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Meryl Neiman, et al., **Petitioners,** **v.** **Secretary of State Frank LaRose, et al.,** **Respondents.**	**Case No. 2022-0298** Original Action Filed Pursuant to Ohio Constitution, Article XIX, Section 3(A)
League of Women Voters of Ohio, et al., **Petitioners,** **v.** **Secretary of State Frank LaRose, et al.,** **Respondents.**	**Case No. 2022-0303** Original Action Filed Pursuant to Ohio Constitution, Article XIX

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INTRODUCTION

Petitioners claim the sky is falling, with *Neiman* Petitioners demanding relief that would violate both the Ohio and Federal Constitutions. But the sky is not falling. Ohio's congressional primaries were already held earlier this month, and the people of Ohio now have congressional candidates for the November 2022 election. The next congressional election is over two years away. Yet both sets of Petitioners still cry "emergency" making arguments and seeking remedies that often conflict with each other. In fact, the only thing Petitioners actually agree on is untenable. Petitioners ask this Court to completely re-write the text of Article XIX. But this Court has a duty to apply the Constitution, as written, not the way Petitioners *wish* it were written. Under Article XIX, it is clear that Ohio's current congressional districts, passed on March 2, 2022 (the "Second Plan") are constitutional. The Court should decline Petitioners' invitation to judicially amend the Ohio Constitution and uphold the Second Plan.

BACKGROUND

On May 8, 2018, for the first time in Ohio's history, the voters of Ohio approved an amendment to Ohio's Constitution that governs congressional redistricting. That amendment – the enactment of Article XIX in the Ohio Constitution – was submitted to the voters by the general assembly. Similar to the amendments to Article XI that voters approved in 2015, Article XIX sets forth a detailed process for how a congressional district plan is adopted in Ohio.

Under Article XIX, the general assembly is initially responsible for adopting a congressional district plan. During this first stage of the process, the general assembly can only pass a plan that will be effective for ten years. To do that, the plan must be supported by at least three-fifths of the members of each house of the general assembly, including at least one-half of

the members of each of the two largest political parties represented in each house. Ohio Const. Art. XIX. Section 1(a).

If the general assembly does not pass such a plan by the last day of September during a redistricting year, congressional redistricting authority then transfers to the Ohio Redistricting Commission (the "Commission"). Any plan adopted by the Commission at this stage must be one that will be effective for ten years. To do that, a congressional district plan drawn by the Commission must receive the support of at least four of the seven Commission members, including at least two Commission members from each of the two largest political parties represented in the general assembly. *See* Article XIX, Section 1(B.

If the Commission does not adopt such a plan before the last day of October during a redistricting year, congressional redistricting authority returns to the general assembly. Article XIX, Section 1(C)(1). At this final stage, the general assembly must pass a congressional district plan no later than the last day of November during a redistricting year. Article XIX, Section 1(C)(1). For a congressional district plan to be effective for ten years at this stage, it must be supported by at least three-fifths of the members of each house of the general assembly, including at least one-third of the members of each of the two largest political parties in each house. If, however, a congressional district plan is only approved by a simple majority of the members of each house of the general assembly, any such plan will remain in effect for only four years. Article XIX, Section 1(C)(2)-(3).

All congressional district plans must comply with the requirements of Article XIX, Section 2. These requirements include that the districts be single member districts, that each district have equal population, that the plan complies with the Ohio Constitution and federal law, and that each district be contiguous. Article XIX, Section 2(A), 2(B)(1)-(3). All congressional district plans must

also comply with criteria for the division of counties, townships, and municipal corporations. Article XIX, Section 2(B)(4)–(8).

If the general assembly passes a four-year, simple majority congressional district plan, Article XIX provides for additional criteria. The relevant portions of Article XIX, Section 1(C)(3) state as follows:

(a) The general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents.
(b) The general assembly shall not unduly split governmental units, giving preference to keeping whole, in the order named, counties then townships and municipal corporations.
(c) Division (B)(2) of Section 2 of this article shall not apply to the plan. The general assembly shall attempt to draw districts that are compact.
(d) The general assembly shall include in the plan an explanation of the plan's compliance with divisions (C)(3)(a)-(c) of this section.

There is one notable standard in Article XIX that is distinct from those set forth in Article XI related to general assembly district plans. Article XI describes an attempt to draw a plan that "corresponds closely" to the "statewide preferences" of Ohio voters in certain elections. Article XI, Section 6(B). Article XIX has no such provision. There is no such provision even though the voters of Ohio could have demanded it based on congressional election results prior to passage of the amendments.[1]

I. The General Assembly passes the First Congressional Plan.

The Ohio Constitution contemplates that the redistricting of general assembly districts will both begin and be completed by the Ohio Redistricting Commission before the general assembly

[1] Under the 2011 Decennial Census, Ohio was apportioned 16 congressional seats. After Article XI was amended in 2015, Ohio voters elected 12 Republicans as members of Congress. The percentage of Republicans elected to Congress in 2016 (75%) was 21 percentage points higher than the average of statewide votes cast in statewide partisan elections (54%). But, despite this alleged statewide partisan election average, the people of Ohio consistently elected Republicans to represent 12 of Ohio's 16 congressional districts, which are based not on statewide vote totals, but on geographically based districts. The general assembly and the people of Ohio made this choice, even consciously knowing that the percentage of Republicans winning congressional races in Ohio was higher than the purported statewide election average. A similar provision to Article XI, Section 6(B) could have been included in Article XIX, but was not.

begins its consideration of congressional plans. Under Article XI, Section 1, the Ohio Redistricting Commission is tasked with adopting a final general assembly district plan no later than the first day of September during any redistricting year. However, neither general assembly nor congressional redistricting can take place without population data from the latest United States Decennial Census. It is undisputed that Ohio received the 2020 census data on August 12, 2021, 133 days later than the date required by federal law (April 1, 2021). As such, the Commission was severely hampered in finalizing a general assembly district plan by the constitutional deadline of September 15, 2021. And that, correspondingly, made it nearly impossible for the general assembly to pass a congressional district plan required by the first deadline of September 30, 2021.

