IN THE SUPREME COURT OF OHIO

THE OHIO ORGANIZING COLLABORATIVE, *et al.*, *Relators*, *v.* OHIO REDISTRICTING COMMISSION, *et al.*, *Respondents*.	:	Case No. 2021-1210 **APPORTIONMENT CASE** Filed pursuant to S.Ct.Prac.R. 14.03(A) and Section 9 of Article XI of the Ohio Constitution to challenge a plan of apportionment promulgated pursuant to Article XI.

SUPPLEMENTAL BRIEF

OF RELATORS THE OHIO ORGANIZING COLLABORATIVE, ET AL.

Alicia L. Bannon (PHV 25409-2021)
Yurij Rudensky (PHV 25422-2021)
Michael Li (PHV 25430-2021)
Ethan Herenstein (PHV 25429-2021)
Harry Black (PHV 25544-2021)
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel: (646) 292-8310
Fax: (212) 463-7308
alicia.bannon@nyu.edu

Brian A. Sutherland (PHV 25406-2021)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Tel: (415) 543-8700
Fax: (415) 391-8269
bsutherland@reedsmith.com

Peter M. Ellis (0070264)
Counsel of Record
M. Patrick Yingling (PHV 10145-2021)
REED SMITH LLP
10 South Wacker Drive, 40th Floor
Chicago, IL 60606
Tel: (312) 207-1000
Fax: (312) 207-6400
pellis@reedsmith.com

Attorneys for Relators
The Ohio Organizing Collaborative, et al.

(listing of counsel for relators continued on next page)

Ben R. Fliegel (PHV 25411-2021)
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
Tel: (213) 457-8000
Fax: (213) 457-8080
bfliegel@reedsmith.com

Brad A. Funari (PHV 3139-2021)
Danielle L. Stewart (0084086)
Reed Smith Centre
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: (412) 288-4583
Fax: (412) 288-3063
bfunari@reedsmith.com
dstewart@reedsmith.com

Attorneys for Relators
The Ohio Organizing Collaborative, et al.

(counsel for respondents listed on next page)

Counsel for Respondents

W. Stuart Dornette (0002955)
Beth A. Bryan (0082076)
Philip D. Williamson (0097174)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut St., Suite 1800
Cincinnati, Ohio 45202-3957
Tel: (513) 381-2838
dornette@taftlaw.com
bryan@taftlaw.com
pwilliamson@taftlaw.com

Phillip J. Strach (PHV 25444-2021)
Thomas A. Farr (PHV 25461-2021)
John E. Branch, III (PHV 25460-2021)
Alyssa M. Riggins (PHV 25441-2021)
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Ave., Suite 200
Raleigh, North Carolina 27612
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
Tel: (919) 329-3812

Counsel for Respondents
Senate President Matt Huffman and
House Speaker Robert Cupp

Erik J. Clark (0078732)
Counsel of Record
Ashley Merino (0096853)
ORGAN LAW LLP
1330 Dublin Road
Columbus, Ohio 43215
T: (614) 481-0900
F: (614) 481-0904
ejclark@organlegal.com
amerino@organlegal.com

Counsel for Respondent
Ohio Redistricting Commission

OHIO ATTORNEY GENERAL
Bridget C. Coontz (0072919)
Counsel of Record
Julie M. Pfeiffer (0069762)
Michael A. Walton (0092201)
Assistant Attorneys General
Michael J. Hendershot (0081842)
Deputy Solicitor
30 E. Broad Street
Columbus, OH 43215
Tel: (614) 466-2872
Fax: (614) 728-7592
bridget.coontz@ohioago.gov
julie.pfeiffer@ohioago.gov
michael.walton@ohioago.gov
michael.hendershot@ohioago.gov

Counsel for Respondents
Governor Mike DeWine,
Secretary of State Frank LaRose, and
Auditor Keith Faber

John Gilligan (0024542)
Diane Menashe (0070305)
ICE MILLER LLP
250 West Street, Suite 700
Columbus, Ohio 43215
John.Gilligan@icemiller.com
Diane.Menashe@icemiller.com

Counsel for Respondents
Senator Vernon Sykes and
House Minority Leader Emilia Sykes

Counsel for *Amici Curiae*

Subodh Chandra (0069233)
Donald Screen (0044070)
Counsel of Record
THE CHANDRA LAW FIRM LLC
The Chandra Law Building
1265 West 6th Street
Cleveland, Ohio 44113
Tel: (216) 578-1700
subodh.chandra@chandralaw.com
donald.screen@chandralaw.com

Janette McCarthy Wallace (0066257)
Anthony P. Ashton*
Anna Kathryn Barnes*
NAACP
Office of the General Counsel
4805 Mount Hope Drive
Baltimore, MD 21215
Tel.: (410) 580-5777
jlouard@naacpnet.org
aashton@naacpnet.org
abarnes@naacpnet.org

Jon Greenbaum*
Ezra D. Rosenberg*
Pooja Chaudhuri*
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street, N.W., Ste. 900
Washington, D.C. 20005
Tel.: (202) 662-8600
jgreenbaum@lawyerscommittee.org
erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org

