IN THE SUPREME COURT OF OHIO

Regina C. Adams, *et al.*, **Relators,** **v.** **Governor Mike DeWine, *et al.*,** **Respondents.**	**Case No. 2021-1428** Original Action Filed Pursuant to Ohio Constitution, Article XIX, Section 3(A)

RELATORS' RESPONSE TO RESPONDENTS' MOTION TO DISMISS AND TO STAY DISCOVERY

Abha Khanna (Pro Hac Vice Pending)
Ben Stafford (Pro Hac Vice Pending)
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
akhanna@elias.law
bstafford@elias.law
T: (206) 656-0176
F: (206) 656-0180

Aria C. Branch (Pro Hac Vice Pending)
Jyoti Jasrasaria (Pro Hac Vice Pending)
Spencer W. Klein (Pro Hac Vice Pending)
Harleen K. Gambhir (Pro Hac Vice Pending)
ELIAS LAW GROUP LLP
10 G St NE, Suite 600
Washington, DC 20002
abranch@elias.law
jjasrasaria@elias.law
sklein@elias.law
hgambhir@elias.law
T: (202) 968-4490
F: (202) 968-4498

Donald J. McTigue* (0022849)
*Counsel of Record
Derek S. Clinger (0092075)
MCTIGUE & COLOMBO LLC
545 East Town Street

Dave Yost
OHIO ATTORNEY GENERAL
Bridget C. Coontz* (0072919)
*Counsel of Record
Julie M. Pfeiffer (0069762)
Michael Walton (0092201)
OFFICE OF THE OHIO ATTORNEY GENERAL
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
T: (614) 466-2872
F: (614) 728-7592
Bridget.Coontz@OhioAGO.gov
Julie.Pfeiffer@OhioAGO.gov
Michael.Walton@OhioAGO.gov

Counsel for Respondents Ohio Governor DeWine, Ohio Secretary of State LaRose, Ohio Auditor Faber, House Speaker Robert R. Cupp, Senate President Matt Huffman, Senator Vernon Sykes, House Minority Leader Emilia Sykes, and Ohio Redistricting Commission

Phillip J. Strach
Thomas A. Farr
John E. Branch, III
Alyssa M. Riggins

Columbus, OH 43215
dmctigue@electionlawgroup.com
dclinger@electionlawgroup.com
T: (614) 263-7000
F: (614) 368-6961

Counsel for Relators

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
T: (919) 329-3812

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

I. Introduction

The issue before the Court on the Motion to Dismiss and Stay Discovery is narrow and discrete.[1] Respondents do not dispute that this case will proceed regardless of the Court's disposition of the Motion. That is, by filing a motion to dismiss only as to certain parties (and certain parties in certain capacities), Respondents concede that the Court has jurisdiction and that Relators state claims for relief. The only issue is *which specific* parties should be named in litigation challenging a congressional districting plan passed using the procedures at issue here. Those procedures were first adopted in 2018, making this a question of first impression.

The question may be new, but the answer is clear: All Respondents are properly named in the Complaint. Relators, who are Ohio electors living in districts that were drawn in violation of Article XIX, allege that each Respondent was part of a scheme to pass an unconstitutional plan that favored the Republican Party and its incumbents. The 2021 Congressional Plan is before the Court because the Governor signed it. The Ohio Redistricting Commission (the "Commission"), meanwhile, refused to even attempt to carry out its constitutional duty to enact a congressional districting plan. Further, the Commission may be responsible for adopting a remedial plan if this Court finds for Relators, and the Governor would be responsible for signing any new congressional districting bill into law. As such, the Governor, the Commission, and the Commission's members—just like the General Assembly leaders and Secretary of State, who do *not* move to dismiss—are all proper parties. Indeed, this is consistent with the approach endorsed by this Court

[1] The motion was filed by the Ohio Redistricting Commission and DeWine, LaRose, Faber, V. Sykes, E. Sykes, Cupp, and Huffman, in their official capacities as members of the Commission, as well as Governor DeWine in his official capacity as Governor. For simplicity's sake, these parties are referred to as the "Respondents" collectively throughout this brief, though Respondents Cupp, Huffman, and LaRose, in their non-Commission capacities, did not join in the motion.

in its most recent apportionment case, and it ensures that all relevant interested parties are before the Court as it considers this critically important matter.

Finally, there is no justification for staying discovery in this case, particularly in light of the expedited discovery period ordered by the Court. Relators seek relevant discovery from these Respondents, and time is of the essence.