Consequently, the Commission was then tasked with adopting a congressional district plan. However, because the Commission did not adopt a congressional district plan by its October 31, 2021 deadline, the responsibility of passing a congressional district plan returned to the general assembly. Republicans and Democrats in both the Ohio House and the Ohio Senate separately introduced proposed congressional district plans. Senate Bill 258, which was sponsored by Republican Senator Robert McColley, was passed by a super-majority vote in the Ohio Senate, and separately passed by a simple majority in the Ohio House of Representatives. Governor Mike DeWine signed that legislation into law (the "First Plan"). The First Plan kept each of Ohio's largest cities in a single district, with the exception of Columbus, which has a population too large for a single congressional district. (GOV_0172-0351). In fact, the First Plan kept 98 of Ohio's 100 largest cities intact, excluding Columbus for the reason described above. (*Id.*).

Because the people of Ohio demanded more competitive districts, the First Plan prioritized making the districts in the First Plan competitive. At the same time, there is no dispute that Republican voters are more evenly distributed throughout the state of Ohio while Democratic

voters are largely clustered in urban areas. As a result, at least 8 of Ohio's 15 congressional districts must be drawn as either safe Republican or Democratic seats. The First Plan did exactly that by creating 6 out of 15 "safe Republican" districts and 2 that are "safe Democratic" districts. That meant the First Plan made 7 of Ohio's 15 congressional districts competitive.

However, on January 14, 2022, this Court invalidated the First Plan, *Adams v. DeWine*, Slip Opinion No. 2022-Ohio-89, after finding it unduly favored the Republican Party and unduly split Hamilton, Cuyahoga, and Summit Counties in violation of Article XIX, Sections 1(C)(3)(a) and 1(C)(3)(b) of the Ohio Constitution respectively. The Court determined that Section 1(C)(3)(a) "prohibits the General Assembly from passing by a simple majority a plan that favors or disfavors a political party or its incumbents to a degree that is in excess of, or unwarranted by, the application of Section 2's and Section 1(C)(3)(c)'s specific line-drawing requirements to Ohio's natural political geography." *Id.* at ¶ 40. According to the Court, this determination does not include a measure of competitive districts or strict proportionality. *Id.* at ¶ 45 ("But "competitiveness" is not a prescribed standard under Article XIX of the Ohio Constitution. That term does not appear within Article XIX, and rules of statutory construction forbid us from adding to the text of Article XIX."); *id* at ¶ 73 ("Section 1(C)(3)(a) does not require a strictly proportional plan[.]"). The Court did not opine as to whether Section 1(C)(3)(a) applies to Commission-drawn congressional plans.[2]

[2] Instead, the Opinion states that "By the plain language of Article XIX, Section 3(B), both the General Assembly and the reconstituted commission, should that be necessary, are mandated to draw a map that comports with the directives of this opinion." ¶99.

II. The Commission passes the Second Congressional Plan.

Following this Court's invalidation of the First Plan, the general assembly did not pass a new remedial congressional plan within the thirty days provided under Section 3 of Article XIX. Thus, that responsibility passed to the Commission.

The Commission met on February 24, March 1, and March 2, 2022, to hear public testimony and to discuss adopting a new congressional district plan.[3] On March 1, Senate President Matt Huffman put forth for discussion a plan uploaded to the Commission website by his staff. (HC102,10:6-7). Senator Huffman indicated that the plan was uploaded pursuant to a request from House Minority Leader Russo, who had examined the plan earlier in the day with Senator Sykes. (HC102, 10:18-23). Senator Huffman also commented that all members of the Commission and their staff were invited during the preceding week to meet with his staff who had worked on the plan. (HC102,10:24-HC103,11:4). In contrast to Petitioners' claims in their briefs, Senator Sykes confirmed that this was the case, and that there had been a meeting regarding the proposed congressional plan over the prior weekend. (HC119, 27:22-25).

Senator Huffman stated that in drawing the proposed congressional plan, changes were made to remedy defects identified by the Court in the First Plan. (HC105, 13:6-12). For example, Senator Huffman testified that in the new District 13, that district now contained all of Summit and a portion of Stark Counties, thereby eliminating any splits of Summit county as compared to that district in the First Plan. (HC112, 20:9-HC113, 21:1). Senator Huffman also commented that this plan kept counties whole, only split Cuyahoga County once, and expressed his belief that the districts making up the northeastern portion of the state (7, 11, 13, 14) were compact. (HC116, 24:15-HC118, 26:24). Specifically, Senator Huffman testified that the number of splits had been

[3] As noted by *Neiman* Petitioners in their brief, work on a legislative plan was also ongoing during February.

minimized and now there were only two districts inside Cuyahoga county (HC116, 26:9-12). Senator Huffman also testified that the plan kept Montgomery and Greene counties together so that Wright-Patterson Air Force base could be in the same district. (HC113, 21:2-15).

When the Commission reconvened the next day, Senator Huffman moved to adopt a plan identical to the map discussed on March 1, with two changes. (HC115, 11:24-12:2). The first change was to Franklin County regarding districts 3 and 15 in response to a request from Congresswoman Beatty to ensure that her district office and Congressman Carey's district office would be within their respective districts. (HC156, 12:2-HC, 157, 13:3). Senator Huffman also pointed out a change in Hamilton County that was made based on feedback from Democratic members to eliminate subdivision splits in District 1. (HC157, 13:4-15). Speaker Cupp praised this change noting that Hamilton County was now only being split once. (*Id.* at 41:8-11).

Minority Leader Russo offered what she styled as four amendments (although it was essentially an entirely new plan) that would swap territory from one district into the other that would create more democratic leaning districts.[4] (HC159,15:5-HC164, 20:17). Senator Huffman discussed problems with those amendments, and separately explained how the "unduly favor" language that constrains the general assembly when passing a four-year, simple majority congressional district plan did not apply to the Commission. (HC167, 23:11-HC173, 29:17). Auditor Faber also questioned whether Leader Russo's proposed amendments regarding Columbus complied with Article XIX, Section 2(B)(4)(a)'s requirements that a "significant portion" of the municipality be contained in a single district. (HC180, 36:24-HC182, 38:19).