*Not Admitted to the State Bar of Ohio

Counsel for Amicus Curiae The Ohio State Conference of the NAACP

Stephanie Marie Chmiel (0087555)
Mary Elizabeth Csarny (0097682)
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Tel.: (614) 469-3247
Fax: (614) 469-3361
stephanie.chmiel@thompsonhine.com
mary.csarny@thompsonhine.com

Counsel for Amicus Curiae David Niven

Andrew William Garth (0088905)
City Solicitor
Emily Smart Woerner (0089349)
Deputy City Solicitor
Shannon Doyle Price (0100744)
Assistant City Solicitor
CITY OF CINCINNATI
801 Plum Street, Room 214
Cincinnati, Ohio 45202
Tel.: (513) 352-3307
Fax: (513) 352-1515
emily.woerner@cincinnati-oh.gov
shannon.price@cincinnati-oh.gov

Counsel for Amicus Curiae City of Cincinnati

Donald C. Brey (0021965)
Ryan C. Spitzer (0093515)
ISAAC WILES & BURKHOLDER, LLC
Two Miranova Place, Suite 700
Columbus, Ohio 43215-5098
Tel.: (614) 221-2121
Facsimile: 614-365-9516
dbrey@isaacwiles.com

Counsel for Amicus Curiae Renew Ohio

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INTRODUCTION

This Court ordered the parties to file supplemental briefs addressing 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?"

The answer is simple: none.

Section 9 of Article XI expressly confers jurisdiction and authority on this Court to grant the relief requested by relators: to declare the district plan invalid and order respondents to adopt a new plan in accordance with the Ohio Constitution. Section 8(C)(1) does not alter that jurisdiction and authority. Rather, it is part of a section specifying different procedural paths for the enactment of a plan and providing an early sunset for a plan adopted by a bare partisan majority, by limiting the plan's effective duration to two election cycles even if the plan is fully compliant with all relevant constitutional requirements. A plan cannot remain "effective," however, if this Court has declared it unconstitutional and ordered the Commission to adopt a new district plan under Article XI. Section 9 grants this Court the authority to make such determinations in multiple provisions: Section 9(B), 9(D)(3)(b), and 9(D)(3)(c). In fact, Section 9(D)(3)(c) expressly contemplates and authorizes judicial review of a "plan adopted under division (C) of Section 8 of this article," *i.e.*, the provision that is the subject of the Court's inquiry and supplemental briefing order. Thus, the voters plainly did not intend to insulate bare partisan majority "four-year maps" from judicial review.

Although respondents have never suggested that Section 8(C)(1) affects this Court's authority to review and invalidate unconstitutional district plans adopted by a simple partisan

majority, they might construe the Court's supplemental briefing order as an invitation to make that argument. If respondents advance such a construction of Section 8(C)(1), this Court should reject it. To read Section 8(C)(1) as providing that a four-year plan is unreviewable would be contrary to the text, history, and purpose of Article XI and the most basic and foundational principles of judicial review. In short, such a construction is untenable, would lead to absurd results, and would violate the separation-of-powers doctrine.

Moreover, reading Section 8(C)(1) as precluding this Court's authority to grant relief under Article XI would incentivize extreme partisanship. It would give the Commission a green light to violate *any* provision of Article XI when enacting a plan by a simple partisan majority and deny this Court the ability to declare an unconstitutional plan invalid. Under such an interpretation, the Commission could do anything—create districts with vastly unequal populations, draw supersized multi-member districts, split every county, municipality, and township in Ohio, gerrymander by race, and so forth—and this Court would be powerless to review and declare such a plan invalid. By contrast, a plan passed with bipartisan support would be subject to judicial scrutiny.

There is no textual or logical basis for the Court to adopt a reading of Section 8(C)(1) that would produce such results. This Court has long held that it has a duty to declare what the law is and the "doctrine of judicial review is so well established that it is beyond cavil." *Board of Education v. Walter*, 58 Ohio St.2d 368, 383, 390 N.E.2d 813 (1979). To depart from this bedrock principle would require an unmistakably clear statement from voters that they wanted to alter this Court's powers of judicial review, and to state the obvious, the 2015 amendments to Article XI were not a jurisdiction-stripping measure. Exempting a plan enacted under Section 8(C)(1)(a) from review would vest a partisan majority of the Commission with final judgment of

the four-year plan's constitutionality. This outcome would be inconsistent with the voters' intent to strengthen this Court's review and to incentivize bipartisanship, not limit it.

To be sure, if this Court invalidates the enacted plan and orders the Commission to draft a new one, Section 8(C)(1) will once again be relevant for determining the duration during which the remedial plan remains effective. This Court's authority under Section 9 does not extend to establishing the *duration* of a remedial plan. Under Section 9(B), if this Court determines a plan is unconstitutional, a reconstituted commission must adopt a remedial plan. If this reconstituted commission adopts a plan with the bipartisan majority prescribed by Section 1(B)(3), then such a plan would be effective until the next year ending in one, *i.e.*, the next decennial redistricting. If, on the other hand, the reconstituted commission once again enacts a district plan with a bare partisan majority, then such a plan would remain effective for only two cycles. If this Court declared *that* plan invalid, a federal malapportionment lawsuit based on unequal population of districts might be appropriate. But nothing in Section 8(C)(1) affects this Court's jurisdiction or remedial authority, the scope of which is defined in Section 9.