II. Background

A. The Ohio Constitution was amended to eliminate partisan gerrymandering and place responsibility for congressional districting with both the General Assembly and the Commission.

In 2018, Ohioans voted three to one to amend the Ohio Constitution to eliminate the pernicious gerrymandering of Ohio's congressional districts. [Compl., Exhibit 1.] Article XIX of the Ohio Constitution, as adopted in 2018, sets forth the procedures and requirements for congressional redistricting in Ohio. That Article places responsibility for districting with both the General Assembly and the Commission.

Article XIX creates a three-step process for redistricting, along with an impasse procedure to be used if bipartisan compromise cannot be achieved. Under Article XIX, Section 1(A), the General Assembly is required to "pass a congressional district plan in the form of a bill by the affirmative vote of three-fifths of the members of each house," including the vote of "at least one-half of the members of each of the two largest political parties represented in that house," here the Democratic and Republican Parties. The General Assembly must do so by the last day of September in a year ending in one.

If the General Assembly cannot pass a bipartisan plan by the end of September, the process moves to the Commission, established under Article XI and consisting of the Governor, Secretary of State, and Auditor of State, as well as appointees of the leaders for the two largest parties in each of the two houses of the General Assembly. Ohio Constitution, Article XI, Section 1(A); *id.*,

Article XIX, Section 1(B). The Commission must similarly pass a plan with bipartisan support, with a majority consisting of at least two Commissioners representing each of the two largest political parties in the General Assembly. *Id.*, Article XIX, Section 1(B). If, and only if, the Commission cannot (or does not) do so by the end of October, the process moves back to the General Assembly. *Id.*, Section 1(C)(1).

If the process returns to the General Assembly for the next round, the bipartisanship requirements are lower. At this stage, while the General Assembly still needs three-fifths of each chamber to vote for a congressional map, it needs only one-third of the members of each of the two largest political parties in each chamber. *Id.*, Section 1(C)(2).

Finally, if the General Assembly cannot achieve even this minimal threshold of bipartisanship, Article XIX, Section 1(C)(3) provides a last-resort impasse procedure. Under that provision, the General Assembly may pass a congressional plan by a simple majority, but that plan will only remain in effect for four years (i.e., two election cycles), and certain substantive requirements will apply that do not apply to bipartisan plans.

For the General Assembly to enact a congressional districting plan, it must do so by "pass[ing] a congressional district plan in the form of a bill." *Id.*, Section 1(C)(1). A bill passed by the General Assembly goes to the Governor. The Governor has the power to refuse to approve the bill and to instead veto it. Thus, a bill generally becomes law when "the Governor approves" the act in question. *See id.*, Article II, Section 16.

B. The Court has original jurisdiction to hear challenges to congressional districting plans, and both the General Assembly and the Commission are responsible for implementing remedial orders of this Court.

This Court has "exclusive, original jurisdiction in all cases arising under" Article XIX of the Constitution. *Id.*, Article XIX, Section 3(A). In the event that the Court declares that a duly enacted congressional districting plan is "invalid"—in whole or part—the plan must be remedied

with a remedial plan "to be used until the next time for redistricting under [Article XIX] in accordance with the provisions of th[e] constitution that are then valid." *Id.*, Section 3(B)(1). Again, responsibility for enacting such a plan is divided between the General Assembly and the Commission. The General Assembly generally has 30 days from entry of a final order to enact a remedial plan. *Id.* If it fails to timely act, the Commission is responsible for enacting a remedial plan within 30 days of the expiration of the General Assembly's time. *Id.*, Section 3(B)(2).

C. The 2021 congressional districting process resulted in a plan Relators assert violates Article XIX, and they seek relief in this Court.

As detailed more fully in Relators' Complaint, neither the General Assembly nor the Commission successfully enacted a congressional districting plan in September or October. Rather, Relators allege, each entity played a necessary role in achieving the ultimate outcome of the 2021 congressional districting process—a partisan gerrymander that (1) unduly advantages the Republican Party and its incumbents and (2) unduly splits governmental units.

Respondents do not dispute that the claims against the Secretary of State and General Assembly leaders—in their non-Commission capacities—are appropriate. But, as Relators allege, the General Assembly did not play the only role required to pass the 2021 Congressional Plan. The Commission, too, had a role to play. That role was calculated, strategic inaction. Compl. ¶ 80-81. The Commission can only pass a congressional plan if it can garner the votes of four Commissioners, "including at least two members of the commission who represent each of the two largest political parties represented in the general assembly." Ohio Constitution, Article XIX, Section 1(B). Because that bipartisanship requirement would not permit Republicans to force through a partisan gerrymander, the Commission simply refused to meet. *See* Compl. ¶ 9. As a result, less than one month prior to Respondents' filing of this Motion, the public had yet to see a single proposed congressional map from any Republican legislators or Commission members, and

the Commission had met only once (and would meet only once), despite an impending October 31 deadline.

