Here, the record is clear that the Commission and Republican map-drawers willfully disregarded the Ohio electorate's overwhelming desire to end partisan gerrymandering and did not attempt to comply with Section 6. Interpreting Section 8(C)(1) to somehow limit the Court's authority to remedy this violation would render not just Section 6, but rather the *entirety* of Article XI (as explained below) a dead letter for the first four years of each decade. This would not only be an absurd result, but also undermine separation of powers and subvert the intent of the legislators and voters who passed constitutional redistricting reform by overwhelming margins. Simply put, Section 8(C)(1) does not impact the Court's authority in this case. Indeed, under a hyper-technical interpretation of Article XI, Section 8(C)(1) does not even apply in this case, as the Commission failed to approve a district plan by the September 15 deadline set forth in Section 8(A)(3), and it is undisputed that the Commission did not adopt the 2021 Plan until September 16.

II. Legal Background

Section 8 generally sets out the procedures that govern the Commission when it has reached an impasse, which occurs when the Commission has failed to adopt a General Assembly plan within the timeline laid out in Section 1. Section 8(A)(1) states that if the 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," then it shall introduce a proposed General Assembly plan by a simple majority vote of the Commission. Section 8(A)(2) requires that a public hearing concerning the plan be held. Section 8(A)(3) provides that, after that hearing and "not later than the fifteenth day of September of a year ending in numeral one, the commission shall adopt a final general assembly district plan," either by a bipartisan vote or a simple majority vote.

The remaining subsections of Section 8 delineate how long legally valid plans adopted under the impasse procedure can remain in effect. The duration depends on whether the plan is passed by a simple majority or bipartisan vote.

Section 8(B) states that an impasse plan passed by a bipartisan vote will "remain effective until the next year ending in numeral one, except as provided in Section 9." And Section 8(C)(1), the provision at issue here, sets out rules on how long an impasse plan passed by a simple majority of the Commission will remain in effect:

> (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)(1)(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.

Section 8(C)(2) requires the Commission to include a statement with any plan adopted by a simple majority under (C)(1)(a) or (b), explaining how the plan complies with the proportionality requirement set forth in Article XI, Section 6(B). Finally, Section 8(D) provides procedures to replace a plan adopted under Section 8(C)(1)(a) that "ceases to be effective."

Thus, under Section 8, a simple majority plan passed at the beginning of the decennial cycle stays in effect for two elections (e.g., 2022 and 2024), and its replacement plan adopted mid-cycle then remains in effect for the next three elections (e.g., 2026, 2028, and 2030). At that point, the process under Article XI starts over anew in the next year ending in one (e.g., 2031).

Section 8 sets out *default* rules for *constitutionally valid* plans. Section 9, meanwhile, addresses what happens when the Court invalidates a plan, a district, or a section of the Ohio Constitution relating to redistricting: "[T]he commission shall be reconstituted" to "determine a general assembly district plan in conformity with such provisions of this constitution as are then valid . . . , to be used until the next time for redistricting under this article in conformity with such provisions of this constitution as are then valid."

III. Argument

A. Proposition of Law 1: This Court has authority to invalidate the 2021 Plan and order a remedy.

As discussed in Relators' prior briefing, the Court has original jurisdiction over all claims arising under Article XI and has authority to declare invalid any General Assembly plan adopted in violation of Article XI. Bennett Br. at 5; Reply Br. at 5-10. Section 9 delineates the scope of this Court's power with respect to Article XI. Section 9(A) of the Ohio Constitution provides that "[t]he Supreme Court of Ohio shall have exclusive, original jurisdiction in all cases arising under" Article XI. Section 9(B) further explains that, in the event that "any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid . . . then, *notwithstanding any other provisions of this constitution*, the commission shall be reconstituted as provided in Section 1" of Article XI to draw a new General Assembly plan "to be used until the next time for redistricting under" Article XI (emphasis added).