For all these reasons and those stated below, this Court should hold that Section 9 confers jurisdiction and authority on this Court to declare the district plan invalid and order the Commission to draft a new one under Article XI, and that Section 8(C)(1) does not alter that authority.

SUPPLEMENTAL BRIEF

I. Section 9 Confers Jurisdiction and Authority on This Court to Grant the Relief Requested by Relators and Section 8(C)(1) Does Not Alter That Authority

As set forth in relators' merits briefing, Section 9 of Article XI unequivocally provides this Court with not only the authority but also the obligation, under the circumstances of this case, to declare that the General Assembly district plan is invalid and unconstitutional. Section 8(C)(1) does not alter that authority. Rather, Section 8(C)(1) specifies the duration for which a plan adopted by a simple partisan majority shall remain effective.

A. Nothing in Section 8(C)(1)'s History Suggests That Section 8(C)(1) Was Intended to Limit This Court's Authority

The 2015 amendments to Article XI began as House Joint Resolution 12 ("HJR 12"). The resolution was introduced in the House, amended and then adopted by the House, then amended again by the Senate. Throughout these iterations, the drafters modified and refined the "impasse procedure" for adopting a plan by a simple majority vote and the duration that such a plan would remain effective. Nothing in this drafting history suggests an intent to limit this Court's authority to review plans adopted via the impasse procedure.

1. The Introduced Joint Resolution

The drafters of what became HJR 12 sought to establish a redistricting scheme that would produce a bipartisan plan. Under Section 1(B) of Article XI as first introduced in 2014, a plan could not be approved without the vote of at least one member of each major political party, except as otherwise provided in draft Section 14 (HIST_0002), which addressed jurisdiction and remedies (HIST_0007).[1]

[1] Citations to "HIST_" are references to the paginated appendix submitted with the Affidavit of Derek Clinger, Evidence of Relators - Historical Records, on October 22, 2021.

The drafters recognized that the Commission might fail to enact a bipartisan plan. To address this issue, the introduced version of HJR 12 included a provision authorizing three statewide elected officials (governor, auditor, secretary of state) to create the plan "independently" in the event that the Commission failed to adopt one. (HIST_0005-0006) Such a plan would be effective for only a limited duration. Further, the Commission's failure to adopt a bipartisan plan would trigger a referendum on the question whether to reconvene the Commission, and even if voters declined, mid-decade redistricting would still ensue. (HIST_0005-0006) This did not mean, of course, that the statewide elected officials could enact an unconstitutional plan without judicial review (*see* HIST_0007); rather, these provisions, like those in Section 8(C)(1), governed the period of time during which an "impasse" type plan would remain effective.

2. The House Amendments

The House subsequently adopted a version of HJR 12 that significantly amended the procedures to govern the situation in which the Commission could not agree on a bipartisan plan under draft Section 1(B). The House version strengthened the "bipartisanship" requirement, providing that a plan could not be approved without the vote of at least two members of each major political party, and moved that requirement to Section 1(B)(3), as opposed to its former location in Section 1(B). (*Compare* HIST_0002, *with* HIST_0010) The House version also removed the "except as otherwise provided" clause from the bipartisanship requirement. (*Compare* HIST_0002, *with* HIST_0010)

As in the introduced version, the drafters of amendments to HJR 12 recognized that the Commission might fail to adopt a bipartisan plan. They provided that if the Commission failed to adopt a bipartisan plan by September 1, then the Commission could introduce a plan by a simple majority vote. (HIST_0012-0013) After a hearing on such a plan, the Commission could adopt

the plan "by the vote required to adopt a plan under division (B) of Section 1 of this article or by a simple majority vote of the commission." (HIST_0013 [draft Section 9(A)(3)]) As indicated, the reference to "division (B) of Section 1" appears to be an outdated reference to the *introduced* version, given that the bipartisan vote requirement had been moved to Section 1(B)(**3**). (Bolding added.) (HIST_0010)

The version adopted by the House had two provisions addressing the length of time during which a plan enacted under the impasse-type procedure would remain effective. It provided that a bipartisan plan adopted under the impasse procedure "shall remain effective until the next year ending in the numeral one, except as provided in Section 10 of this article" (HIST_0013 [draft Section 9(B)]), *i.e.*, the jurisdiction and remedies section in that version of the joint resolution (HIST_0013-0014). A plan adopted by simple majority vote, on the other hand, would "remain effective until two general elections for the house of representatives have occurred under the plan or until a year ending in the numeral one, whichever is earlier." (HIST_0013 [draft Section 9(C)(1)]) Here again, these provisions did not mean that only bipartisan plans were subject to judicial review—that would make no sense. Rather, they governed the period of time during which an "impasse"-type plan would remain effective.