[4] These amendments are different than the amended whole state map offered by Senator Sykes during this meeting, which was the "Yuko Map" uploaded to the Commission website on February 8, 2022. In offering the amendment, Senator Sykes made no statement other than it was an 8-7 map. It is unclear how this map was developed, and if it follows the provisions of Article XIX. As such, this amendment was voted down without significant discussion. (HC149, 5:2-25; HC154, 10:10-25).

When put forth for a vote, the plan offered by Senator Huffman with the two changes was adopted by the Commission by a vote of 5-2 (the "Second Plan"). (HC 89, 45:3).

After Petitioners' procedural games in the *Adams* and *LWVO I* cases were ended, Petitioners filed the instant actions on March 21 and March 22, 2022. While both sets of Petitioners challenge the Second Plan, the similarities between the actions largely end there. While *Neiman* Petitioners challenge the entirety of the Second Plan, the *LWVO* Petitioners challenge only the first and fifteenth districts, a tacit admission of the constitutionality of the remaining districts. The remedies sought likewise diverge. While *Neiman* Petitioners seek a plethora of inappropriate court-ordered remedies, *LWVO* Petitioners acknowledge that, should any further districting be necessary (which it is not), such a process must involve the Court allowing the general assembly, and the Commission if necessary, to draw new districts in accordance with Article XIX. Instead what both Petitioners wrongly seek , is for this Court to judicially amend the Ohio Constitution to their liking, by applying provisions of Article XIX that clearly apply only to maps drawn by the general assembly to commission-drawn plans.

ARGUMENT

Petitioners must prove the Second Map is unconstitutional beyond a reasonable doubt. *Wilson v. Kasich*, 134 Ohio St. 3d 221, 228, 2012-Ohio-5367, 915 N.E.2d 814, ¶ 22. *Adams v. DeWine,* Slip Opinion No. 2022-Ohio-89 ¶27. Petitioners fail to meet this heavy burden.

I. Article XIX, Section 1(C)(3) and 1(F)(3) do not apply to Commission-drawn plans.

Article XIX of the Constitution is self-contained and focused solely on redistricting of congressional districts. Section 1 controls the shifting responsibilities of the authorities in redistricting, section 2 covers the requirements for drawing the districts, and section 3 outlines the role of the Court and how to remedy a finding of unconstitutionality. The language of these

sections is plain. And where "the meaning of a provision is clear on its face," the Court "will not look beyond the provision in an attempt to divine what the drafters intended it to mean." *Toledo City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*, 2016-Ohio-2806, ¶ 16, 146 Ohio St. 3d 356, 359, 56 N.E.3d 950, 954 (2016). Petitioners choose to ignore both the plain language and this cannon of construction because both damage their case. This Court, however, should reject forcing an amendment of Section 1 through the guise of interpretation—interpretation that as argued by Petitioners actually substitutes the phrase "redistricting Commission" for "general assembly" directly in the text.

Article XIX, Section 1(C)(1) picks up with the general assembly's responsibility in congressional redistricting if the Commission did not adopt a timely plan pursuant to its duties. Both bodies—the general assembly and the Commission—are separately identified in the constitution's plain text. They are not the same; they are not interchangeable. Section 1(C)(3) of Article XIX lays out what happens if the general assembly can only pass a plan by simple majority. In that singular event, the following "shall apply":

> (a) The ***general assembly shall not*** pass a plan that unduly favors or disfavors a political party or its incumbents.
> (b) The ***general assembly shall not*** unduly split governmental units, giving preference to keeping whole, in the order named, counties then townships and municipal corporations.
> (c) Division (B)(2) of Section 2 of this article shall not apply to the plan. The ***general assembly shall attempt*** to draw districts that are compact.
> (d) The ***general assembly shall include*** in the plan an explanation of the plan's compliance with divisions (C)(3)(a)-(c) of this section.

Article XIX, Section 1(C)(3) (emphasis added). "If the plan *becomes law*" it is effective for four years. There is no reference to the Commission; no reference to "*adopting* a plan." The language in the Constitution does not say "the authority that passes a plan shall not pass a plan that unduly favors or disfavors a political party or its incumbents." Rather, that reference—to "the authority

drawing the districts"—occurs four times in Section 2 of Article XIX. In Section 1, however, the drafters specifically referenced each "authority" separately, giving each distinct thresholds for action. For instance, Section 1(G) of Article XIX refers separately to the general assembly and the Commission having two public meetings in mirrored, but distinct language. *See* Article XIX, Section 1(G). The same is true of Section 1(F), which applies when a new congressional district plan must be adopted mid-decade due to the expiration of a four-year, simple majority plan. *See* Article XIX, Section 1(F). Just like in the beginning of a decade, the general assembly gets the first try (Section 1(D)) but again needs a bipartisan supermajority in each of its houses to pass a plan at this stage. If it does, none of the Section 1(C)(3)/(F)(3) requirements apply. If it does not, the Commission gets to try to adopt a congressional district plan (Section 1(E)) but again must do so with a bipartisan majority. Here again, the Section 1(C)(3)/(F)(3) requirements do not reference the Commission, rather just the general assembly.

This Court in *Maurer v. Sheward,* 1994-Ohio-496, 71 Ohio St. 3d 513, 644 N.E.2d 369 (1994) faced a similar issue. In *Maurer,* the Governor commuted multiple sentences and pardoned one individual in the waning days of his administration. *Id*. Agency heads filed suit to question whether the Governor followed Section 11 of Article III of the Ohio Constitution and accompanying law at the time. *Id*. at 514-15, 644 N.E.2d at 373. The question was whether the general assembly's law regulating reprieves, commutations, and pardons was constitutional, or whether, consistent with the Constitution, just pardons could be regulated.[5] *Id*. at 518, 644 N.E.2d at 374. The agencies' arguments were that "the word 'pardons' may be interpreted broadly to include all types of executive clemency." *Sheward*, 71 Ohio St. 3d at 520, 644 N.E.2d at 375. "In

[5] Section 11, Article III of the Ohio Constitution provides the authority for the Governor's clemency power: "[the Governor] shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. . . ."

other words, the plaintiffs argue[d] that commutations are a subset of pardons, and by using the word 'pardons' the drafters intended that the General Assembly have the power to regulate commutations as well as pardons." *Id*. The Court rejected this argument.

