

In the
Supreme Court of Ohio

LEAGUE OF WOMEN VOTERS OF OHIO, et al., :
:
: *Relators,* : Case No. 2021-1193
:
: v. : Original Action Pursuant to
: Ohio Const., Art. XI
OHIO REDISTRICTING COMMISSION, et al., :
: Apportionment Case
Respondents. :

BRIA BENNETT, et al., :
:
: *Relators,* : Case No. 2021-1198
:
: v. : Original Action Pursuant to
: Ohio Const., Art. XI
OHIO REDISTRICTING COMMISSION, et al., :
: Apportionment Case
Respondents. :

OHIO ORGANIZING COLLABORATIVE, et al., :
:
: *Relators,* : Case No. 2021-1210
:
: v. : Original Action Pursuant to
: Ohio Const., Art. XI
OHIO REDISTRICTING COMMISSION, et al., :
: Apportionment Case
Respondents. :

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Introduction

The Governor, the Secretary of State, and the Auditor file this brief to make two legal points and a practical one. Legally, the claims in all three cases challenging the Commission's map fall short because they fail even to allege the necessary predicate to a generalized proportionality claim. Apart from that shortcoming, the three statewide elected officials are not proper respondents. Practically, the Governor, the Secretary, and the Auditor—who among them have nearly 75 years' experience in Ohio elections—file this brief to explain their efforts to bridge the divide between the Commission's Republican and Democrat legislative members.

The Governor, the Secretary, and the Auditor are filing this same brief in all three cases.

The Constitution places a barrier between the allegations here and the relief requested: no claim that a new legislative map violates the proportional-representation language in Article XI, Section 6 is actionable unless the claim first alleges that the map violates one of the requirements enforcing neutral districting criteria (or the Constitution's broader guarantees that also apply to districting, like the protection against racial gerrymandering). In other words, the Constitution recognizes that proportionality—the idea that the statewide vote split for statewide elected officeholders will translate into the same split for members of the General Assembly—is not subject to judicial review standing alone.

Separately, the Constitution says that individual Commission members are not proper respondents in these lawsuits. The Constitution charges the Redistricting Commission with the responsibility to draw new state legislative districts, often referred to as “maps.” And it tells this Court to direct any remedial orders about those maps to the Commission, not its members. The Constitution’s text, by naming the state entity with the duty and responsibility for drawing maps, excludes the Commission members from individual duties, such as they might have in other areas like pardons. Critically, the Constitution’s assigning the duty and responsibility to a body is a change from the pre-2015 Constitution, which instead charged individuals with the map-drawing duty and responsibility. The Constitution’s text prohibits naming as individual respondents in a suit over a legislative map the Governor, the Secretary, or the Auditor. The Constitution also prohibits this Court from ordering any of them to act on those maps, other than as members of the Commission.

Finally, the statewide officeholders make a practical point. The Constitution’s new Article XI rewards compromise—a bipartisan, compromise map lives on for ten years; otherwise the map lasts only four. The statewide officeholders entered the discussions about the map filed with the Commission by the Republican legislative leaders with the sincere hope and desire to reach a bipartisan compromise on a ten-year map. But even their considerable leadership experience could not bring the Commission’s legislative Republicans and Democrats together. The statewide officeholders’ inability to bridge that

gap, however, does not tarnish the enacted map. But the officeholders' long experience in Ohio's politics made clear to them that compromise should have been possible in this process.

Although the legislative Republicans and Democrats on the Commission could not see eye-to-eye on a final map, compromise may have been closer than it looked. Anyone who says they can "score" a map as definitively X percent Democrat and Y percent Republican overestimates the science half of political science. The Governor, Secretary, and Auditor know from long experience that the politics half—which is the People speaking their will at the ballot box—usually predominates. Ohio voters are far wiser and deserve more credit. Elections matter. The relative quality of the two major-party candidates matters. Conditions in the country and the State matter. What party controls the White House or the Ohio Governor's mansion matters. Thus, dozens of factors at play in an election can swing a district from one party to the other and often do so. Sometimes the same voter will vote for one party in the statewide race and the other in the General Assembly race.

As the Governor, Secretary, and Auditor know from long experience, Ohio voters crave real choice among possible representatives in the General Assembly, and they value that choice more than the hope that their voice might be heard because the General Assembly makeup matches some statewide proportion of past votes. For example, Secretary LaRose started his political service in 2010 by winning a supposedly safe Democrat

Ohio Senate seat. Scoring a seat as Republican or Democrat is only a prediction—the real test is what the voters say in the voting booths. At bottom, “asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2503–04 (2019).

Beyond the false promise of “scoring” part of Ohio’s geography as indelibly Republican or Democrat, the statewide officeholders know that the distribution of voters across Ohio is not uniform between those who tend to vote for Republicans and those who tend to vote for Democrats. That geographic reality in Ohio means that any independent requirement of proportionality would *mandate* gerrymandering. The Constitution accounts for this by linking any judicial remedy for a disproportionate map to a predicate showing that the map violated neutral districting criteria.

The people who ratified new Article XI knew that proportional representation cannot be a stand-alone goal, and that it clashes both with Ohio’s political geography and the competing value of competitive districts. The Court should let the People’s wisdom that is reflected in the Constitution shine through and reject the claims of the current lawsuits that ask this Court to do something other than what Article XI says.

Statement

A. The new Article XI.

The starting place for new Article XI is old Article XI. Prior to the 2015 amendments, the apportionment board had five partisan elected officials: “[t]he governor, auditor of state, secretary of state, one person chosen by the speaker of the House of Representatives and the leader in the Senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member.” Ohio Const. art. XI, §1 (1967). After the 2015 amendments (effective in 2021), the Constitution entrusts state legislative redistricting to the new seven-member Ohio Redistricting Commission, which includes the same three elected officials with four members appointed by the legislative leaders of the two largest political parties. *Id.* art. XI, §1(A).

In other areas, new Article XI is truly new. First, Section 1(B)(1) provides that “a simple majority of the commission members shall be required for any action by the commission” except as otherwise provided. Next, “a majority vote of the members of the commission, including at least one member of the commission who is a member of each of the two largest political parties represented in the general assembly” is required to adopt rules, hire staff, and expend funds. *Id.* §1(B)(2)(a). But there is a release valve for this majority-vote requirement. If the Commission cannot achieve bipartisan consensus on how funds should be spent, then “each co-chairperson of the commission shall have

the authority to expend one-half of the funds that have been appropriated to the commission.” *Id.* §1(B)(2)(b). Thus, if a bipartisan majority of the Commission members cannot agree on how to spend Commission funds, then each co-chair can use half of the funds as she chooses.