3. The Senate Amendments and Final Joint Resolution

The Senate further amended the version of the joint resolution that the House had adopted, and the House thereafter agreed to the Senate's amendments. (HIST_0091-0092) The drafting teams had worked late into the night on the joint resolution, presumably to complete it by the adjournment of the legislative session ahead of the 2014 holidays. (HIST_0086 [Tr. 19:11-17]; *see also* HIST_0073) Reflecting the pace of negotiations and drafting, then-Senator LaRose even offered an amendment on the Senate floor to edit the punctuation, calling it "twilight legislating." (HIST_0059-0060) The House and Senate teams ultimately agreed to

make a significant change to the provision that would become Section 8(C)(1). But that change did not affect this Court's authority.

After the Senate amendments, the final version of Section 8(C)(1), consisting of subparagraphs (a) and (b), provides as follows:

> **(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.

Ohio Constitution, Article XI, Section 8(C)(1); HIST_0021.

Thus, whereas the version adopted by the House provided that a plan adopted by a simple majority would "remain effective until two general elections for the house of representatives have occurred under the plan or until a year ending in the numeral one, whichever is earlier," the

final joint resolution provided that if the Commission adopted a four-year plan, the next plan to replace it would remain effective until the next decennial redistricting. In other words, the Senate amended the impasse procedure to eliminate the possibility of three or more district plans within a ten-year period. Then-Representative Huffman described these changes in detail on the House floor. (HIST_0070-0071 [Tr. 3:11-4:3]) As he explained, the House version created problems for Senate candidates, which are elected to four-year terms. (*See id.*) The Senate amendments were meant to address that issue by providing for a four-year plan and then, after that one expired, a six-year plan to last until the next year ending in one. (*See id.*) Nothing in these amendments suggests that their purpose was to deprive this Court of authority to review plans adopted by a simple majority of the Commission. Instead, their main concern was duration.

Two minor differences between subparagraphs (C)(1)(a) and (C)(1)(b) surfaced when the Senate amended the "sunset" provision by modifying and dividing what *had been* Section 9(C)(1) in the prior House version into two parts. For one, subparagraph (a) refers to a plan adopted under "division (B)(3) of Section 1 of this article," whereas subparagraph (b) refers to a plan adopted "under division (B) of Section 1," which again carries forward the outdated reference to the original introduced resolution. For another, subparagraph (b) states that a plan adopted under that subparagraph "shall remain effective until a year ending in the numeral one, except as provided in Section 9," whereas subparagraph (a) does not have the "except as provided in Section 9" language. As described below, these minor differences do not and cannot lead to differing conclusions about this Court's authority concerning plans adopted under each respective subparagraph.

B. Under Article XI's Plain Text, Section 9 Governs This Court's Authority to Grant Relief, Not Section 8(C)(1)

Section 8 of Article XI, titled "impasse procedure," does not address the jurisdiction or authority of this Court to impose remedies. Section 9 addresses that topic directly, and its plain language is clear. This Court has "exclusive, original jurisdiction in all cases arising under [Article XI]." Ohio Constitution, Article XI, Section 9(A). And if this Court determines that a General Assembly district plan or "any district" within the plan is invalid, then, "*notwithstanding any other provisions of this constitution*," the Commission shall be reconstituted as provided in Section 1 and shall determine a new plan to be used until "the next time for redistricting under [Article XI]." (Emphasis added.) Ohio Constitution, Article XI, Section 9(B). The term "notwithstanding" means "'without prevention or obstruction from or by; in spite of.'" *State ex rel. Carmean v. Bd. of Educ.*, 170 Ohio St. 415, 422, 165 N.E.2d 918 (1960) (quoting Webster's New Int'l Dictionary (2d Ed.)). Thus, the provisions included in a "notwithstanding" section override any conflicting provisions. *See Ohio Neighborhood Fin., Inc. v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 35.

Moreover, Section 9(D)(3)(c) specifically provides that "[i]f, in considering a plan adopted under division (C) of Section 8 of this article, the court determines that [two Section 6(B)-related conditions] are true, the court shall order the commission to adopt a new general assembly district plan in accordance with this article." Ohio Constitution, Article XI, Section 9(D)(3)(c). This provision explicitly directs the Court to review plans adopted under the Section 8(C) impasse procedure and to order a new plan if the criteria of Section 9(D)(3)(c) are met. The OOC relators seek relief under Section 9(B) in connection with their "Section 6" claim and under Section 9(D)(3)(b) and Section 9(D)(3)(c) in connection with their "Section 3" claims, *i.e.*, their

claims that non-compliance with the Ohio Bill of Rights is a violation of the Section 3(B)(2) districting standard under Article XI. *See* OOC Merits Br. 46-49; OOC Reply Br. 2, 5, 9-10.

While Section 8 is concerned with the effective duration of a plan enacted pursuant to the impasse procedure, its procedural provisions likewise confirm that judicial review is available for violations of a four-year plan. Section 8(C)(2) states that a plan adopted "under division (C)(1)(a) or (b) of this section shall include a statement" explaining how the Commission complied with Section 6(B). Ohio Constitution, Article XI, Section 8(C)(2). In addition, a commissioner who does not vote for the enacted plan may submit a statement into the record. *See id.* Both of these processes exist to facilitate judicial review by making the basis for Section 6(B) compliance and any dissenting views part of the official record relevant to adjudicating Section 6 claims and whether any Section 3(B)(2) violations trigger Section 9(D)(3)(c)'s mandatory remedies. Without the availability of judicial review, the Section 8(C)(2) statements would have limited value.