Section 9 also includes certain express restrictions on the Court's remedial authority. First, the Court cannot order the implementation of a General Assembly district plan that has not been approved by the Commission. Ohio Constitution, Article XI, Section 9(D)(1). Second, the Court cannot draw a plan or district itself and order that the Commission adopt it. *Id.*, Section 9(D)(2). Rather, the Court must order the Commission to draw a new plan or district. Third, with regard to

certain violations of certain sections (namely, Sections 2, 3, 4, 5, or 7), the Court has certain "available remedies" that it can order in particular circumstances. *Id.*, Section 9(D)(3). Section 9 thus sets out a constitutional scheme establishing this Court's broad power, with specifically delineated exceptions, to declare and order remedied violations of Article XI.

This understanding of the Court's authority is consistent with the purpose and history of Article XI. As explained in Relators' briefs, Ohio voters amended Article XI in response to the General Assembly's extreme partisan gerrymander in 2011, which—despite a state electorate that was almost evenly divided between Democrats and Republicans—granted Republicans supermajority control over both chambers of the General Assembly. *See* Bennett Br. at 5-11. The amended Article XI overhauled the state's redistricting procedures, setting forth clear standards for partisan fairness and detailed judicial review provisions. *See id.* at 1. By approving the amended Article XI, the people of Ohio chose to ensure robust judicial review of Commission plans. (*See* HIST_0120 (Fair Districts Handout) (stating that the amendment to Article XI 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 Court has both the authority and the obligation to address violations of Article XI, including Section 6, and any argument that renders any part of Article XI a nullity should be rejected for all the reasons Relators have previously set forth.

B. Proposition of Law 2: Section 8(C)(1) sets no limit on this Court's authority.

Section 8(C)(1) does not impact the remedial scheme described above, *see supra* Part III.A. The plain text of Section 8(C)(1) makes clear that the provision merely sets forth default timelines for simple majority plans passed pursuant to an impasse procedure, rather than obliquely vitiating the Court's authority to remedy certain invalid districting plans. Even if Section 8(C)(1) is ambiguous (it is not), the Court should hold that it has no impact on the Court's remedial authority

because to find otherwise would lead to absurd results in contravention of basic principles of separation of powers and clearly contrary to the intent of Article XI.

1. By its plain text, Section 8(C)(1) simply delineates the default length of time that a simple majority plan is effective.

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. "[I]n construing the Constitution, [this Court's] duty is to determine and give effect to the intent of the framers as expressed in its plain language . . . so that 'where the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean.'" *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 446, ¶ 17 quoting *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16. This Court "give[s] undefined words in the Constitution their usual, normal, or customary meaning," and it "may go beyond the text to consider other sources of meaning, such as the purpose of the amendment, the history of its adoption, or its attending circumstances, only 'when the language being construed is obscure or of doubtful meaning.'" *Id.* quoting *State ex rel. Wallace v. Celina*, 29 Ohio St.2d 109, 112, 279 N.E.2d 866 (1972). Further, this Court "may not use canons of interpretation to create ambiguity that does not exist in the plain language itself" as "[d]oing so would be inconsistent with the 'well-established rule that the plain language of the enacted text is the best indicator of intent.'" *Id.* quoting *Nixon v. United States*, 506 U.S. 224, 232, 113 S.Ct. 732, 122 L.Ed.2d 1 (1993); *see also Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 12 ("Rules for construing the language (such as *expressio unius*) may be employed only if the statute is ambiguous.").

The text of Section 8(C)(1), when considered alongside the language and design of Article XI as a whole, has no bearing on this Court's remedial authority. As described above, *see* Part II,

Section 8 sets forth procedures for when the Commission is unable to meet the deadline outlined in Section 1. *Compare* Ohio Constitution, Article XI, Section 8 (entitled "Proceedings when Ohio redistricting commission fails to timely adopt final general assembly district plan under Art. XI, § 1") *with id.*, Section 9 (entitled "Jurisdiction; proceedings upon determination of invalidity by unappealed, final court order"). Section 8(C)(1) merely states that a simple majority plan adopted under 8(A)(3)—that is, by September 15 of a year ending in the numeral one—will "remain effective" for two general election cycles. It makes no mention of this Court's jurisdiction or remedial authority. And although certain other provisions of Section 8 make a passing, unexplained cross-reference to "Section 9," which are further addressed below, that language does not affect the plain meaning of Section 8(C)(1), which is clear.[1]