> The meaning of Section 11 is obvious after a careful review of that provision. The first sentence provides the Governor with the power to grant three different types of clemency—reprieves, commutations, and pardons. The end of the first sentence is equally clear in providing the General Assembly with the authority to regulate the application process for only one type of clemency—pardons. The language of Section 11 could not be clearer in limiting the General Assembly's authority to regulate only pardons. Moreover, any argument that commutations are a subset of pardons is, as shown below, simply unsupportable.

Id. at 521, 644 N.E.2d at 375. The Court noted that it "has consistently held that words used more than once in the same provision have the same meaning throughout the provision, unless there is clear evidence to the contrary." *Id.* at 521, 644 N.E.2d 369, 375–76. "To define pardons to include commutations when the two types of clemency are each listed together so many times within the same small section would be nonsensical." *Id*. Yet, that is exactly what Petitioners here want the Court to do: to define Section 1(C)3/(F)3 to apply equally to general assembly-drawn plans or Commission-drawn plans despite each authority referred to separately throughout Article XIX. It would be equally nonsensical to construe them as one in the same.

Reading Article XIX, Section 1 as it is plainly written works no injustice on the language. The limitations of undue partisanship are applicable when a simple majority of the general assembly passes a plan. But stretching those words to apply to a Commission-drawn plan or plan approved by a supermajority of the general assembly within the same Section tortures the plain text. As this Court stated in *Adams v. DeWine*, 2022-Ohio-89, ¶ 34, the provisions of Section 1(C)3/(F)3 have teeth, but these provisions do not have legs; they cannot walk their way into other instances of how or when a congressional plan could be passed. And while Petitioners speak of

intent and history as important tools of statutory interpretation, as the Court in *Maurer* stated: neither imprecise speeches by drafters nor the history of a provision give courts the ability to ignore the plain language of the Constitution. *Maurer*, 71 Ohio St. 3d at 522, 644 N.E.2d at 376. Moreover, limiting Section 1(C)3/(F)3 to simple majority, general assembly-drawn plans does not leave the Commission to gerrymander at will. Section 2 of Article XIX—entitled "requirements for drawing congressional districts"—applies to a Commission-drawn plan the same as a general assembly plan. The waterfall of municipal and township splits, along with their maximum numbers and other required criteria curtails the Commission from congressional gerrymandering.

Section 3 of Article XIX, which pertains to the remedial process after a congressional district plan, or any of its districts, are invalidated by this Court, has nothing in it that would rewrite Article XIX, Section 1 such that a Commission-drawn plan had to comply with the Section 1(C)(3)/(F)(3) requirements. Section 3 is specifically referenced 8 times in Section 1, each time where the various parts of Section 1 identify how long a particular plan passed under the divisions of Section 1 will be effective. *See, e.g.,* Article XIX, Section 1 (A) ("A congressional district plan that is passed under this division and becomes law shall remain effective until the next year ending in the numeral one, except as provided in Section 3 of this article."). Section 3 sets up the timing of and procedure for providing a remedy for an invalidated plan. If a congressional district plan, or any of its districts, is invalidated by this Court, the general assembly has thirty days to "remedy any legal defects in the previous plan identified by the court" and "in accordance with the provisions of this constitution that are then valid". Article XIX, Section 3(B)(1). As such, the Section 1(C)(3)/(F)(3) requirements would apply here to any simple majority remedial plan passed *by the general assembly*. It would not, however, apply to the Commission if it is tasked with

adopting a remedial plan under Section 3 within thirty days based on the general assembly not passing a plan within its allotted time.

Nevertheless, Petitioners claim the identical language in the last sentences of Section 3(B)(1) and (2) — that a "congressional district plan adopted under this division shall remedy any legal defects in the previous plan"— actually means that the Section 1(C)(3)/(F)(3) requirements, for the first time anywhere in Article XIX, now somehow apply to the Commission despite no reference or even a textual hint at those requirements applying to anything other than the general assembly passing a congressional plan by simple majority vote.

Petitioners' interpretation collapses under its own weight. The language referenced above (a "congressional district plan adopted under this division shall remedy any legal defects in the previous plan") applies to either a general assembly remedial plan (which is "passed") or a Commission remedial plan, as it appears in each division addressing those plan drawing authorities. Under Article XIX, an invalidated plan could have been drawn in the first instance by the general assembly or by the Commission. The Section 3 language requires the relevant map-drawing authority whose plan was invalidated to address the reasons why its map was invalidated, and only those reasons. But it does not make the Commission the general assembly because correcting a specific legal defect cannot override the directive that the map drawing authority "adopt a congressional district plan in accordance with the provisions of this constitution that are then valid", none of which apply the Section 1(C)(3)/(F)(3) requirements to a Commission-drawn plan.

To hold that the cited language in Section 3 subjects the Commission to the Section 1(C)(3)/(F)(3) requirements would be to judicially amend the Constitution and add words that do not exist. That cuts against the grain of decades of precedent in this Court. *See Northeast Ohio*

Regional Sewer Dist. v. Bath Twp., 144 Ohio St.3d 387, 389, 44 N.E. 3d 246, 250, 2015-Ohio-2705 at ¶¶ 13-14 ("[I]t is well known that our duty is to give effect to the words used, not the delete words used or to insert words not used.") (internal quotations omitted); *Columbus–Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 819 (1969) (it is the Court's duty to "give effect to the words used, not to delete words used or to insert words not used"); *see also State ex rel. Carmean v. Hardin Cty. Bd. of Edn.,* 170 Ohio St. 415, 422, 165 N.E.2d 918, 923 (1960) ("It is axiomatic in statutory construction that words are not inserted into an act without some purpose"); *Adams v. DeWine,* Slip Opinion 2022- Ohio- 89 ¶ 45 ("the rules of statutory construction forbids us from adding to the text of Article XIX.").