Also new is an impasse procedure and an associated incentive to avoid impasse. If the Commission can vote for a map with at least two members from each of the two largest political parties, the map lasts until the next census cycle—ten years. *See id.* §§1(B)(3), 1(C); *see also id.* §8(B). But if the Commission hits an impasse in that the minority political party on the Commission does not provide at least two votes for a proposed map, and thus the Commission is forced to adopt a map by a simple majority, the consequence is that the map lasts only four years. *Id.* §§8(A)(3), (C)(1)(a).

B. Sections 2, 3, 4, 5, and 7 combat “gerrymandering.”

The 2015 amendments were also designed to lessen opportunities for “gerrymandering.” Sections 2, 3, 4, 5, and 7 of Article XI provide the specific framework for drawing the new legislative districts. Together these provisions mandate adherence to neutral, non-partisan principles such as contiguity, continuous boundary lines, and non-split political subdivisions. They serve as roadblocks to the “packing” and “cracking” of districts and other common tools of partisan gerrymandering. Section 2 provides that each house of representative and each senate district shall be entitled to one representative. Section 3 contains a host of specific requirements for drawing districts. For example, Section

3(B)(1) sets outer population limits for each district: “In no event shall any district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the applicable ratio of representation” — the average number of citizens represented by a member of the General Assembly. Section 3(B)(3) requires every General Assembly district to be composed of contiguous territory with the boundary of each district “a single nonintersecting continuous line.” Section 3(C) sets out rules for dividing districts that are larger than the 105% cap and, in particular, mandates that “[a]ny fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.” Section 3(C)(2) requires that a whole county must be its own district if the county population falls within the 95% to 105% population range, and Section 3(C)(3) states that, where feasible, “no county shall be split more than once.” Section 3(D) and (E) provide multiple additional roadblocks to the “cracking” and “packing” of counties, municipal corporations, and townships.

Section 4 sets out specific rules for the drawing of senate districts, which require senate districts to be drawn to include three house districts and to use the same boundary lines. Section 5 provides non-discretionary rules for how the unexpired terms of senators must be handled when senate district boundaries are changed within two years of a change in the General Assembly district plan. Section 7 ensures consistency of district boundaries and prohibits the redrawing of district boundaries even when the boundaries of counties, municipal corporations, and townships change.

C. Section 6 requires an attempt.

Section 6 is different. Section 6 states that the Commission “shall attempt” to draw a General Assembly district plan that meets three standards: (1) that the plan not primarily favor or disfavor a political party; (2) that the plan “correspond closely” to the statewide preferences of Ohio voters during the last ten years; and (3) that districts shall be compact. Section 6 also explains that in the attempt to achieve those three goals, a Commission-approved plan must not “violate the district standards described in Section 2, 3, 4, 5, or 7.”

Like many laws, the difference between Section 6 and the other sections arose from compromise. In the final 2014 House floor debate on adopting the joint resolution that would become Article XI, then-Democrat State Representative Kathleen Clyde explained: “Another concession by our side is that the fairness criteria are not required but are aspirational. Fairness should be required of any plan and I think Ohioans deserve to have a fair map, not just an attempt at a fair map. This plan doesn’t ensure bipartisanship. It ensures minority input. Those are two different things. And the minority input is not required if there’s an impasse, which I believe [was] a significant concession.” (LWV, No. 2021-1193, Historical Records - Appendix of Exhibits, Vol. 1, at HIST_0078–79 (Oct. 22, 2021).)

D. Section 9 details the available remedies

For each of these map-drawing requirements, Section 9 contains a specific remedy. And once again, the Constitution draws a line between Sections 2, 3, 4, 5, and 7 on one hand and Section 6 on the other. Section 9 grants this Court exclusive, original jurisdiction over challenges to Commission-approved General Assembly district plans. Section 9(D)(3) provides specific remedies once the Court “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.” If a plan has “one or more isolated” violations of Sections 2, 3, 4, 5, or 7, the Court shall order the Commission to amend the plan to correct the violation. Ohio Const. art. XI, §9(D)(3)(a). If the Commission-approved plan contains more Section 2, 3, 4, 5, or 7 violations such that at least six house districts or at least two senate districts must be amended, then this Court shall “declare the plan invalid and shall order the commission to adopt a new general assembly district plan.” *Id.* §9(D)(3)(b).

Finally, the Constitution addresses remedies for Section 6. But those remedies are available only when the Court reviews a plan adopted under Article XI, Section 8(C)—in other words a four-year map approved by a simple majority of the Commission. *See* art. XI, §9(D)(3)(c). Even then, Section 9 specifically links Section 6 considerations to predicate violations of the other map-drawing requirements. Under Section 9, the Court is empowered to order a new plan only if the Commission-approved four-year plan: (1) contains significant violations of Sections 2, 3, 4, 5, or 7 that “materially affect[] the ability

of the plan” to reflect proportionality to the statewide political party preference of Ohio voters from the last ten years, “as described in division (B) of Section 6 of this article”; and (2) the “statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party does not correspond closely to the statewide preferences of the voters of Ohio.” *Id.* §9(D)(3)(c)(i), (ii). The Constitution does not set out a remedy for a violation of Section 6(A). In all instances, without first finding a violation of Section 2, 3, 4, 5, or 7, this Court is not empowered to disturb the Commission-approved General Assembly district plan.

E. The statewide elected officials attempted to achieve a bipartisan ten-year plan.

Article XI is structured to produce a bipartisan General Assembly map that lasts ten years. *See* Ohio Const. art. XI, §8(B). The Governor, Auditor, and Secretary of State aimed to produce such a map. From the start, though, the Commission was up against a clock that had long been ticking. The federal government was many months tardy in producing census data that is the basic building block of all map drawing. *See* 13 U.S.C. §141(a), (c) (census data for redistricting due to the states by April 1, 2021). Ohio did not receive the population data from the U.S. Census Bureau until August 12, 2021. Starting without that data would have been pointless, as any map built on non-census data would almost certainly have failed later court review. *See, e.g., McConchie v. Scholz*, No. 21-CV-

3091, 2021 WL 4866354, at *1, *13–17 (N.D. Ill. Oct. 19, 2021) (invalidating map drawn without waiting for federal census data).