As noted, respondents may construe the Court's inquiry and supplemental briefing order as an opening to argue, for the first time, that Section 8(C)(1)(a) forecloses judicial review. Respondents may note that a plan adopted under Section 8(C)(1)(a) "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." Ohio Constitution, Article XI, Section 8(C)(1)(a). In contrast with this provision, Section 8(B) and 8(C)(1)(b) provide that a plan adopted under those respective provisions would remain effective until a year ending in the number one, "except as provided in Section 9 of this article." Respondents may argue that the absence of the words, "except as provided in Section 9 of this article" in Section 8(C)(1)(a) means that the voters deprived this Court of jurisdiction to provide remedies when the plan at issue was adopted

by a simple majority under that provision. If respondents make that belated argument, this Court should reject it for many reasons.

First, nothing in Section 8 purports to limit judicial review or judicial remedies. Rather, any interpretation to that effect would have to arise only by negative inference, *i.e.*, the fact that Section 8(C)(1)(a) does *not* have a proviso that other provisions have. But the provisions authorizing judicial review and remedies in Section 9(B), 9(D)(3)(b), and 9(D)(3)(c) are specific and contain no exceptions for a four-year plan, and therefore dispel any weak inference that might otherwise arise. In construing the Constitution, this Court applies the same rules of construction as it applies in construing statutes. *See Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5, ¶ 57. Under those rules of construction, the Court must give effect to all provisions of Article XI if possible. *See, e.g.*, *State v. Pribble*, 158 Ohio St. 3d 490, 2019-Ohio-4808, 145 N.E.3d 259, ¶ 12 ("'This court in the interpretation of related and co-existing statutes must harmonize and give full application to all statutes concerning the same subject matter unless they are irreconcilable and in hopeless conflict.'" (quoting *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 372, 643 N.E.2d 1129 (1994) (ellipsis and brackets omitted))). Here, judicial review of a four-year plan adopted under Section 8(C)(1) is the construction that best harmonizes and honors the "notwithstanding" language in Section 9(B) and the explicit authorization to review a plan "adopted under division (C) of Section 8 of this article" in Section 9(D)(3)(c).

Second, even if there were a conflict between Section 8(C)(1) and Section 9 (there is none), Section 9 more specifically addresses this Court's jurisdiction and authority and therefore controls. *See MacDonald v. Cleveland Income Tax Bd. of Review*, 151 Ohio St.3d 114, 2017-Ohio-7798, 86 N.E.3d 314, ¶ 27 ("when there is a conflict between a general provision and a

more specific provision in a statute, the specific provision controls").[2] Section 9(D)(3)(c) specifically contemplates review of a plan adopted under Section 8(C), so it cannot be the case that voters (or the General Assembly) intended to *foreclose* review of plans adopted under Section 8(C)(1)(a). That would be a stunning withdrawal of jurisdiction, and yet the parties with an interest in asserting that argument did not even notice it or, if they did, they thought the argument too weak to raise in their merits briefing. The U.S. Supreme Court's axiom that one does not "hide elephants in mouseholes" is apt here. *Whitman v. American Trucking Associations*, 531 U.S. 457, 468, 121 S.Ct. 903 (2001). That is, the absence of a phrase in a subparagraph concerning a plan's shelf life is not the logical way to curtail this Court's jurisdiction, and therefore such an interpretation of Section 8(C)(1) would be unsound.

Third, no inference arises from the absence of the phrase "except as provided in Section 9 of this article" in Section 8(C)(1)(a) given the pattern of usage and omission throughout Article XI. Article XI provides four procedural pathways for the adoption of a General Assembly district plan. Section 1(C) sets out the effective dates of a plan enacted by September 1 on a bipartisan basis. Section 8(B) sets out the effective dates of a plan enacted *after* September 1 on a bipartisan basis. Section 8(C)(1)(a) sets out the effective dates of a plan enacted after September 1 with a

[2] Respondents sought to invoke this same canon of construction in their briefs in arguing that Section 3(B)(2) of Article XI does not impose any limitations on partisan gerrymandering because other provisions of Article XI more specifically address map-drawing. *See* Huffman Br. 29 n.5; DeWine Br. 24-25. But respondents skipped the first step of the analysis—whether Section 3(B)(2) and the constitutional provisions it incorporates as districting standards were irreconcilably and hopelessly in conflict with the other provisions of Article XI—and failed to harmonize or give effect to Section 3(B)(2). As the OOC relators demonstrated, their claim under Section 3(B)(2) and the Ohio Bill of Rights does not conflict with or render superfluous any provision of Article XI. *See* OOC Reply Br. 4-7; *see also* OOC Relators Merits Br. 19-20. To the contrary, Section 3(B)(2) expressly and unambiguously incorporates the Ohio Bill of Rights as an Article XI districting standard, and therefore must be given effect.

bare partisan majority. Section 8(C)(1)(b) set out the effective dates of a plan enacted to replace a Section 8(C)(1)(a) four-year plan. Notably, Section 1(C)'s provision establishing when a bipartisan plan becomes effective does not contain the phrase "except as provided in Section 9 of this article," but Section 8(B)'s parallel provision does.[3] A plan enacted under either provision would receive bipartisan support and would remain effective for 10 years. The only distinction between the two is Section 1(C) applies to a plan enacted by September 1 while Section 8(B) applies to a plan enacted by September 15. There is no reason why one 10-year plan would receive judicial review under Section 9 and the other would not, as the date of passage would not be a material factor in such determination. Likewise, there is no reason why a plan passed for four years by a bare partisan majority under Section 8(C)(1)(a) should escape scrutiny, while the plan that replaces it for the remaining six years per Section 8(C)(1)(b) could be challenged no matter how it is passed.