As written, Section 3 sets up a final Commission plan as a safety valve of sorts. Ohio must have congressional elections at some point and a congressional district plan is a necessity under the United States Constitution. Requiring enhanced majorities or similar requirements at this final stage of the mapmaking process, for which there is only thirty days, could lead to an impasse and give the minority party incentive to simply vote against any plan, so that they can get to this final stage of enhanced requirements. In the event of an impasse, however, this Court lacks the authority under both the Ohio and United States Constitutions from drawing the plan itself. Ohio Const. art. XIX, Section 3; U.S. Const. art. I, Section 4 (see *infra* at Section III). Rather than create a situation that could create an impasse and cede the map drawing to a federal court, *see Upham v. Seamon*, 456 U.S. 37, 44 (1982), the Ohio Constitution ensures that a plan drawn by the entity with legislative authority will be enforced.[6]

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[6] Petitioners resort to misrepresenting a recent Ohio Attorney General Opinion to support their argument. Nothing in that opinion states that the Commission is obligated to comply with the Section 1(C)(3)/(F)(3) requirements. The opinion had nothing to do with those requirements and to the extent the opinion mentioned them, it tied them to the general assembly, not the Commission. AG Op. 2022-004, p. 5.

II. The Second Plan is Constitutional.

Assuming arguendo that the Court's prior order and Section 1(C)(3) applied to the Commission,[7] the Second Plan satisfies both.

First, it is important to remember that the people of Ohio made the Commission a creature of the Ohio Constitution, and separately provided it with duties independent of any other branch of government in Ohio. It consists of members who are appointees of either the executive or legislative branches established in the Ohio Constitution. It is the Commission and the general assembly who solely possess the legislative authority to create legislative and congressional districts.

As such, the people of Ohio entrusted the Commission to exercise its discretion when adopting a congressional district plan. *Voinovich v. Ferguson*, 63 Ohio St.3d 198, 204, 586 N.E.2d 1020, 1024 (1992). This Court must presume the constitutionality of any congressional district plan adopted by the Commission. *Wilson v. Kasich,* 981 N.E.2d 814, 824, 2012-Ohio-5367 ¶18. Here, Petitioners have the burden of proving the unconstitutionality of the Second Plan "beyond a reasonable doubt." *Id.* Whether the Commission "wisely or unwisely" exercised its discretion is immaterial. *Voinovich*, 63 Ohio St. 3d at 204. "For the wisdom or unwisdom of what they have done, within the limits of the powers conferred, they are answerable only to the electors of the state, and no one else." *Id*. Rather, Petitioners rely almost exclusively on the testimony of their paid experts in bringing this motion. None of these experts have been subject to discovery or cross examination by the Respondents. The effect of Petitioners' arguments, that the Court should overturn the Commission's plan based upon experts who have never been subject to cross examination, turns the presumption of constitutionality on its head. Instead of deferring to the

[7] The Commission was not a party to the *Adams* litigation, and for reasons more fully discussed in briefing in that matter, enforcing that judgment against the Commission is improper.

Commission's reasonable interpretation of the law and facts, Petitioners argue that the Court should instead defer to interpretations of paid out-of-state academicians whose job is to provide testimony to help their principals achieve their desired goal.

Petitioners ignore the discretion and deference owed to the Commission and instead want this Court to subject the Second Plan to a beauty contest with other maps. Nothing in the Ohio Constitution supports this baseless approach. The Second Plan can pass constitutional muster "without having to defeat rival compact districts designed by plaintiffs' experts in endless 'beauty contests.'" *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality). The issue in assessing the Second Plan here is *not* who has produced the "best" or "most constitutional" maps. *See Wilson*, 981 N.E.2d at 824, 2012-Ohio-5367 ¶31 ("[W]hether relators have presented a 'better' apportionment plan is irrelevant in determining whether relators have met their burden to establish that the board's . . . 2011 apportionment plan is unconstitutional."); *Daly v. Hunt*, 93 F.3d 1212, 1221 (4th Cir. 1996) (providing that the existence of a "more constitutionally perfect" plan with smaller population variances does not in itself amount to a constitutional violation).

Worse, Petitioners would have this Court judge the beauty contest with so-called partisan metrics and measures of compactness. But none of this is in the Ohio Constitution. Just as this Court found that "competitiveness" was not an appropriate factor for consideration under Article XIX, there is no requirement that the Commission (or this Court) adopt the opinions of mathematicians and law professors who have allegedly created "nonpartisan" algorithms that the people cannot see, or mathematical measures that no one understands. *Adams v. DeWine*, Slip Opinion No. 2022-Ohio-89, ¶ 45. If the Commission was required to measure the constitutionality of its plans using a specific mathematical test or compactness score, it would have been included

in the Constitutional Amendment passed by the general assembly and approved by Ohio voters. No such measures can be found anywhere in Ohio's constitution.

There is a good reason courts choose not to rely on metrics like the compactness measures cited by Petitioners as "there is no particular score that divides compact from non-compact districts" *Covington v. North Carolina*, 316 F.R.D. 117, 140 (M.D.N.C. 2016), aff'd, 137 S. Ct. 2211 (2017). Nor is a mapdrawing authority required to use the Polsby-Popper or any other particular mathematical test for measuring compactness. *See Holt v. 2011 Legislative Reapportionment Comm'n,* 620 Pa. 373, 423, 67 A.3d 1211, 1242 (2013) (holding that the Legislative Reapportionment Committee was "not obliged to adopt [Polsby-Popper] or any other of an apparent variety of such compactness models," and noting that no party had articulated a principle "by which [the Court] may assess which of multiple methods of assessing compactness could or should be employed." In fact, some courts have specifically noted that because "[c]ompactness is a somewhat abstract concept" it doesn't lend itself to a bright line approach. *Vesilind v. Virginia State Bd. of Elections*, 295 Va. 427, 444-45, 813 S.E.2d 739, 748–49 (2018). *See also Pearson v. Koster,* 367 S.W.3d 36, 55 (Mo. 2012) (noting agreement between both Defendants' and Petitioners' experts that there is "no bright line between a compact and non-compact district."). The court in *Vesilind* noted that **social scientists have developed at least 50 different methods of measuring compactness**, but that "[t]he proliferation of measures does not provide clarity. It does exactly the opposite." 295 Va. at 445, 813 S.E.2d at 748–49. Therefore, the *Vesiland* court found it appropriate to "give proper deference to the wide discretion accorded the general assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of redistricting." *Id.* at 749 (internal quotations omitted).