2. Even if the plain text of Section 8(C)(1) were ambiguous, all factors weigh against an alternative reading.

But what of the fact that Section 8(C)(1)(a) says that plans passed by a simple majority by September 15 last for two election cycles? Section 8(C)(1)(a) contains no cross-reference to Section 9. There is a cross-reference to Section 9 in some of the other subsections of Section 8. *See* Ohio Constitution, Article XI, Section 8(B) & 8(C)(1)(b). Does that mean that Section 8(C)(1)(a) strips this Court of jurisdiction to review any map that is passed pursuant to the simple majority impasse procedure at the beginning of the redistricting cycle—and that such a plan *must* remain in effect for four years no matter what? Absolutely not.

[1] The focus of the cross-reference appears to be Section 9(B), which contemplates that provisions of the Constitution *themselves* might be declared invalid. *See* Ohio Constitution, Article XI, Section 9(B) (giving the Court authority to adopt plans "to be used until the next time for redistricting under this article ***in conformity with such provisions of this constitution as are then valid***" (emphasis added)). The bolded language does not appear in Section 8. It suggests that the framers contemplated that in the long run (for example, over the course of a ten-year General Assembly plan, or in the latter half of a decade when a replacement plan for a four-year plan goes into effect), certain relevant provisions of the Constitution could be declared invalid, necessitating further consideration when determining the length or operation of district plans.

Even if the Court finds that Section 8(C)(1) is ambiguous in this regard, or "reasonably susceptible to more than one meaning," it must "seek to interpret the [constitutional] provision in a manner that most readily furthers the [] purpose as reflected in the wording used in the [provision]." *State v. Black*, 142 Ohio St.3d 332, 2015-Ohio-513, 30 N.E.3d 918, ¶ 38. To determine intent outside the text, this Court "may consider several factors, including the object sought to be obtained, the legislative history, and the consequences of a particular construction." *Id.*; *see also Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.*, 94 Ohio St.3d 449, 455, 2002-Ohio-1362, 764 N.E.2d 418 (2002) ("[T]his court has long recognized that the canon '*expressio unius est exclusio alterius*' is not an interpretive singularity but merely an aid to statutory construction, which must yield whenever a contrary legislative intent is apparent."). Here, each of those factors confirms the reading set forth in Part III.B.1.

a. Relators' reading of Section 8(C)(1) avoids absurd consequences.

Reading Section 8(C)(1)(a)'s absence of a reference to Section 9 as precluding judicial review of a simple majority four-year plan would, unlike Relators' reading of the same subsection, lead to absurd consequences: The Commission could ignore *every single* Article XI requirement—procedural, technical, substantive, or otherwise—and Ohioans would have *zero* recourse. That is, the Commission would be free to ignore not just Section 6—as the Respondents have audaciously claimed the power to do—but also Sections 1, 2, 3, 4, 5, and 7. The Commission could ignore technical line drawing rules altogether. It could stack itself with members of one party, pass a plan with any number of total districts, zigzagging across the state without consideration to county or community boundaries, 100% of which would elect one party's candidates, and, so long as that plan was passed by a simple majority by September 15 of a year ending in the numeral one, it would remain in effect for two general election cycles without *any possibility of judicial review under Article XI*. Ohioans would have to wait four years—during which they would be forced to

live with the consequences of whatever districts, elected officials, and resulting policies were put in place—until the redistricting process re-started, and only *then* would they have legal recourse if the Commission again passed an unconstitutional plan. *See* Ohio Constitution, Article XI, Section 8(C)(1)(b) (setting forth the timeline for a simple majority map passed after a first simple majority map expired and including a reference to Section 9).[2]

In other words, such a reading of Section 8 would foist upon Ohioans an outcome *worse* than the worst-case scenario allowed by the previous Article XI, which was amended in 2015 to make the redistricting process *more* accountable. This outcome would be absurd, and the canons of construction accordingly foreclose this reading. *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").