As Relators further allege, as soon as the calendar page turned to November, the General Assembly took the baton back from the Commission and promptly introduced and passed a partisan gerrymander. *Id.* ¶ 10-12. And despite his previous statement that "[Article XIX's] rules are pretty clear" and require that redistricting "be done in a bipartisan way," Governor DeWine signed the bill into law promptly thereafter. *Id.* ¶ 15.

In sum, without the actions and inactions of each of the Respondents named in Relators' Complaint, the 2021 Congressional Plan could not and would not have been enacted into law. Further, should the Court find in favor of Relators, each of the Respondents who now moves to be dismissed from this action would have a role to play in remediating the harm their actions caused. These are the very characteristics of proper Respondents in litigation of this type.

III. Law and Argument

As Respondents acknowledge, a motion to dismiss should be granted only in limited circumstances: specifically, in the Rule 12(B)(1) context, when no "cause of action cognizable by the forum has been raised in the complaint," *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989), and, in the Rule 12(B)(6) context, "only when the complaint, when construed in the light most favorable to the plaintiff and presuming all the factual allegations in the complaint are true, demonstrates that the plaintiff can prove *no set of facts* entitling him to relief," *State ex rel. Belle Tire Distributors, Inc. v. Indus. Comm'n of Ohio*, 154 Ohio St.3d 488, 2018-Ohio-2122, 116 N.E.3d 102, ¶ 17 (emphasis added). Neither is true here, and the Court should deny the motion.

Again, Respondents do not move to dismiss Relators' case in full; they accept that claims properly lie against Secretary LaRose, Speaker Cupp, and Senate President Huffman in their official, non-Commission capacities. *See* Mot. at iii-iv. That is, they implicitly concede that Relators have standing to pursue their claims against these Respondents and, thus, that the 2021 Congressional Plan passed by the General Assembly and signed by the Governor causes the Relators harm for purposes of the standing inquiry.

Nonetheless, the moving Respondents advance two theories under which the Court should dismiss claims against *them*: (a) that they did not "harm" Relators and thus Relators have no standing to sue them, and (b) that Relators fail to state a claim for relief against them. The two theories boil down to the same basic assertion: that the Commission and its members are not proper parties to a lawsuit challenging a congressional districting plan even if, as Relators allege here, the Commission not only fails to affirmatively adopt a plan, but participates in a scheme to facilitate passage of an unconstitutional plan by quiescently failing to act itself. *See supra* 4-5.[2] The Court should reject this assertion.

Relators start with the obvious: Article XIX gives authority to both the General Assembly and the Commission to adopt a congressional plan. If the Court strikes the plan down, both have authority to enact a remedial plan. Each of the Respondents played a direct and necessary role in

[2] Respondents offer no arguments unique to Governor DeWine in his role as Governor, *see infra* at 7. Notably, although Respondents allege that Article XIX, Section 1(C)(3) applies only to the General Assembly, they do not contest that Secretary LaRose is a proper Respondent in his capacity as Secretary of State. Presumably, that is because Secretary LaRose has a role in implementing the 2021 Congressional Plan that was passed pursuant to Section 1(C)(3). *See* Compl. ¶ 23 (citing R.C. 3501.04). Likewise, the fact that the Commission and the Governor are not directly responsible for following Section 1(C)(3)'s criteria in the first instance, just as Secretary LaRose is not, does not limit their ability to be sued under that provision.

the ultimate passage of the 2021 Congressional Plan, and all are necessary parties to redress any order by this Court finding the Plan invalid. No more is required to deny the Motion.

A. Governor DeWine is a proper party in his official capacity as Governor.

Respondents ask the Court to dismiss claims against Governor DeWine in his official capacity as Governor. They offer no arguments specific to Governor DeWine, instead asserting that their arguments with regard to the Commission apply with equal force to the Governor.