Finally, any argument that Section 8(C)(1) forecloses judicial review of a four-year plan passed by a bare partisan majority should also be rejected because it would lead to absurd results. To be clear, the Court need not reach the "absurd results" canon of interpretation because the plain language of Article XI, Section 8(C)(1) does not affect this Court's authority to grant the relief requested by relators. But even if such a strained reading were possible, construing this provision as limiting the Court's authority would produce patently absurd results. *See State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 29 ("'statutes will be construed to avoid unreasonable or absurd consequences'" (quoting *State v. Wells*, 91 Ohio St.3d 32, 34, 740

[3] Section 1(C)'s provision governing when the governor shall convene the commission includes a reference to "except as provided" in Sections 8 and 9, but its provision governing when the plan becomes *effective*—language parallel to Section 8(B) and 8(C)(1)'s provisions—has no reference to Section 9.

N.E.2d 1097 (2001))); 16 Ohio Jurisprudence 3d, Constitutional Law, Section 41. Under such an interpretation, a bare partisan majority of the Commission could create a plan that wantonly violated *every* provision of Article XI, from Section 1 through Section 7, and this Court would be powerless to intervene. Such a guarantee of immunity for a partisan plan would serve only to disincentivize good faith negotiation and bipartisanship by commissioners representing the majority party. Commissioners from the minority party would be pressed to vote against their will in favor of plans known to be illegal and unfair so as to bring it under Section 8(B) and thereby trigger judicial scrutiny. Even setting aside these bizarre incentives, it also makes no sense to subject a plan enacted through good faith negotiation across party lines to review and not a four-year plan passed with a bare partisan majority. A bipartisan plan would be much more likely to treat voters equally and to comply with Section 6. In fact, the existence of the Section 8(C)(2) statement requirement recognizes that four-year plans are more likely to be gerrymandered than 10-year ones.

In sum, when amending Article XI in 2015, the people of Ohio could not possibly have intended an interpretation of Section 8(C)(1) that would allow the Commission to run roughshod over the Constitution.

C. Construing Section 8(C)(1) as Limiting this Court's Authority Would Be Inconsistent with the Separation of Powers

Even absent Article XI's clear textual designation that Section 9, not Section 8(C)(1), governs this Court's authority to grant relief, the separation of powers undergirding Ohio's system of government, along with this Court's precedents, would require the Court to reject any reading of Section 8(C)(1) that limited its Section 9 remedial authority. This is because the Court should not conclude that voters intended to disturb the traditional separation of powers in this State unless their intent to do so appears unmistakably on the face of the 2015 amendments. No

such unmistakable intent appears; therefore, the voters did not strip this Court of the power of judicial review.

"The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 462, 715 N.E.2d 1062 (1999). The doctrine of separation of powers "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." *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114 (quoting *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 134, 729 N.E.2d 359 (2000)). The doctrine presupposes that without a robust judiciary, "[t]he people can never be secure under any form of government, where there is no check among the several departments." *Sheward*, 86 Ohio St.3d at 463 (quoting *Rutherford v. M'Faddon* (1807), Ohio Unreported Judicial Decisions Prior to 1823 (Ervin H. Pollack ed., 1952) at 75).

To protect the citizens of this State, this Court ensures that legislative and agency discretion is not unbridled. *See State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 52. Neither the General Assembly nor a commission may require this Court to treat unconstitutional laws, or district plans, as valid. *See generally id.* "'If this could be permitted, the whole power of the government would at once become absorbed and taken into itself by'" those branches of government. *Id.* (quoting *Bartlett v. State*, 73 Ohio St. 54, 58, 75 N.E. 939 (1905)). This is why this Court has a longstanding tradition and power of judicial review. *See, e.g.*, *Walter*, 58 Ohio St.2d at 383. Abrogating judicial review would be particularly problematic in this context given that a bare partisan majority of the Commission would be the

final judge of a General Assembly district plan, an enactment that implicates principles of self-government, fundamental voting rights, and the structure and composition of the legislative branch.

Whether the people of this State have the power to abrogate the separation of powers and leave to a single commission the power to decide what is constitutional and what is not is a delicate question (one, fortunately, that the Court need not answer today). Certainly, no evidence has been presented that this was the intent of the 2015 amendments. Instead, if the Court were to get this far and reach the issue, it should hold that the voters' intent to deprive this Court of the power of judicial review of a four-year plan does not appear unmistakably on the face of the amendments, and therefore does not interfere with that power. In doing so, the Court would be drawing on a tradition in which a court does not recognize interference or incursion on sovereign powers unless the intent to do so appears unmistakably in the relevant act or amendment. *See State ex rel. Horvath v. State Teachers Retirement Board*, 83 Ohio St.3d 67, 76, 697 N.E.2d 644 (1998) (reasoning that application of a presumption that statutes do not create contractual rights binding upon future legislatures in the absence of clearly stated legislative intent "'serve[s] the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions'" (quoting *Parker v. Wakelin*, 123 F.3d 1, 5 (1st Cir.1997))).