Governor DeWine. From the very beginning, Governor DeWine’s goal was to reach an agreement among the Commission members to ensure that a ten-year plan was adopted. (LWV, No. 2021-1193, Stip. of Evid., Vol. 1, DeWine Depo. at 25 (Oct. 22, 2021).) Such a result “would give the public confidence that this was a fair map[.]” *Id.* Governor DeWine believed it was best for him to act as a middleman with the hopes of bridging the gap between the four legislative members of the Commission. *See id.* at 25–27. Leading up to, and on, the September 15 deadline to enact a map, Governor DeWine negotiated with both the Republican and Democrat legislators, albeit separately. *See, e.g., id.* at 89–90. He believed that the two groups were not far apart with their respective proposals. Specifically, in response to Leader Sykes and Senator Sykes proposing 57 Republican leaning House districts, the Republican legislators proposed a plan with 62 Republican leaning House districts, a difference of only five seats. *See id.* at 91. Governor DeWine even expressed his willingness to go past the midnight deadline, if it meant that the Commission could come to an agreement. *See id.* at 88–89. He remained optimistic that a deal could be struck until the eleventh hour, when it became clear to him that he could not bridge the gap between the two camps of legislators. *Id.* at 93–94.

Auditor Faber. Auditor Faber’s goal from the start was to unify the Commission behind a ten-year plan. (LWV, No. 2021-1193, Stip. of Evid., Vol. 5, Faber Depo. at 25

(Oct. 22, 2021.) Auditor Faber approached the process by which the Commission would draft a map as if he were crafting legislation: the redistricting plan—like an introduced bill—served as a baseline from which the commissioners would then move for and second amendments, debate those amendments, and vote to accept, reject, or modify those amendments. *See id.* at 113–14. After the Republican legislators’ September 9 plan was introduced, Auditor Faber took on the role of mediator, and he approached each commissioner to broker an agreement. *Id.* at 23. Auditor Faber suggested that each of the commissioners designate a staff member so that the staff could meet together to advance negotiations while the commissioners themselves were unable to meet. *Id.* at 25. As Auditor Faber saw it, those staff negotiations were successful in resolving some issues in Central Ohio, Dayton, Cincinnati, and Northeast Ohio. *Id.* at 25, 63. In the end, though, these agreements never produced a formal proposal. *Id.* at 31.

Once the Commission reconvened, Auditor Faber had a discussion with Secretary LaRose and Senator Sykes about the Senator’s proposed plan. *Id.* 35. At that meeting, Senator Sykes and his staff explained his proposal and the three Commission members discussed aspects of the plan, including concerns regarding its constitutionality. *Id.* Senator Sykes and Leader Sykes also made their map drawers available to Auditor Faber and Secretary LaRose so that both could participate in drafting possible revisions to Senator Sykes’s maps that might garner bipartisan support. *Id.* at 36. During these meetings, Auditor Faber and Secretary LaRose would focus on geographic areas of Ohio with which

they were most familiar (Auditor Faber—Northwest Ohio; Secretary LaRose—Northeast Ohio). *Id.* at 40. As this work continued, Auditor Faber believed it might lead to a map agreeable to all Commission members. *See id.* at 44. Auditor Faber also negotiated with Speaker Cupp and President Huffman in an effort to identify possible concessions and compromises to an attempt to reach a ten-year bipartisan map. *Id.* at 70, 71. But time ran out, and a compromise map was never finished, nor were possible amendments to the pending map submitted for a Commission vote. Therefore, the only map on the table on the September 15 deadline was the one the Commission adopted.

On September 15—the final day—Auditor Faber worked in tandem with Secretary LaRose in a last-ditch effort to get an agreement. *See id.* at 64–65. The two, either together or separately, met with each of the other members of the Commission. *Id.* at 66–67. Auditor Faber met with President Huffman, who indicated that he could move off of his position if the Democrats were willing to move off of theirs. *Id.* at 69–70. Auditor Faber later sat down with Leader Sykes and Senator Sykes and encouraged them to respond to the Republican legislators’ latest offer of 62 Republican leaning House districts. *Id.* at 46. Neither Senator Sykes nor Leader Sykes ever made a motion before the Commission to offer an amendment to the map put forth for adoption by the Commission. *Id.* at 137–38. By that point, though, Senator Sykes and Leader Sykes preferred to “ignore” President Huffman and Speaker Cupp by pushing for a “brand-new map” rather than negotiate with the map on the table. *Id.* at 46. Similarly, as the deadline neared, President Huffman

told Auditor Faber that no more negotiations would take place. *See id.* at 71. Auditor Faber came to believe that negotiations broke down because the camps he was trying to bring together were either worried about a lawsuit or welcomed a lawsuit as a means to “give them an advantage, political or legal, that they otherwise weren’t going to be able to get through negotiation.” *Id.* at 69.

Secretary of State LaRose. Like the other statewide elected officials, Secretary LaRose’s prime concern was working with all of the commissioners to get a ten-year plan. (LWV, No. 2021-1193, Stip. of Evid., Vol. 1, LaRose Depo. at 26 (Oct. 22, 2021).) Prior to the September 9 Commission meeting, Secretary LaRose met with Governor DeWine and Auditor Faber and suggested that the three of them work together as “convenors” to help get an agreement between the four legislative Commission members. *See id.* at 69. To that effect, Secretary LaRose and Auditor Faber worked together, even sharing a car ride to a Commission meeting in Cleveland, in an attempt to broker a compromise. *Id.* at 70. Secretary LaRose also directed his staff to reach out to the staff of the other commissioners in a further attempt to encourage negotiations. *Id.* at 39.

Secretary LaRose also met with Leader Sykes, Senator Sykes, and their respective teams several times with the goal of producing a map acceptable to all commissioners. *Id.* at 34. That joint effort, though, ran out of time. *See id.* Yet the Secretary understood that the map later shared by Senator Sykes on September 15 incorporated some of his suggestions. *See id.* at 64–65. And although the map drawers for Speaker Cupp and

President Huffman were never made available to Secretary LaRose, despite promises that they would be, he had several conversations with Speaker Cupp and President Huffman before the final vote on September 15. *Id.* at 35.

Leading up to the final vote on September 15, Secretary LaRose “shuttl[ed] between offices at the statehouse, trying to find, still, in that late hour, opportunities for a compromise.” *Id.* at 46. He identified three principles that he believed could facilitate negotiations: (1) agreeing on the meaning of “proportionality,” (2) creating minority opportunity districts, and (3) refraining from drawing incumbents into the same district. *See id.* at 36–37. On September 15, being optimistic that a deal could still be struck, Secretary LaRose even went so far as to suggest that the Commission vote to table the proposed plan and go past the September 15 constitutional deadline in the hope that in an extra day or two, the Commission could reach consensus and enact a ten-year plan. *Id.* at 48.

F. The Commission uses Article XI’s impasse procedure to enact a four-year map.

The Commission did not pass a ten-year map by September 1, 2021. Thus, the Commission had to turn to the Section 8 procedures. Under Section 8, the difference between a ten-year map and a four-year map is the margin by which the plan is approved and the political affiliation of those voting to approve it. A ten-year Section 8 map requires the affirmative vote of four members of the Commission, including at least two commission members who represent each of the two largest political parties represented

in the General Assembly. Ohio Const. art. XI, §8(B); *see id.* §1(B)(3). A four-year Section 8 map requires only a simple majority. *Id.* §8(C)(1). The Constitution sets a September 15 deadline to pass a Section 8 map. *Id.* §8(A)(3).