At the outset, Respondents mischaracterize the Complaint. Respondents assert that Relators "do not claim that there is any connection at all between the alleged harm and . . . the Governor." Mot. at 7. This is simply incorrect. As noted above, the General Assembly must pass a congressional districting plan in the form of a "bill." Ohio Constitution, Article XIX, Section 1(C)(1). The Governor has authority to sign bills into law that he approves and to veto bills he disapproves. *Id.*, Article II, Section 16. Here, Relators specifically allege that "Governor DeWine *completed the final step required for the Plan's enactment* on a Saturday morning, two days after it passed through the General Assembly." Compl. ¶ 15 (emphasis added).

As they allege in their Complaint, Relators' injury is simple and directly traceable to the Governor. Respondents do not contest (for purposes of the standing inquiry) that the General Assembly's actions in passing the plan as a bill harmed Relators. Governor DeWine signed the legislation when he instead could have vetoed it. Accordingly, Relators' injury flows as much from Governor DeWine as from the General Assembly Respondents, neither of whom join in the Motion to Dismiss in their legislative capacities. And should the General Assembly pass a remedial plan, it will fall on Governor DeWine to ensure that plan comports with the Court's order and to exercise his veto power if it does not. Governor DeWine caused Relators' injuries and will be responsible for redressing them.

Relators have named the Governor as a Respondent to ensure that all parties who played a role in enacting the 2021 Congressional Plan are before the Court and will be subject to any remedial order issued by the Court. In these circumstances, the Court has subject matter jurisdiction over Relators' claims against Governor DeWine. And for the same reasons, Relators have stated a claim against Governor DeWine in his official capacity.

B. The Commission, and its members, are proper parties.

In naming both the Commission and its members, Relators followed the Court's guidance in its most recent apportionment case, *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 10, that "it remains better practice in this type of action to name the board and all its members as parties." 2012-Ohio-5367.[3] The Commission now has a role to play in congressional apportionment, and so the practice laid out in *Wilson* makes good sense here.

First, Relators state claims for relief against the Commission and its members, in their capacity as Commissioners, for similarly straightforward reasons as those applicable to the Governor. Just as the Governor caused Relators injury when he signed the 2021 Congressional Plan into law, so too the Commission harmed Relators when it failed to adopt a congressional districting plan when it had an opportunity—and, indeed, a duty—to do so. Relators contend that this failure was not inadvertent. Rather, as explained above, and as alleged in detail in Relators' complaint, the Commission was a necessary player in a scheme to enact a congressional districting plan that unduly favored the Republican Party and its incumbents and, in service of that end, unduly split governmental units. Only at the final stage of the three-stage process set out in Article

[3] Of course, *Wilson* concerned state legislative redistricting. At the time, the Commission did not exist, and the predecessor Apportionment Board played no role in congressional redistricting. Before the 2021 cycle, congressional redistricting was treated like any other legislative matter: The General Assembly was tasked with drawing and passing a congressional map, subject to the Governor's veto.

XIX could a plan become law without support from the minority party. The Commission's acquiescence was integral to this scheme coming to fruition. And, as Relators allege, the Commission did not do its good faith best to carry out its constitutional obligations: It refused to even meet, other than a single pro forma hearing before which it announced it would take no action. The Commission and its members caused Relators cognizable injury and failed to carry out their constitutional obligations under Article XIX.

Second, the Commission, through its members, is one of the parties tasked with remedying an unconstitutional map. Relators appreciate that the Commission—through counsel—has acknowledged its "mandatory duty (again, irrespective as to who is named) . . . to remedy any or all of a congressional plan deemed to be invalid." Mot. at 9 (citing Ohio Constitution, Article XIX, Section 3(B)). But that duty must be enforced, and it is appropriate for the Court to exercise jurisdiction over the Commission and its members so that they will be *bound* by the Court's order if it holds the plan invalid. In short, the Commission—which has already flatly ignored its constitutional mandate to pass a congressional districting plan once—is a necessary party to this litigation.[4]

C. The Court should not stay discovery regardless of its disposition of this motion.

Finally, the Court should deny Respondents' request to stay discovery as to them pending resolution of this motion. The discovery sought is directly relevant to Relators' claims, and prompt responses to that discovery are necessary given the Court's scheduling order.

Respondents filed their motion without the benefit of the scheduling order entered by the Court later that same day. Under the Court's scheduling order, discovery must be *completed* by

[4] Indeed, it is particularly appropriate to exercise such jurisdiction over individual Commission members because the Commission itself dissolves four weeks after the passage of the map. Ohio Constitution, Article XI, Section 1.

Wednesday, December 8, a week from today, and all parties must file their evidentiary submissions on December 10, two days later. Prompt responses to the requested discovery are necessary to comply with these deadlines.