Here, the voters plainly intended for this Court to review partisan gerrymandering claims, *especially* in connection with a four-year plan, which is the type of plan that is *most* likely to violate the Constitution. At a minimum and to say the least, Section 8(C)(1) does not unmistakably deprive this Court of jurisdiction and authority to impose the remedies set out in Section 9. Accordingly, and for all the additional reasons stated above, Section 8(C)(1) does not

affect this Court's authority to grant the relief requested by relators where, as here, the Commission adopted the district plan by a simple majority vote.

II. This Court Has Authority to Invalidate the Current Plan and to Order the Commission to Enact a Constitutional One

Relators have demonstrated that this Court has authority to review the enacted plan and declare that it violates Section 6 and Section 3(B)(2). Based on relators' claims and the number of districts affected by the Commission's violations, the Court should invalidate the enacted plan under Section 9(B), Section 9(D)(3)(b) and/or 9(D)(3)(c) and order the Commission to adopt a new one. Section 8(C)(1) does not impact this authority. After declaring the enacted plan invalid and ordering the Commission to adopt a new one, however, Section 8 will again be relevant to the effective duration of a valid remedial plan.

The Commission that enacted the General Assembly district plan at issue is now dissolved. *See* Ohio Constitution, Article XI, Section 1(C).[4] So, once the Court invalidates the current plan, "the commission shall be reconstituted as provided in Section 1 of [Article XI], convene, and ascertain and determine a general assembly district plan * * *." Ohio Constitution, Article XI, Section 9(B). But Section 9 itself provides no guidance as to the *timeline* for remedying defects or the effective duration of a remedial plan.

In terms of remedial process, nothing in Section 9 limits the Court's authority to set a timeline for the reconvening of the commission, the enactment of a constitutional plan, or any additional public process deemed necessary. This could be done *sua sponte* or with additional

[4] "Four weeks after the adoption of a general assembly district plan or a congressional district plan, whichever is later, the commission shall be automatically dissolved." Ohio Constitution, Article XI, Section 1(C). The Commission did not adopt a congressional district plan and adopted the General Assembly district plan on September 16, 2021. Even if the enactment of the congressional district plan by the legislature is the relevant triggering date, the four-week timeline will run prior to this Court rendering judgment.

briefing from the parties. However, with respect to the effective *duration* of the remedial plan, Section 8's provisions should determine whether the remedial plan remains effective for four or ten years, respectively. If the reconstituted commission enacts a plan with the bipartisan majority prescribed by Section 1(B)(3), then such a plan should be effective until the next year ending in one, *i.e.*, the next decennial redistricting. *See* Ohio Constitution, Article XI, Section 8(B). If, on the other hand, the reconstituted commission adopts a plan by a simple majority, then such a plan should remain effective for only two election cycles. *See* Ohio Constitution, Article XI, Section 8(C)(1)(a). Simply put, Section 8 does not affect this Court's remedial authority to order a new plan; rather, it determines the effective period for a new plan that the reconvened commission adopts. Given the mandatory durational provisions of Section 8, this Court's remedial authority is consequently limited to invalidating a plan and ordering the process for enactment of a new plan under Article XI.

CONCLUSION

For the reasons stated above and previously discussed, this Court should declare that the General Assembly district plan adopted by the Commission is invalid, enjoin respondents from using the plan adopted by the Commission, order respondents to adopt a new plan in accordance with the Ohio Constitution, and retain jurisdiction should further relief be necessary.

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Respectfully submitted,

/s/ Brian A. Sutherland

Brian A. Sutherland (PHV 25406-2021)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Tel: (415) 543-8700
Fax: (415) 391-8269
bsutherland@reedsmith.com

Peter M. Ellis (0070264)
Counsel of Record
M. Patrick Yingling (PHV 10145-2021)
REED SMITH LLP
10 South Wacker Drive, 40th Floor
Chicago, IL 60606
Tel: (312) 207-1000
Fax: (312) 207-6400
pellis@reedsmith.com

Alicia L. Bannon (PHV 25409-2021)
Yurij Rudensky (PHV 25422-2021)
Michael Li (PHV 25430-2021)
Ethan Herenstein (PHV 25429-2021)
Harry Black (PHV 25544-2021)
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel: (646) 292-8310
Fax: (212) 463-7308
alicia.bannon@nyu.edu

Ben R. Fliegel (PHV 25411-2021)
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
Tel: (213) 457-8000
Fax: (213) 457-8080
bfliegel@reedsmith.com

Brad A. Funari (PHV 3139-2021)
Danielle L. Stewart (0084086)
Reed Smith Centre
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: (412) 288-4583
Fax: (412) 288-3063
bfunari@reedsmith.com
dstewart@reedsmith.com

Attorneys for Relators
The Ohio Organizing Collaborative, et al.