On September 15, 2021, the Commission had before it only one map that it could consider and pass. Faber Dep. at 72. So, with a constitutional deadline looming, the Commission had two choices: follow Section 8's four-year impasse procedure and approve the plan without minority-party support or miss the Constitution's September 15 deadline. The statewide elected officials chose the former.

Argument

The complaints should be dismissed because they do not plead a violation of neutral districting criteria, which forms a prerequisite for any claim that a map violates proportionality. Nor are relators right that constitutional provisions enacted in the nineteenth century somehow required what Article XI does today. Apart from the merits, the Governor and the other statewide elected officeholders are not proper respondents. They should be dismissed regardless of the merits holding. Relators' counterarguments do not carry the day.

I. The complaints do not state a constitutional cause of action because they do not allege that the Commission's map violates any of the mandatory redistricting criteria the People added to the Constitution in 2015, and the non-Article XI claims do not state a claim for relief.

The complaints here fail to state a cause of action that the Constitution recognizes. For the complaints that cite Article XI, §6, the problem is that those provisions are not

actionable *unless* the complaint first pleads a violation of one of sections 2, 3, 4, 5, or 7. *See* Ohio Const. art. XI, §9(D)(3). None of the three complaints alleges any violations of sections 2, 3, 4, 5, or 7. For the complaint that cites free-speech, assembly, and equal-protection principles, the problem is that the very specific requirements of Article XI govern over those very general sections.

A. Article XI, §6 does not provide a cause of action to invalidate a map without a predicate showing that the map violates Article XI, §§ 2, 3, 4, 5, or 7.

“In construing our state Constitution,” the Court looks “first to the text of the document as understood in light of our history and traditions.” *State v. Smith*, 162 Ohio St. 3d 353, 2020-Ohio-4441 ¶29. The language of the Ohio Constitution “controls as written” because the People “chose its language carefully and deliberately.” *City of Cleveland v. State*, 157 Ohio St. 3d 330, 2019-Ohio-3820 ¶16. “Generally speaking, in construing the [Ohio] Constitution,” the Court applies “the same rules of construction” used “in construing statutes.” *Athens v. McClain*, 163 Ohio St. 3d 61, 2020-Ohio-5146 ¶29; *Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St. 3d 356, 2016-Ohio-2806 ¶16.

As with statutes, the Court looks to text and structure to determine constitutional meaning. *See, e.g., Toledo City Sch.* 146 Ohio St. 3d 356 ¶16; *Smith v. Leis*, 106 Ohio St. 3d 309, 2005-Ohio-5125 ¶59; *Beaver Excavating Co. v. Testa*, 134 Ohio St. 3d 565, 2012-Ohio-5776 ¶36. The text and structure of Article XI’s remedy section leaves no doubt that the Section 6(B) language about proportional representation is not actionable absent a violation of the more detailed map-drawing requirements in Sections 2, 3, 4, 5, and 7.

Start with the text’s explicit command that this Court may order the Commission to “adopt a new general assembly district plan” only if the new plan would “correct violations of” “those requirements” listed in subsection (D)(3). See Ohio Const. art. XI, §9(D)(3)(b), (c)(i). The phrase “those requirements” refers to the earlier-listed parts of Article XI that contain other map-drawing commands because “those” is a “pointing word” that refers back to something else. Bryan A. Garner, *Garner’s Modern American Usage* 619 (2003); see also, e.g., *Am. Airlines, Inc. v. United States*, 551 F.3d 1294, 1300 (Fed. Cir. 2008); cf. *State ex rel. Extendicare Health Servs., Inc. v. Ryan*, 126 Ohio St. 3d 12, 2010-Ohio-2452 ¶27. The list to which the phrase “those requirements” points omits Section 6.

The Constitution’s structure buttresses the plain meaning. Subsection (D) of Article XI, Section 9 comprehensively details the remedies available to the Court for map-drawing defects. By specifying that a remedy for a Section 6 defect is available only for a four-year map after a challenger shows that the map suffers a defect under Sections 2, 3, 4, 5, or 7, the Constitution prohibits reading in an implied remedy for all of Section 6 standing alone. This structure, naming “only” certain parts of Article XI, and omitting Section 6, shows that Section 6 has no stand-alone remedy. *Ohio Grocers Ass’n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872 ¶28; see *id.* ¶32.

Precedent reinforces the text and structure. Reading Article XI as the People intended by refusing to read in a remedy that they omitted follows this Court’s longstanding precedents about how to read the Constitution. When the Constitution circumscribes

a right, this Court honors it. So, for example, the limits on municipal and statewide referenda mean that those claims are not available for every governmental action a citizen may wish to challenge. See, e.g., *State ex rel. Ebersole v. Delaware Cnty. Bd. of Elections*, 140 Ohio St. 3d 487, 2014-Ohio-4077 ¶29; *Grabler Mfg. Co. v. Kosydar*, 35 Ohio St. 2d 23, 33 (1973). Nor does the Minimum Wage Amendment reach every job in the State, and the Court refused to read its scope more broadly than the words would allow. *Haight v. Minchak*, 146 Ohio St. 3d 481, 2016-Ohio-1053 ¶¶13–14.

The Constitution also draws lines about remedies for certain guarantees, and this Court has never been quick to read implied remedies into constitutional amendments. For example, the Court recently refused to read into the Marsy’s Law Amendment an implied remedy in favor of a prosecuting municipality. *City of Centerville v. Knab*, 162 Ohio St. 3d 623, 2020-Ohio-5219 ¶27. Long before that, the Court refused to read the amendment authorizing suits against the State as implying a remedy on its own. *Raudabaugh v. State*, 96 Ohio St. 513, 513–14 (1917). Similarly, the failed experiment with implying remedies on top of those in the Constitution for workplace injuries arose because the Court strayed beyond what the Constitution said. See, e.g., *Jones v. VIP Dev. Co.*, 15 Ohio St. 3d 90, 103 (1984) (Wm. Brown, J., dissenting); *Johnson v. BP Chems., Inc.*, 85 Ohio St. 3d 298, 313 (1997) (Cook, J., dissenting).

All told, when “we consider how the language” of Article XI “would have been understood by the voters who adopted the amendment,” *City of Centerville*, 162 Ohio St.

3d 623 ¶22, there should be no doubt that the People understood that by omitting Section 6 from the list in the remedy section of the amendment, they voted to link Section 6 remedies to violations of the listed sections when the Court reviews a four-year map.