Moreover, the discovery sought from Respondents is plainly appropriate—whether they are parties or not. In general, the scope of discovery is broad and encompasses "*any* nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering [among other things] the importance of the issues at stake in the action." Civ. R. 26(B) (emphasis added). Indeed, this Court granted broad discovery in a similar redistricting case just two months ago. Order, *Bria Bennett v. Ohio Redistricting Commission*, Case No. 2021-1198, *10/07/2021 Case Announcements #2,* 2021-Ohio-3607. To be sure, different procedures apply to seeking discovery from non-parties, but given the expedited scheduling order in place, staying discovery until the Motion to Dismiss is decided would do little more than delay the inevitable: Even if these Respondents were not parties, Relators would be entitled to seek effectively the same discovery from them as third parties, in just the same way that discovery was sought and obtained from third parties in the *Bennett* matter.

It is true that Relators believe that, to strike down the 2021 Congressional Plan, the Court need look no further than the contorted lines of the Plan itself and various metrics plainly showing that the Plan is a partisan gerrymander. But evidence concerning the *intent* behind the Plan is *relevant*, even if not *necessary* to prove Relators' claims. This is precisely the philosophy that undergirds the broad concept of relevancy in discovery: Parties are entitled to inquire as to relevant information that will help them build their most robust case; they are not limited to only that which is absolutely necessary to prove their claims.

In this case in particular, the development of proposed congressional districting plans and information about why the Commission did not so much as attempt to meet to pass a plan itself are directly relevant to Relators' claim that the final map unduly favors the Republican Party and its incumbents in violation of Article XIX, Section 1(C)(3)(a). It is Relators' theory and belief that the Commission purposefully stayed its hand because it was preordained that the General Assembly would pass a plan that unduly favored the Republican Party and its incumbents, and it was known that such a plan could be passed only in November.

In other words, as Relators have alleged, the partisan ends of the 2021 Congressional Plan are evinced by the partisan means used to enact that plan—which include circumventing the Commission. Discovery into the Commission's actions and inactions is, at the very least, reasonably calculated to lead to the discovery of admissible evidence.

IV. Conclusion

For the reasons set forth above, the Court should deny Respondents' motion and allow this case to proceed to the merits against all named Respondents in all identified capacities.

Respectfully submitted,

/s Donald J. McTigue

Donald J. McTigue (0022849)
Derek S. Clinger (0092075)
MCTIGUE & COLOMBO LLC
545 East Town Street
Columbus, OH 43215
dmctigue@electionlawgroup.com
dclinger@electionlawgroup.com
T: (614) 263-7000
F: (614) 368-6961

Abha Khanna (Pro Hac Vice Pending)
Ben Stafford (Pro Hac Vice Pending)
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
akhanna@elias.law
bstafford@elias.law
T: (206) 656-0176
F: (206) 656-0180

Aria C. Branch (Pro Hac Vice Pending)
Jyoti Jasrasaria (Pro Hac Vice Pending)
Spencer W. Klein (Pro Hac Vice Pending)
Harleen K. Gambhir (Pro Hac Vice Pending)
ELIAS LAW GROUP LLP
10 G St NE, Suite 600
Washington, DC 20002
abranch@elias.law
jjasrasaria@elias.law
sklein@elias.law
hgambhir@elias.law
T: (202) 968-4490
F: (202) 968-4498

Counsel for Relators

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via email this 1st day of December, 2021 to the following:

Bridget C. Coontz, bridget.coontz@ohioago.gov
Julie M. Pfeiffer, julie.pfeiffer@ohioago.gov
Michael Walton, michael.walton@ohioago.gov

Counsel for Respondents Ohio Governor DeWine, Ohio Secretary of State LaRose, Ohio Auditor Faber, House Speaker Robert R. Cupp, Senate President Matt Huffman, Senator Vernon Sykes, House Minority Leader Emilia Sykes, and Ohio Redistricting Commission

W. Stuart Dornette, dornette@taftlaw.com
Beth A. Bryan, bryan@taftlaw.com
Philip D. Williamson, pwilliamson@taftlaw.com
Phillip J. Strach, phil.strach@nelsonmullins.com
Thomas A. Farr, tom.farr@nelsonmullins.com
John E. Branch, III, john.branch@nelsonmullins.com
Alyssa M. Riggins, alyssa.riggins@nelsonmullins.com

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

/s/ Derek S. Clinger
Derek S. Clinger (0092075)