Indeed, resting this Court's authority to review a map on the presence or absence of a cross-reference to Section 9 would lead to absurd results in the context of passing a *bipartisan* plan as well. Section 1 provides the default procedure for General Assembly redistricting, and, notably, Section 1(C) sets forth in relevant part, "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." Like in Section 8(C)(1)(a), there is no cross-reference to Section 9 in the final paragraph of Section 1(C). However,

[2] Section 8(C)(1)(b) exemplifies that Article XI must be read in context. After all, that section includes a cross-reference to Section 8(A)(3), which explicitly applies to plans passed by September 15 in a year ending in numeral one. However, Section 8(C)(1)(b) concerns plans passed to *replace* four-year plans and therefore, by its very nature, involves mid-decade redistricting that would occur in a year ending in the numeral five. Thus, if each provision of Section 8 were to be read hyper-technically, with no consideration of Article XI's context, then Section 8(C)(1)(b) would be dead letter. This cannot be so.

there *is* a cross-reference to Section 9 in Section 8(B), which applies to plans passed with a bipartisan vote under the impasse procedure by September 15 in a year ending in numeral one. If one read a plan's reviewability as dependent on whether the phrase "except as provided in Section 9 of this article" was included in the relevant provision, as is the case for Section 8(B) but not the relevant portion of Section 1(C), the consequences would again be nonsensical. For example, a future commission could successfully pass a bipartisan map by September 1 but make several technical line-drawing errors, none of which would be reviewable; on the other hand, if the same commission had spent a few extra days and arrived at the same result by September 15, the errors *would* be reviewable.

This surely cannot be what either Article XI's framers or the voters intended: a constitutional scheme operating without rhyme or reason rather than one whose provisions work together in harmony.

b. Relators' reading of Section 8(C)(1) gives meaning to all of Article XI's provisions.

Relators' plain-text interpretation of Section 8(C)(1) gives meaning and effect to all provisions of Article XI. In contrast, reading the absence of a cross-reference to Section 9 in Section 8(C)(1)(a) as precluding judicial review would render Section 8(C)(2) and Section 9(D)(3)(c) meaningless in certain instances. Section 8(C)(2) requires "[a] final general assembly district plan adopted under division (C)(1)(a) or (b) of this section" 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 . . . favor each political party corresponds closely to those preferences, as described in [Section 6(B)]." The provision is included to facilitate judicial review. But if only those maps passed under Section

8(C)(1)(*b*) are reviewable, then the 8(C)(2) statement in the context of a plan passed under Section 8(C)(1)(*a*) would be irrelevant.

Likewise, Section 9(D)(3)(c) sets forth one specific remedy (though not the only remedy) for certain constitutional violations in "plans adopted under division (C) of Section 8 of this article." All parties to this litigation agree that Section 9(D)(3)(c) applies to simple majority four-year plans,[3] and the decision to cross-reference Section 8(C) in its entirety demonstrates that plainly. If the Court could review only half of the plans adopted under Section 8(C)—namely, those adopted under 8(C)(1)(b)—however, then Section 9(D)(3)(c) would be entirely superfluous in half of the circumstances for which it, on its plain text, applies. This Court avoids construing statutes in this manner. *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."); R.C. 1.47(B) & (C) ("In enacting a statute, it is presumed that . . . the entire statute is intended to be effective [and that a] just and reasonable result is intended."); Scalia & Garner, Reading Law: The Interpretation of Legal Texts 63 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."); *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).

c. Relators' reading of Section 8(C)(1) avoids serious constitutional problems.