The People declared that any Section 6 remedy depends on a violation of the politically neutral map-drawing requirements in Sections 2, 3, 4, 5, and 7, and their wisdom tracks insights from courts and political scientists. The U.S. Supreme Court recognized at the dawn of the one-person, one-vote era that “construct[ing] districts along political subdivision lines ... deter[s] the possibilities of gerrymandering.” *Reynolds v. Sims*, 377 U.S. 533, 581 (1964). And a Justice of this Court observed that rules to “protect the integrity of governmental units by minimizing their division” can thwart partisan gerrymandering. *Wilson v. Kasich*, 134 Ohio St. 3d 221, 2012-Ohio-5367 ¶69 (McGee Brown, J., dissenting).

Social science provides a similar insight: objective map-drawing rules often conflict with proportionality. The reason: the way voters live around the State may make anything approaching proportionality impossible. Democrats and Republicans are not scattered uniformly around Ohio, or many other states, in the same way. This feature—what social scientists call political geography—produces a well-documented skew towards Republicans. One study measured this effect in Florida and concluded that political geography produced between 6% and 18% pro-Republican maps. Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in*

Legislatures, 8 Q.J. Pol. Sci. 239, 253 (2013); see also Jonathan Rodden & Thomas Weighill, *Political Geography and Representation: A Case Study of Districting in Pennsylvania*, 16 (Nov. 4, 2020) (chapter preprint) (22% bonus for Republicans winning 55% of the vote in models of Pennsylvania congressional districts). More broadly, “one cannot necessarily infer that partisan manipulation has taken place” when confronting a “7 or 8% pro-Republican bias in a state like ... Pennsylvania.” Chen & Rodden, *Unintentional Gerrymandering*, at 264.

The realities of political geography mean that “neutral redistricting tends to lead to maps that result in representation that is far from proportional.” Rodden & Weighill, *Political Geography and Representation*, at 2. In other words, proportionality “does not emerge from the neutral ensembles, and it might take a conscious effort to consider partisanship in order to produce one.” *Id.* at 14. That is, in many places, absent gerrymandering to *favor* Democrats, a computer-generated map, blind to party, will produce a set of districts that give Republicans an advantage in legislative seats.

The Ohio Constitution enacts these insights by requiring that anyone who would ask this Court to tear up a Commission-enacted map first show that the map violates objective map-drawing principles such as impermissibly dividing a county or other political subdivision. Only then may a challenger impugn a map on the general—and much more debatable—metric of whether it could more proportionally reflect statewide vote totals.

The People’s choice to exclude Section 6 from direct judicial review also makes

sense in light of Section 6's conflicting goals. Section 6(B) directs the Commission to aim for proportional representation while Section 6(C) commands that districts "shall be compact." Those goals, of course, often conflict. Perfectly compact districts make perfect proportionality impossible because voters do not live in perfectly homogenized patterns. Compactness also makes other values harder to achieve, as non-compact districts make it easier to draw minority-opportunity districts, districts that adhere to municipal lines, and districts that keep communities of interest together. *See, e.g.,* Bruce E. Cain, *The Reapportionment Puzzle*, 45 *Engineering and Sci.* 4, 8 (1982).

When the Constitution directs map drawers to achieve incommensurate goals, this Court has long held that it will not second-guess the map drawers' choice. *See Wilson*, 134 Ohio St. 3d 221 ¶33; *see also id.* ¶67 (McGee Brown, J., and O'Connor, C.J., dissenting); *Voinovich v. Ferguson*, 63 Ohio St. 3d 198, 200 (1992). And the choice between proportionality and compactness is easily seen in the maps here. The map proposed by Senator Sykes aimed for more proportionality, but sacrificed compactness. Look at proposed House District 12. That hypothetical district included all of Pickaway County, a chunk of southeastern Franklin County, and then an isthmus connecting that chunk to another wide chunk of central Franklin County. (LWV, No. 2021-1193, Huffman and Cupp Evid. Vol. III, Barber Aff., Ex. A at 49 (Oct. 22, 2021).)

One last point. Even the part of the Constitution that lets challengers claim that a map fails proportionality if they show another violation makes no mention of Section

6(A)'s language telling the Commission that it must "attempt" to construct a map that neither favors nor disfavors a political party. *See* Ohio Const. art. XI, §6(A). Section 6(A)'s absence from the Remedy Clause must mean something. *See, e.g., State v. Bryant*, 160 Ohio St. 3d 113, 2020-Ohio-1041 ¶18. Plus, the language is aimed at the result, not the process. Surely a clause that tells state actors to "attempt" something has less force than a clause that tells them they "shall" take a concrete act. This Court quite recently held that one of those "shall" commands directing a concrete action did not put the Court in the "role to police how" a law came into "existence" by reviewing the "proceedings" that birthed the law. *Youngstown City Sch. Dist. Bd. of Educ. v. State*, 161 Ohio St. 3d 24, 2020-Ohio-2903 ¶20; *see also id.* ¶54 (French, J., concurring). Indeed, any view of Section 6(A) as mandating this Court's review of the Commission members' motives makes no sense when the People changed the Constitution to put the map-drawing obligation (and any associated remedies) on a corporate body instead of on individual actors.

So, the best reading of Section 6(A) is that the People viewed it like other parts of the Constitution in which a value is "safeguarded by the oath each member of the [Commission] takes to uphold the Constitution," *Youngstown*, 161 Ohio St. 3d 24 ¶45 (Kennedy, J., concurring), rather than through private lawsuits. But even if the People imbued it with more teeth, it stops short of telling courts to referee the Commission's motives as its members worked to fulfill their constitutional obligations to draw the map.

B. Article I, §11, which protects free speech, Article I, §3, which addresses the right to assemble, and Article I, §2, which speaks to equal protection, contain no hidden mandate about drawing legislative districts.

One group of relators claims that the Commission's map is invalid because it runs afoul of the Ohio Constitution's guarantees for free speech, assembly, and equal protection of the laws. That argument means all the hard work behind the 2015 amendments was pointless. On these relators' theory, the 2015 amendments were never needed because the same prohibitions on map drawing had been hidden away in other parts of the Constitution since 1802 or 1851. This argument devalues the three different rounds of constitutional amendments specifically designed to address redistricting. Ohioans also addressed map drawing specifically with significant constitutional changes in 1851 and 1967. *See Wilson*, 134 Ohio St. 3d 221 (McGee Brown, J., and O'Connor, C.J., dissenting) (describing 1851 and 1967 changes). All of that was unneeded according to the relators who press free-speech, assembly, and equal-protection theories against the map. Unsurprisingly, then, well-settled principles of constitutional interpretation foreclose these claims.