As the Supreme Courts of Missouri, Virginia, and Pennsylvania wisely recognized in the cases above, tests developed by social scientists and mathematicians provide no useful clarity when assessing the constitutionality of legislative or congressional maps. And yet, Petitioners rely on these controversial compactness measures to challenge the validity of the Second Plan. Ironically, any differences in compactness scores are slight, at best, and cannot possibly be evidence that the Commission failed to draw districts that are compact.[8] This logical conclusion is reinforced by the text of Section 1(C)(3)(d), which does not define compactness at all. More importantly, what the Constitution clearly does not do is intimate any type of calculation of any sort when reviewing compactness. Nor did this Court's prior order, which did not require plans to

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[8] Deference to the Commission's determination that the Second Plan is compact is not only appropriate here, but also supported by the facts. A review of the attached Maptitude reports (Exhibits 4-6) and Petitioners' own expert reports support the contention that the Second Plan *is* compact. When comparing the Second Plan to Dr. Imai's plan submitted to the Commission ("Imai Plan") and the Democratic Proposal uploaded to the Commission website on March 2, 2022 ("Democratic Plan"), the Second Plan has the highest "max" Reock and Polsby Popper scores of any of the three plans. In fact, when comparing the three plans, the Second Plan contains the most compact version of CD 3 as compared to the Imai or Democratic plans under either metric. CD 7 under the Second Plan is more compact than the Democratic Plan under both metrics, and more compact than the Imai plan under the Reock metric. Likewise, CD4 is more compact than the Democratic Plan on both metrics and more compact than the Imai Plan on Polsby Popper.

And while Petitioners make much ado about the compactness scores of CD's 1 and 15, the data reveals that this is much ado about nothing. The difference in the Reock scores between the Second Plan and the Imai Plan for Districts 1 and 15 is .25 and .23 respectively. Compare this with the difference in the Reock scores between the Second Plan and the Imai Plan for Districts 12 and 3 which are .22 and .19 respectively, with the Second Plan being the more compact of the two. Therefore, based on Petitioners' own arguments, if Districts 1 and 15 are non-compact due to the difference in scores, or the difference reveals some sort of partisan intent, then the same argument applies to Dr. Imai's Districts 3 and 12.

Furthermore, the Second Plan's scores on Reock and Polsby Popper are *identical* to the Democratic Plan in 6 districts: Congressional Districts 2, 6, 10, 12, 13, and 14. In Districts 2 and 13 the Reock score is also identical to Dr. Imai's. And in Districts 11, 12 and 14 the Second Plan and the Democratic Plan are both more compact than Dr. Imai's versions of the same districts. This means that in 8/15 districts the Second Plan's districts are at least as or *more* compact than Dr. Imai's districts on one or both compactness measures. The other 7 districts show miniscule differences. For example, the difference between the Reock score of Dr. Imai's District 10 is only -.04 greater than both the Second and the Democratic Plans. The plan-wide averages also show miniscule differences between the plans. The Second Plan is only .02 less compact on Reock than the Imai and Democratic Plans, and only .07 less compact than the Imai Plan and only .01 less compact than the Democratic Plan under Polsby Popper. These differences are miniscule even though Dr. Imai had advanced knowledge of the compactness scores of the Second Plan and had an opportunity to prepare a plan with higher compactness scores.

maximize compactness in order to comply with Section 1(C)(3)(d).[9] Indeed, "the fact that more compact formulations can be devised is not . . . a sufficient basis for invalidating a map" *Cole-Randazzo v. Ryan*, 198 Ill. 2d 233, 238, 762 N.E.2d 485, 487–88 (2001). Courts have routinely held that minor differences in compactness scores not only do not raise any sort of inference regarding intent of the drafter, but are also evidence that the plans are comparable to each other. *See Id.* at 487 (noting that the mean differences in plans of .03 and .04 meant the plans were "comparable" to each other); *Radogno v. Illinois State Bd. Of Elections*, 836 F. Supp 2d 759, 769 (N.D. Ill. Dec. 7. 2011) (holding that a difference of .03 less under Reock and .05 less under Polsby Popper was "far from raising eyebrows"). Under these circumstances, Petitioners cannot meet their burden to prove that the Second Plan is unconstitutional beyond a reasonable doubt.

A. Petitioners Own Evidence is Conflicting and Unreliable.

Moreover, Petitioners' own evidence demonstrates the unreliability of using so-called partisan metrics. Consider the evidence that has been submitted by Dr. Imai in this case and Dr. Chen for the First Plan. While the Court may have previously been relying on this evidence, it is now clear as day that the evidence is both conflicting and contradictory.

For example, in his first report, Dr. Imai reported that nearly 80% of his simulations resulted in 8 Republican districts, 20% resulted in 9 Republican districts, and none of his plans resulted in either 10 or 11 Republican districts. But then compare that to the evidence from Dr. Chen on the same issue. In his second report, Dr. Chen compared the political performance of his

[9] These measures can also be manipulated for litigation purposes. An expert can use one set of metrics for one purpose and then move the goalposts for another purpose if it so suits him. Dr. Imai does this. In his first report, Dr. Imai compared his calculation of the mean Polsby Popper score for the general assembly's first congressional plan against the average mean for his simulated maps. Dr. Imai also used a test called the "Edge-removal compactness test," a method not adopted by any of the other experts. In his second report, without explanation, Dr. Imai moves the goalposts. Instead of comparing the mean Polsby Popper score (or even the score under his Edge removal test) for the Second Plan versus the average for his own simulations, he changes focus and cherry picks two districts (1 and 15) and focuses only on Polsby Popper scores.

simulated districts to the Commission's plan using various elections. In Figures A1 through A9, Dr. Chen makes these comparisons using election results in nine different elections. Dr. Chen also compares the Second Plan to his simulations under an index using statewide elections from 2016-2020. *See* March 4, 2022 Chen Report, Figure 1. Under this comparison, a majority of Dr. Chen's simulations result in 10 Republican districts and 5 Democratic districts. But Dr. Imai's analysis claims that only 8 Republican districts would be expected (and rarely 9) (2022-Ohio-89 ¶49). This Court relied upon Dr. Imai's analysis that, in effect, Democrats should expect at least 7 seats. (*Id.*). This conflicts with Dr. Chen's analysis which produces two fewer Democratic seats (5). Using Dr. Chen's result, the Second Plan is just fine but using Dr. Imai's it is not. Moreover, using Dr. Chen's result, Dr. Imai's plan is a partisan outlier that unduly favors Democrats. This is not the kind of evidence courts should use to decide constitutional questions.