CERTIFICATE OF SERVICE

I, Danielle L. Stewart, hereby certify that on December 17, 2021, I caused a true and correct copy of the foregoing Supplemental Brief of Relators The Ohio Organizing Collaborative, et al. to be served by email upon the counsel listed below:

Counsel for Respondents

W. Stuart Dornette (0002955)
Beth A. Bryan (0082076)
Philip D. Williamson (0097174)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut St., Suite 1800
Cincinnati, Ohio 45202-3957
Tel: (513) 381-2838
dornette@taftlaw.com
bryan@taftlaw.com
pwilliamson@taftlaw.com

Phillip J. Strach (PHV 25444-2021)
Thomas A. Farr (PHV 25461-2021)
John E. Branch, III (PHV 25460-2021)
Alyssa M. Riggins (PHV 25441-2021)
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Ave., Suite 200
Raleigh, North Carolina 27612
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
Tel: (919) 329-3812

Counsel for Respondents
Senate President Matt Huffman and
House Speaker Robert Cupp

OHIO ATTORNEY GENERAL
Bridget C. Coontz (0072919)
Counsel of Record
Julie M. Pfeiffer (0069762)
Michael A. Walton (0092201)
Assistant Attorneys General
Michael J. Hendershot (0081842)
Deputy Solicitor
30 E. Broad Street
Columbus, OH 43215
Tel: (614) 466-2872
Fax: (614) 728-7592
bridget.coontz@ohioago.gov
julie.pfeiffer@ohioago.gov
michael.walton@ohioago.gov
michael.hendershot@ohioago.gov

Counsel for Respondents
Governor Mike DeWine,
Secretary of State Frank LaRose, and
Auditor Keith Faber

John Gilligan (0024542)
Diane Menashe (0070305)
ICE MILLER LLP
250 West Street, Suite 700
Columbus, Ohio 43215
John.Gilligan@icemiller.com
Diane.Menashe@icemiller.com

Counsel for Respondents
Senator Vernon Sykes and
House Minority Leader Emilia Sykes

Erik J. Clark (0078732)
Counsel of Record
Ashley Merino (0096853)
ORGAN LAW LLP
1330 Dublin Road
Columbus, Ohio 43215
T: (614) 481-0900
F: (614) 481-0904
ejclark@organlegal.com
amerino@organlegal.com

Counsel for Respondent Ohio Redistricting Commission

Counsel for *Amici Curiae*

Subodh Chandra (0069233)
Donald Screen (0044070)
Counsel of Record
THE CHANDRA LAW FIRM LLC
The Chandra Law Building
1265 West 6th Street
Cleveland, Ohio 44113
Tel: (216) 578-1700
subodh.chandra@chandralaw.com
donald.screen@chandralaw.com

Janette McCarthy Wallace (0066257)
Anthony P. Ashton*
Anna Kathryn Barnes*
NAACP
Office of the General Counsel
4805 Mount Hope Drive
Baltimore, MD 21215
Tel.: (410) 580-5777
jlouard@naacpnet.org
aashton@naacpnet.org
abarnes@naacpnet.org
*Not Admitted to the State Bar of Ohio

Counsel for Amicus Curiae The Ohio State Conference of the NAACP

(*counsel listing continued on next page*)

Stephanie Marie Chmiel (0087555)
Mary Elizabeth Csarny (0097682)
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Tel.: (614) 469-3247
Fax: (614) 469-3361
stephanie.chmiel@thompsonhine.com
mary.csarny@thompsonhine.com

Counsel for Amicus Curiae David Niven

Andrew William Garth (0088905)
City Solicitor
Emily Smart Woerner (0089349)
Deputy City Solicitor
Shannon Doyle Price (0100744)
Assistant City Solicitor
CITY OF CINCINNATI
801 Plum Street, Room 214
Cincinnati, Ohio 45202
Tel.: (513) 352-3307
Fax: (513) 352-1515
emily.woerner@cincinnati-oh.gov
shannon.price@cincinnati-oh.gov

Counsel for Amicus Curiae City of Cincinnati

Jon Greenbaum*
Ezra D. Rosenberg*
Pooja Chaudhuri*
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street, N.W., Ste. 900
Washington, D.C. 20005
Tel.: (202) 662-8600
jgreenbaum@lawyerscommittee.org
erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
*Not Admitted to the State Bar of Ohio

Counsel for Amicus Curiae The Ohio State Conference of the NAACP

Donald C. Brey (0021965)
Ryan C. Spitzer (0093515)
ISAAC WILES & BURKHOLDER, LLC
Two Miranova Place, Suite 700
Columbus, Ohio 43215-5098
Tel.: (614) 221-2121
Facsimile: 614-365-9516
dbrey@isaacwiles.com

Counsel for Amicus Curiae Renew Ohio

Dated: December 17, 2021

By: /s/ Danielle L. Stewart
Danielle L. Stewart
Ohio Sup. Ct. Reg. No. 0084086
Reed Smith LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: 412-288-4583
Fax: 412-288-3063
dstewart@reedsmith.com

Attorneys for Relators The Ohio Organizing Collaborative, et al.