First, a claim cannot rest on a general part of the Constitution when a specific part of the Constitution addresses the precise question. "It is a general rule of constitutional interpretation that when a specific constitutional provision applies, it controls over a more general provision." *State v. Anderson*, 148 Ohio St. 3d 74, 2016-Ohio-5791 ¶26 (plurality op.); *see also Sattazahn v. Pennsylvania*, 537 U.S. 101, 115–16 (2003); *Sacramento Cnty.*

v. Lewis, 523 U.S. 833, 844 (1998). And those “[s]pecial constitutional provisions ... control general provisions” even if the general provision might bear on the question if the special provision were not part of the Constitution. *State ex rel. Maxcy v. Saferin*, 155 Ohio St. 3d 496, 2018-Ohio-4035 ¶10 (internal quotation marks omitted); *Akron v. Roth*, 88 Ohio St. 456, 461 (1913). For example, the generally worded due-process clause in the Ohio Constitution does not control questions about second criminal trials because the more-specific double-jeopardy clause addresses the matter. *Anderson*, 148 Ohio St. 3d 74 ¶46 (plurality op.). Similarly, the general language about municipal initiative power in Article II, §1(f) does not control over the more-specific language in Article XVIII, §9 about the power to amend a municipal charter. *Maxcy*, 155 Ohio St. 3d 496 ¶10. The Court should therefore “be hesitant to adopt an analysis that would allow a party to evade the procedure expressly provided by the Constitution ... simply by characterizing” its claim as arising under a more general provision. *State ex rel. Twitchell v. Saferin*, 155 Ohio St. 3d 52, 2018-Ohio-3829 ¶32 (Kennedy, J., concurring in judgment). With the very detailed and very recent 2015 amendments addressing map drawing, there is no need to turn to language written in 1802 or 1851 and pretend that it somehow addresses the same topic.

Second, any claim under the Constitution’s free-speech, assembly, or equal-protection components would conflict with current and former Article XI because those theories have no stopping point short of maximum possible proportionality. “There are no legal standards discernible in the Constitution for making such judgments, let alone

limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is ‘fair’ in this context would be an ‘unmoored determination’ of the sort characteristic of a political question beyond the competence of the federal courts.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019) (citations omitted). In other words, under these open-ended theories, “any level of partisanship in districting would constitute an infringement of ... rights.” *Id.* at 2504. But that zero-politics standard conflicts with the Constitution giving members of the General Assembly power over four of the Commission’s seven seats. Ohio Const. art. XI, §1(A). And it rests uncomfortably in the shadow of sister-state laws that explicitly prohibit the use of partisan data to draw maps. *See* Ariz. Const. art. IV, pt. 2, §1(15) (passed in 2000); Calif. Const. art. XXI, §2(d)(4) (passed in 2010); Mont. Code Ann. §5-1-115(3)(b), (c) (passed in 2003).

Another problem with a maximum-proportionality standard is that it should pay no heed to county or other local political-subdivision boundaries. Indeed, if these very general clauses of the Constitution impose the relevant metrics, why must districts be contiguous and made from a single non-intersecting line? To describe the logic of this theory is to reject it. The Ohio Constitution’s command in statehouse redistricting is to explicitly preserve geographic lines like county and municipal boundaries. *See, e.g.*, Ohio Const. art. XI, §3(C)(1), (D)(2). And, of course, it “is impossible to hold unconstitutional that which the Constitution explicitly contemplates.” *Glossip v. Gross*, 576 U.S. 863, 894 (2015) (Scalia, J., concurring). In other words, “the very text of the document recognizes

that [drawing district lines to respect existing boundaries] is a permissible legislative choice.” *Baze v. Rees*, 553 U.S. 35, 87 (2008) (Scalia, J., concurring in the judgment).

*

The Constitution does not support relators’ preferred method of invalidating the Commission’s map. How can that be, they say, when the People so recently passed an amendment that directs the Commission to consider the statewide proportion of seats that will likely be won by a Republican or a Democrat, and how that figure compares to the statewide votes for statewide offices? Consider the choices that face mapmakers trying to draw Ohio’s district lines. All seem to agree that the difference between maps the relators think are acceptable and the Commission map they condemn comes down to how the lines are drawn in and around Ohio’s most populous counties. *See, e.g.*, (Bennett, No. 2021-1198, Supp. to Merits Br., Vol. II, Rodden Aff. at 19 (Oct. 29, 2021)); (LWV, No. 2021-1193, Huffman and Cupp Evid. Vol. III, Barber Aff., Ex. A at 40 (Oct. 22, 2021)); *see also Rucho*, 139 S. Ct. at 2500 (“the ‘natural political geography’ of a State ... can itself lead to inherently packed districts”). And the only way to avoid a seat bonus arising from the more widespread distribution of Republican voters is to draw lines in and around those populous counties to virtually eliminate likely Republican seats in those areas. That in turn means that counteracting the natural Republican advantage in less populous counties requires gerrymandering districts to crack apart Republican voters in populous counties. And that is exactly what one map offered by Senator Sykes did in Franklin County. It eliminates a potential Republican seat in southwestern Franklin County by splitting a

contiguous cluster of Republican voters into three separate districts. *See* (LWV, No. 2021-1193, Huffman and Cupp Evid. Vol. III, Barber Aff., Ex. A at 44–45 (Oct. 22, 2021).)

So does the Ohio Constitution require the Commission to disenfranchise Republican voters in large counties through gerrymanders in favor of Democrats? That is a hard question. It is a political question. And it is not a question the People left to this Court. Instead, the People restrained this Court to toss out a four-year map under Section 6 *only if* a challenger can first show that the map violates the less-politically-charged requirements in Sections 2, 3, 4, 5, or 7. There is much wisdom in the People’s choice to steer this Court clear of the hard question about correcting a natural Republican advantage with an intentional gerrymander for Democrats. It is not obvious that all maps lacking proportional representation are unfair. That is so because maximizing proportionality can sacrifice competitive districts. “[T]here is not necessarily partisan bias if a party wins 40% of the votes and only 20% of the seats. This could indeed be a fair outcome when many seats are highly competitive The assumption that the fraction of seats should equal the fraction of votes assumes that proportional representation is the ideal, and that is highly arguable, especially as it does not allow higher levels of competitiveness.” John F. Nagle, *Measures of Partisan Bias for Legislating Fair Elections*, 14 Elec. L.J. 346, 347 (2015) (citations omitted). Permitting judicial review of proportionality for all maps runs the risk of sacrificing competitiveness for proportionality every time. The People’s choice to

limit the kinds of maps that this Court can invalidate is a value judgment that some value judgments about maps should not be judicially reviewable.