More critically, Dr. Imai's analysis conflicts with itself. In his first report Dr. Imai predicted that only 20% of his simulations would result in 9 Republican districts and he therefore concluded that plans which resulted in more than 8 Republican districts were partisan outliers that unduly favored Republicans. (2022-Ohio-89 ¶49). The Court expressly relied upon this testimony in its first decision. (*Id.*). But now in his second report, Dr. Imai submits an "example plan," Second Imai Report at 13, that contains 9 Republican districts.[10] Is Dr. Imai's example plan a

[10] Dr. Imai's simulation analysis is fundamentally tainted by a racial target he employs and thus is useless for making the compactness and other comparisons he makes. In running his simulations, Dr. Imai admits that his algorithm was programed, at the request of "relators'" counsel, to always create a district based in Cuyahoga County containing a Black Voting Age Population ("BVAP") of at least 42%. Imai Report at 7. **Every district drawn by the simulations is affected by and tainted by this racial target. This use of race to establish a mandatory racial target for the Cuyahoga district would violate the Fourteenth Amendment and subject the state to a claim for racial gerrymandering if the Court relied upon Dr. Imai's simulations to invalidate the Second Plan.** There is no evidence here that would satisfy the threshold conditions required under *Gingles* before using race to draw a district at a specific target. *See Cooper v. Harris,* 137 S. Ct. 1455, 1470, 197 L. Ed. 2d 837 (2017) *citing Thornburg v. Gingles,* 478 U.S. 30, 50-51, 106 S. Ct. 2752 (1986). There is no evidence that Dr. Imai performed a racial polarization analysis or that legally significant racially polarized voting exists in Cuyahoga County or any other location in Ohio. Because Dr. Imai has not produced copies of his simulated maps with corresponding tables showing the BVAP in all of his other districts, we have no way of knowing whether Dr. Imai simulations improperly used race as a proxy for politics. *Bush v. Vera*, 517 U.S. 952, 968 (1996). Accordingly, Dr. Imai's intentional use of race to draw at least one crossover

partisan outlier? Is he gerrymandering for Republicans? Of course not. Is Dr. Chen's conclusion that you could expect up to 10 Republican districts mean he is secretly consulting for the Republicans? Of course not. What this does mean, is that all of this "math" is unreliable, changes on any given day or case, and prejudices the Respondents who have had little opportunity to vet it through the proper adversarial process.

With the limited time available to Respondents in this matter, only a cursory examination of Dr. Imai's code could be conducted. However, even that cursory examination revealed conflicting conclusions, and gross overstatements on the value of Dr. Imai's code and his analysis. At the outset, while Dr. Imai may claim that he ran simulated maps and analyzed 5,000 unique plans, his code reveals that there are not 5,000 unique options for each district. In fact, Dr. Imai's code reveals that there are relatively few ways to draw each congressional district. (HC567-68). Dr. Imai's 13th most Republican district has 511 variations, the 12th most Republican district has 215 variations, and the 15th most Republican district has almost no variation, with only 13 unique variations of this district. (*Id.*). Even districts that are more competitive[11] have very few numbers of actual variations that can be made. (*Id.*). Dr. Imai's code reveals that he created only 167 unique districts for the 11th most Republican district, 142 unique districts for the 10th most Republican district, and just 47 unique ways to draw the 8th most Republican district. (*Id.*). This is far from the picture that Petitioners' have painted for the Court.

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district in every one of his simulated maps, renders each of those maps constitutionally suspect. *Bartlett v. Strickland,* 556 U.S. 1, 13, 129 S. Ct. 1231, 1242, 173 L.Ed.2d 173 (2009).

[11] *LWVO* Petitioners argue that the Imai plans are superior to the Second Plan, in part because Imai's illustrative plan turns districts 11-13 into "highly competitive districts." This is a bizarre about-face from LWVO's arguments against the First Plan's competitive districts. This argument is also curious given LWVO's instance that the *Adams* opinion is binding on the Commission. If the *Adams* opinion were binding on the Commission, which it is not, the *Adams* court made clear that competitiveness is not a standard under Article XIX. *Adams,* ¶45.

Furthermore, depending upon which set of elections Dr. Imai uses to determine the number of congressional seats expected for each party, the results swing wildly. And unsurprisingly, nearly every other set of elections studied by Dr. Imai results in simulations with *more* Republican districts than what is represented in Dr. Imai's Report. In fact, in his report, Dr. Imai shows only a histogram using federal elections dating back to 2012 (HC563). This histogram shows that almost 80% of Dr. Imai's simulations resulted in a map with 8 Republican congressional districts. (*Id.*at 564).

But Dr. Imai's backup data reveals other histograms. (*Id.*at 564). Dr. Imai himself calculated and created a histogram illustrating the partisanship of districts from his simulations utilizing congressional election results. (*Id.*). Under this set of elections, over 60% of Dr. Imai's simulations produce maps with 11 Republican seats, while nearly 30% produce maps with 12 Republican seats. (*Id.*). Dr. Imai's backup also contains a histogram charting partisanship of the districts using 13 statewide races dating back to 2012. (*Id.* at 565). Under this histogram, nearly all of the simulated plans contain between 9 and 10 Republican seats. (*Id.*). But this histogram puts Dr. Imai's thumb on the scale, resulting in an apples to oranges comparison. (*Id.*). When you apply the 13 statewide races to the same scale as the first two histograms, it shows that over 60% of Dr. Imai's plans would result in 11 Republican seats, and another 30% would result in 12 Republican seats. (*Id.*). Dr. Imai's code can also be used to calculate the partisanship of his simulated maps using statewide state and federal elections from 2016-2020. (*Id.* at 566). Recreating a histogram from this code reveals that over 80% of Dr. Imai's plans resulted in 10 Republican seats, while 10% resulted in 11 Republican seats. (*Id.*). It is clear that Petitioners and their experts are simply gaming the math, and proffering the most extreme pro-democratic position they can to the Court

in an effort to make the maps passed by the general assembly or the Commission appear like outliers.