Construing the lack of cross-reference in Section 8(C)(1)(a) to strip this Court of jurisdiction would raise serious constitutional problems that can be avoided with the construction set forth in Part III.B.1. At the outset, "[i]t has long been recognized that a statute or other rule of

[3] *See, e.g.*, Statewide Br. 18; Legislative Br. 5.

law "'must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" *In re Jud. Campaign Complaint Against Stormer*, 137 Ohio St. 3d 449, 2013-Ohio-4584, 1 N.E.3d 317, ¶ 20 quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379, 53 S.Ct. 620, 77 L.Ed. 1265 (1933). Reading Section 8(C)(1)(a) to make four-year simple majority maps unreviewable would be at odds with Article IV, Section 1 of the Ohio Constitution, which vests the "judicial power of the state" in the Ohio courts, as well as Article I, Section 16, which provides that "every person . . . shall have remedy by due course of law" for injuries. *See* R.C. 1.11 ("Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice."). Moreover, stripping this Court of jurisdiction that it previously had under the pre-amendment version of Article XI based on a mere *omission* of an *exception* would itself be at odds with longstanding principles of construction. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L.Ed.2d 645 (1988) (explaining that when a particular interpretation of a statute invokes the outer limits of Congress's power, the court expects a clear indication that Congress intended that result); *cf. I.N.S. v. St. Cyr*, 533 U.S. 289, 299, 121 S. Ct. 2271, 2279, 150 L. Ed. 2d 347 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.").

Even more critically, reading Section 8(C)(1)(a) to preclude judicial review would undermine the separation of powers doctrine, which "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158–159, 503 N.E.2d 136 (1986). Citing that doctrine, this Court has held that "[t]he administration of

justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 421, 423 N.E.2d 80 (1981). Just as "[t]he General Assembly cannot require the courts 'to treat as valid laws those which are unconstitutional [because, if so], the whole power of the government would at once become absorbed and taken into itself by the Legislature," *Bartlett v. State*, 73 Ohio St. 54, 58, 75 N.E. 939 (1905), neither can the Commission. But that is exactly what the alternative reading of Section 8(C)(1)(a) would allow, because it would give the Commission a procedural escape hatch from judicial review that the Commissioner's majority party could use whenever it pleased. This Court should not interpret Section 8(C)(1)(a) to let the Commission's power go unchecked. *See Kucana v. Holder*, 558 U.S. 233, 235, 130 S.Ct. 827, 175 L.Ed.2d 694 (2010) ("When a statute is 'reasonably susceptible to divergent interpretation,' this Court adopts the reading 'that executive determinations generally are subject to judicial review.'"). Rather, this Court must review the 2021 Plan in order to "ensure the security and harmony of the government and to avoid the evils that would flow from legislative encroachment on our independence," including the "subver[sion]" of "the fundamental principles of a free constitution." *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 47, 51 (internal quotations and citations omitted).

d. The history of Article XI's adoption confirms Relators' reading of Section 8(C)(1).

Furthermore, the history of the Fair Districts Amendments' passage, both in the General Assembly and during the referendum process, confirms Relators' reading of Section 8(C)(1). When construing a constitutional amendment approved by voters via referendum, courts "consider how the language would have been understood by the voters who adopted the amendment." *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 22. "The purpose

of the amendment and the history of its adoption may be pertinent in determining the meaning of the language used." *Id.* During legislative debates on HJR 12, Representative Kathleen Clyde noted, "The Ohio Supreme Court also ruled that the criteria currently in the Ohio constitution are not enforceable and this plan should help fix that frustrating problem." (HIST_0078 (12/17/14 House Debate).) In the run-up to the public's vote on the amendments, Fair Districts for Ohio, a coalition supporting Issue 1 started by current Commissioners (and then-state Representatives) Huffman and Vernon Sykes, put up posters explaining that Issue 1 would, among other things, keep the Commission "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." (HIST_0120 (Fair Districts Handout).) The voters who went to the polls on November 3, 2015 to approve Issue 1 by an overwhelming margin were no doubt aware of the message being conveyed by these legislators and organizations, and therefore had little doubt that a "yes" vote meant a vote in favor of enforceable requirements.

The circumstances surrounding HJR 12 and Issue 1, including the problems that prompted its inception, provide further confirmation. The measure was expressly adopted to prevent a partisan political process such as the one that led to the 2011 plan from occurring again, especially without robust judicial review, which was missing at the time. *See Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 24. Moreover, Commission members from both parties tacitly acknowledged the 2021 Plan's reviewability when questioning the constitutionality of the 2021 Plan after its adoption, noting that it would be this Court—not the Commission itself—that would resolve whether the 2021 Plan passes constitutional muster. (STIP_0398 (9/15/2021 Commission Hearing).) Most notably, 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."