In the end, the great irony of circumventing the Constitution's check on Section 6 claims is that the only way to approach partisan proportionality in Ohio is through a process that would flunk the OOC relators' own test. After all, those relators insist on voters' rights to "associate for advancement of political goals" through an "equal opportunity to elect government representatives." OOC Br.25, 28. If no Republican voter in Franklin County has a chance to elect the candidate of her choice because the map cracks those voters into many districts, the plans that the OOC relators might prefer would violate the very values those relators ask this Court to embrace.

II. The Governor, the Secretary, and the Auditor are not proper respondents.

Regardless of any merits ruling about the meaning of Article XI (or Article I), the statewide elected officeholders should be dismissed from this case. The Constitution addresses the Redistricting Commission, not its individual commissioners.

The language in current Article XI places on the "commission" the duty and responsibility to draw legislative districts. That is a change from the pre-2015 Constitution. The old language spoke in terms of "the persons responsible" for drawing district lines, and charged those individuals "by a majority of their number" to draw new maps as a remedy for violating the Constitution. Ohio Const. art. XI, §13 (1967) (repealed 2015). The new language switches from individuals to the corporate body of the Commission.

That significant change must have meaning. Courts “must presume that the[se] amendments were made to change the effect and operation of the law.” *State v. Jones*, 163 Ohio St. 3d 242, 2020-Ohio-6729 ¶38 (quoting *Lynch v. Gallia Cnty. Bd. of Comm’rs*, 79 Ohio St. 3d 251, 254 (1997)); see also *State v. Aguirre*, 144 Ohio St. 3d 179, 2014-Ohio-4603 ¶1. After the change, individual commissioners are not proper respondents. Only the Commission is.

The 2015 change from officer to Commission responsibility has good company. The Constitution has been amended before to change who may be sued. In 1912, the Constitution authorized suits against the State (subject to authorizing legislation) that had previously been barred by sovereign immunity. See, e.g., *Boggs v. State*, 8 Ohio St. 3d 15, 16 (1983); see Ohio Const. art. I, §16. So the change switched the proper defendant from officers to the State itself. Moving in the other direction, but through an amendment in the same year, the People changed the Constitution to insulate employers from most employee torts. See, e.g., *Sutton v. Tomco Machining, Inc.*, 129 Ohio St. 3d 153, 2011-Ohio-2723 ¶34; *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St. 3d 38, 41 (2001); see Ohio Const. art. II, §35. The amendment therefore switched the proper defendant for most industrial accidents from the employer to a state body. In each case, the amended constitution changed the proper defendant. So too with the amendments to Article XI.

Expanding the field of view to statutes, many state entities have duties and responsibilities as corporate bodies, not as individuals who make up that body. For

example, this Court regularly remands matters to the Industrial Commission or the Public Utilities Commission to correct or amend some action those bodies have taken. Those orders are not directed to any individual member of those commissions. *See, e.g., State ex rel. T.S. Trim Indus., Inc. v. Indus. Comm’n*, ___ Ohio St. 3d ___, 2021-Ohio-2709 (remanding to Industrial Commission for reconsideration); *State ex rel. Merritt v. Indus. Comm’n*, 161 Ohio St. 3d 380, 2020-Ohio-4379 ¶6 (same); *In re Application of Suburban Nat. Gas Co.*, ___ Ohio St. 3d ___, 2021-Ohio-3224 (remanding to Public Utilities Commission); *see also State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm’n*, 117 Ohio St. 3d 441, 2008-Ohio-1261 ¶¶7, 23 (ordering Civil Rights Commission to issue subpoena).

The Court similarly commands many other state entities as corporate bodies, even if not often by original actions. *See, e.g., Bernard v. Unemp. Comp. Rev. Comm’n*, 136 Ohio St. 3d 264, 2013-Ohio-3121; *WCI, Inc. v. Ohio Liquor Control Comm’n*, 116 Ohio St. 3d 547, 2008-Ohio-88; *Ohio Hist. Soc. v. State Emp. Rels. Bd.*, 66 Ohio St. 3d 466 (1993). The practice of ordering commissions, not commissioners, to act stretches back decades. *See, e.g., State ex rel. Pressley v. Indus. Comm’n*, 11 Ohio St. 2d 141 (1967); *Burger Brewing Co. v. Liquor Control Comm’n, Dep’t of Liquor Control*, 34 Ohio St. 2d 93 (1973). The same is true of this Court’s original-action cases directing local corporate bodies to take some action. *See, e.g., Columbus Bituminous Concrete Corp. v. Harrison Twp. Bd. of Zoning Appeals*, 160 Ohio St. 3d 279, 2020-Ohio-845; *State ex rel. O’Neill v. Athens Cnty. Bd. of Elections*, 160 Ohio St. 3d 128, 2020-Ohio-1476.

All told, the framers of the 2015 amendments had a “readymade” model to shift responsibility for map drawing from individual commissioners to the Commission as a corporate body. *See Thryv, Inc v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1375 (2020). The decision to make the Commission, but not its individual members, the proper respondent has good company in Ohio law.

All of this shows why the Governor, the Secretary, and the Auditor are not proper respondents here. A recent decision from the Court seals the deal by analogy. A few months ago, the Court ordered the Department of Education to approve a charter school’s application for funding. *State ex rel. Horizon Science Acad. of Lorain, Inc. v. Ohio Dep’t of Educ.*, 164 Ohio St. 3d 387, 2021-Ohio-1681 ¶22. But the Court declined to issue that order against an officer of the Department. The relevant statute, the Court held, imposed the duty only on the Department, “not on any particular individual or officer.” *Id.* ¶21. The same logic should apply here. The Constitution places map-drawing responsibility on the “commission,” *see, e.g.*, art. XI, §9(D)(3)(c), not its individual members.

III. Relators offer no convincing interpretation of the Constitution.

What do the relators have to say about all of this? Very little, despite three separate briefs. They never grapple with the tiered-remedy language in Article XI, Section 9. They cannot articulate a way for this Court to pick between the competing expert claims that a disfavored plan draws lines to advantage one political party or the other. And they do not explain why this Court can issue an order against any individual respondent.

A. All three relator groups believe that the Commission’s map violates Article XI, §6. But none offers a way to honor the Constitution’s explicit directive that a Section 6 violation is remediable in this Court only if it can be linked to a predicate violation of Sections 2, 3, 4, 5, or 7. *See above* at 17–23. One group of relators candidly acknowledges that the Constitution’s remedy section directed specifically at this Court “does not provide” an “available” remedy for a stand-alone Section 6 violation. OOC Br.8. But, rather than take that observation to its logical conclusion, those relators believe that remedies must “aris[e]” from Article XI’s “grant of ... jurisdiction” to this Court. *Id.* Of course, the general grant exists because other parts of Article XI, such as Sections 3 and 4 *are* paired with a specified remedy in the Constitution. What is more, jurisdiction and remedy are separate questions. A court may have jurisdiction, but lack remedial power. *See, e.g., Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020); *DeRolph v. State*, 78 Ohio St. 3d 193, 265 (1997) (Moyer, C.J., dissenting), *subsequent history omitted*.