(*Id.*) And again, it is telling that Respondents have not raised a single argument about Section 8(C)(1) affecting this Court's remedial authority at any point in this litigation.

Finally, the outcome of the 2021 redistricting process illustrates how an interpretation of Article XI as completely non-binding or non-enforceable in the *most* partisan of the possible outcomes (i.e., a simple majority four-year map) runs contrary to the intent behind the Fair Districts Amendments, which were meant to strengthen (not strip) this Court's authority. The General Assembly district plan approved by the Commission is not meaningfully different from the plan approved by the 2011 apportionment board in terms of its partisan breakdown. (Aff. of J. Rodden ¶ 19, Supp. 334.) It is hard to imagine that Ohioans chose to vote for redistricting reforms that would lead to a substantially similar outcome as that in the previous redistricting cycle. Rather, 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 as the "guardian of the constitution that it is designed to be." *Wilson*, 2012-Ohio-5367 at ¶ 57 (Pfeifer, J., dissenting).

In sum, Section 8(C)(1)(a) does not affect this Court's authority to review four-year simple majority plans, which is robust and set forth in Section 9. 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. 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"). And Relators' reading, for all the reasons set forth above, is the only one which gives effect to Article XI in its entirety, while also honoring the legislators' and voters' purpose in adopting it.

C. Proposition of Law 3: Under a hyper-technical reading of Article XI, Section 8(C)(1) would not even apply to this case because the 2021 Plan was adopted after September 15, 2021.

Even if the Court were to reject the plain-text reading of Section 8(C)(1) and the principles of statutory construction described above, Section 8(C)(1) still would not limit the Court's remedial authority in this case, because the 2021 Plan was not adopted pursuant to Section 8(C)(1). As explained above, Section 8(A)(3) allows the Commission to pass a simple majority plan "not later than the fifteenth day of September of a year ending in numeral one," in this case September 15, 2021. Both Sections 8(C)(1)(a) and 8(C)(1)(b) apply only "if the commission adopts a final general assembly district plan in accordance with division (A)(3) of this section."

It is undisputed that the 2021 Plan was passed by only a simple majority of the Commission. (STIP_0401 (9/15/2021 Commission Hearing).) It is also undisputed that the 2021 Plan was not passed by September 1. (STIP_0204-0205 (9/9/2021 Commission Hearing).) Finally, it is undisputed that the 2021 Plan also was not passed by September 15. Response of Respondents Huffman and Cupp to Motion for Scheduling Order, *League of Women Voters, et al. v. Ohio Redistricting Commission, et al.*, Ohio Supreme Court Case No. 2021-1193 (Sept. 28, 2021) (acknowledging the Commission "adopt[ed] the final plan just after midnight on September 16, 2021"). The Commission thus missed the final constitutional deadline set by Section 8(A)(3). *Id.* By its plain language, then, Section 8(C) does not even technically apply to this case.[4] It thus does not and cannot constrain the Court's authority to invalidate the 2021 Plan and afford Relators the other relief they seek.

[4] Relators addressed the fact that the Commission did not timely pass a plan in their Complaint and opening brief. Compl. ¶ 113; Bennett Br. at 25. But Relators have focused their arguments on why the 2021 plan is *substantively* invalid rather than the fact that it is also *procedurally* invalid. This focus is practical in nature: Relators seek to ensure that any plan passed by the Commission complies with the substantive requirements of Article XI. A plan presenting *only* a procedural violation would present a different case for consideration.

IV. Conclusion

For the foregoing reasons, Section 8(C)(1) of Article XI does not affect this Court's authority to issue the remedies that Relators seek. Given the February 3, 2022 filing deadline for candidates seeking General Assembly seats, the Court should promptly declare the 2021 Plan invalid and order that the Commission reconvene to pass a new plan, with clear directives from this Court with regard to deadlines, procedures, and substance, 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.

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Respectfully submitted,

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