These relators make a further point of the general language in Section 9(B) authorizing a court order to reconstitute the Commission. OOC Br.48. That general language cannot override the more specific language linking certain remedies to certain problems with a map. *See, e.g., State v. Taylor*, 113 Ohio St. 3d 297, 2007-Ohio-1950 ¶14; *Minster Farmers Coop. Exch. Co. v. Meyer*, 117 Ohio St. 3d 459, 2008-Ohio-1259 ¶25. Nor does that clause’s “notwithstanding” provision let it trump the more-specific provisions of Section 9(D), as that clause is “a big indicator that the framers of the provision understood that it

would be read narrowly.” *City of Cleveland*, 157 Ohio St. 3d 330 ¶54 (DeWine and Stewart, JJ., concurring in judgment). Read narrowly, Section 9(B)’s language about a court order holding a map “invalid” must be read in light of Section 9(D)’s limits on what counts as an invalid map.

Other relators point out that Section 6 contains a mandatory “shall” command about map drawing. LWV Br.23–26; Bennett Br.45–50. True, but irrelevant. The more-specific provision limiting remedies controls over the general language imposing map-drawing rules. *See, e.g., Taylor*, 113 Ohio St. 3d 297 ¶14; *Minster*, 117 Ohio St. 3d 459 ¶25. Honoring the textual restraint that this Court may remedy Section 6 violations only when they can be linked to violations of Sections 2, 3, 4, 5, or 7 hardly makes Section 6 “superfluous.” Bennett Br.48. To the contrary, Section 6 offers a reason for invalidating a four-year map that is not available for ten-year maps. Section 9 authorizes this Court to invalidate a ten-year map only if at least six House seats or at least two Senate seats violate Sections 2, 3, 4, 5, or 7. *See* Ohio Const. art. XI, §9(D)(3)(b). For a four-year map, the bar is not as high. Section 9(D)(3)(c) authorizes the Court to invalidate an entire map as long as a single district violates Sections 2, 3, 4, 5, or 7, and also violates the listed part of Section 6. Far from being toothless, Section 6 can be a basis to invalidate a four-year map that would not be available in a challenge to a ten-year map. What is more, the Ohio Constitution includes obligations that are “safeguarded by the oath” the relevant actor “takes to uphold the Constitution,” *Youngstown*, 161 Ohio St. 3d 24 ¶45 (Kennedy, J.,

concurring); *DeRolph*, 78 Ohio St. 3d 267 (Moyer, C.J., dissenting). And Section 6 shows real teeth if a challenger can first show a violation of one of the enumerated sections.

B. As to the claims that a proportional-representation command has hidden away in the Constitution's speech and assembly provisions since 1802 and in its equal-protection provision since 1851, the OOC relators offer some whiplash-inducing logic. *See* Ohio Const. art. VIII, §§6, 19 (1802); *id.* art. I, §2 (1851). According to these relators, the Court should engage in the following analysis: (1) recognize that the Ohio Constitution's clauses about free speech, free assembly, and equal protection "afford greater rights" than their federal counterparts, OOC Br.22 (quotation omitted); (2) also read these same clauses as "coextensive with" their federal counterparts, *id.* at 27; and then (3) draw heavily from vacated federal opinions or dissents to read into the Ohio provisions some standards for proportional representation drawn from these federal decisions, *see, e.g., id.* at 27, 31, 37, 38.

The argument does not merit much of a response. If the argument requires drawing on analogous federal constitutional provisions, the argument hits a brick wall. U.S. Supreme Court precedents about these analogous provisions "'foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.'" *Rucho*, 139 S. Ct. at 2499 (citation omitted); *see also Mobile v. Bolden*, 446 U.S. 55, 75–76 (1980) (plurality

op.). And as detailed above, it is hard to believe that state leaders like Senator Sykes, Senator Huffman, Secretary LaRose, and Auditor Faber—not to mention the voters who approved Article XI—would have expended all the energy to amend the Constitution if the same restrictions on map drawing had been placed there by the framers of Ohio’s original charter in 1802. This argument would also likely come as a great surprise to those who championed the 1851 amendments aimed at “the prevention of gerrymandering,” *State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 509 (1942), if the 1802 original had prevented it all along. Indeed, gerrymandering was “a common practice in the first fifty years of statehood.” Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution: A Reference Guide* 279 (2004). As some relators see it, Ohio leaders had been violating multiple provisions of Ohio’s Bill of Rights for fifty years, and no one thought to invoke these sections to curb the practice. “Long settled and established practice is a consideration of great weight in a proper interpretation” of a constitutional provision. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

But what of Article XI’s requirement that maps abide all other “applicable” provisions of the Ohio and federal constitutions? See Ohio Const. art. XI, §3(B)(2). That language is not an invitation to breathe Article XI ideas into inapplicable text, but a reminder that some map-drawing actions might violate those provisions in ways that Article XI does not cover. For example, Article XI does not address racial gerrymandering, but the federal and Ohio constitutions do. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 907–08 (1996).

C. Finally, no relator explains how relief can run against any individual respondent. Indeed, two of the three relator briefs appropriately seek an order against “the Commission,” not the individual respondents. LWV Br.50; Bennett Br.50. Just as the Court did in the very recent *Horizon Science Academy* case, it should dismiss the individual Governor, the Secretary, and the Auditor. 164 Ohio St. 3d 387 ¶22.

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At bottom, relators’ various theories in this case “involve not a construction of the” Constitution, “but a rewriting of it.” *State Bd. of Equalization v. Young’s Mkt. Co.*, 299 U.S. 59, 62 (1936). Rather than follow the Constitution and show how the Commission map violates the sections of Article XI that serve as gateways to a Section 6 analysis, they either ask the Court to read into ancient provisions the same standards that Article XI finally added in 2015 or read out of Section 9 its explicit check on this Court’s power. Neither move is faithful to the words the People placed in the Constitution, whether in 1802, 1851, or 2015. Relators offer many reasons that their preferred maps might make good policy. But “no amount of policy-talk [should] overcome a plain [textual] command.” *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

Conclusion

The Court should dismiss the complaints in all three cases because none pleads an actionable claim. At minimum, the Court should dismiss the Governor, the Secretary, and the Auditor as improperly named respondents.

Respectfully submitted,
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Certificate Of Service

I hereby certify that on November 5, 2021, the foregoing *Merit Brief Of Governor Mike DeWine, Secretary Of State Frank LaRose, And Auditor Keith Faber* was filed electronically. I further certify that a copy of the foregoing has been served via the electronic mail upon the following counsel for Relators.

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