Petitioners try to argue that math does not lie. And while that may be true, Petitioners are not representing the full mathematical analysis to the Court. Rather, Petitioners and their experts are manipulating the results to show only one side of mathematical analysis. This begs the question, what would Respondents and their experts have found if they were given time to conduct more than a cursory review into Dr. Imai's code? What other misrepresentations would that reveal? What similar issues would be found in Dr. Chen's code that Respondents had no time to vet at all? Does Dr. Chen's code actually produce the number of unique maps or districts he claims? What about Dr. Rodden or Dr. Warshaw's methodologies?

This is likely why Dr. Imai admitted in sworn testimony just last month that his simulations were not suitable for legislative or governmental purposes in districting. Dr. Imai testified that the intent of his simulations were not to create districts that voters actually vote in or could be enacted into law, but to evaluate plans drawn by legislatures or commissions. (HC385, 24:4-12). This is also probably because Dr. Imai's simulation creates unconstitutional districts, as Dr. Imai also testified that his algorithm cannot constrain itself to comply with the constitutional one person one vote principle, as he constrains his algorithm to create districts with a population deviation up to 1%, which could create a population deviation of hundreds of people between districts (HC522-523). And shockingly, *Neiman* Petitioners ask this Court to eschew the Ohio and Federal Constitutions and simply adopt one of Petitioners maps here and now. (*Neiman* Br. P. 38). Even if this Court disagrees with Respondents as to how catastrophic this could be, the Court should take the counsel of Dr. Imai that these plans are inappropriate for actual governmental consideration or use.

Respondents anticipate that *Neiman* Petitioners will argue that Dr. Chen's simulated districts have been used in a remedial phase previously. But even if Dr. Chen's algorithm has been used by government entities in redistricting schemes previously, that does not mean the results of his algorithm should be used here. A few of Dr. Chen's simulated districts were used as legislative districts in North Carolina in 2019 after a handful of North Carolina's legislative districts were found to be unconstitutional under the State Constitution.[12] However, this was at the choice of the North Carolina Legislature during a remedial process. And importantly this choice was made only after Dr. Chen's code and report were subject to months of analysis by the legislative defendants' lawyers and experts in that case, and Dr. Chen was subject to cross-examination at a lengthy deposition, and 3 days on the stand at trial. In this case, however, Respondents have been afforded none of the same discovery and due process rights as their North Carolina counterparts. Respondents have no idea if Dr. Chen's code here was the same,[13] whether it would be appropriate for use as a remedial district in Ohio, or whether Dr. Chen now shares Dr. Imai's opinions that simulated maps should not be used by governments as actual districting plans.

It is now plainer than ever that it is dangerous and disingenuous to base Ohio constitutional law and the voting rights of millions of citizens on this untested and contradictory evidence conceived of by for hire mathematicians and social scientists. The Court should uphold the Second Plan and decline Petitioners' invitation to engage in mathematical antics.

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[12] Incredibly, even after the North Carolina Legislature enacted new remedial districts drawn by their own experts, Plaintiffs' counsel, some of whom now practice with Petitioners' counsel at the Elias Law Firm, still challenged some of Dr. Chen's own districts as partisan gerrymanders. A clear admission, that simulations too can "gerrymander." Ironically, Plaintiffs' motive to simply draw more democratic districts was revealed, when after the 2020 election, some of those same legislative districts drawn by Dr. Chen, and challenged by Plaintiffs voted for a Republican candidate.

[13] There is a real possibility that Dr. Chen changed his algorithm. In fact, Dr. Chen admitted on the stand earlier this year in North Carolina that he adjusted his algorithm between reports *in the same case* that were submitted mere weeks apart. See Ex. 1.

III. This Court Lacks Authority under the United States Constitution to Draw a Congressional Plan.

In their briefing, Petitioners resign themselves to accept that the 2022 congressional election is underway and cannot be altered. Despite that, Petitioners push this Court to make an immediate decision holding the Section Plan that governs the 2022 election unconstitutional—in whole, according to *Neiman* petitioners or perhaps in part according to the *LWVO* petitioners' arguments about Districts 1 and 15. But out from under the delayed census data on one side and on the other the set dates to conduct an election for congressional representatives in 2022, this Court should exercise its jurisdiction to develop a more fulsome record of evidence that includes the hallmarks of cross-examination and fact finding before making any decision. Further, the potential for change within the general assembly and the Commission is on the ballot in the upcoming elections. Delaying judgment of affirmation of the Second Plan until there is a more in-depth record benefits the Court. Potentially waiting until after these election dates to redraw the plan, if necessary, benefits Ohioans because it allows more up to date representation on both of Ohio's map-drawing authorities.

Indeed, there are only two authorities in the Ohio Constitution who can draw the maps in Ohio: the general assembly or the Commission. This Court, despite its authority to identify legal defects on judicial review, lacks any constitutional authority to legislatively draw a congressional map to correct them. The *Neiman* Petitioners argument otherwise[14] ironically depends on the very

[14] *Neiman* Petitioners argument that this Court should appoint a special master to draw districts is belied by their counsel's own conduct. Just this week, Marc Elias, head of the law firm representing the *Neiman* Petitioners shared a tweet from Congressman Hakeem Jeffries with the comment "If you care about voting rights, please read this and then share it." (Ex. 2). Congressman Jeffries' tweet railed against a new congressional plan "prepared by an unelected, out of town special master, and rubber-stamped in the dead of night by a partisan Republican Judge." Either Special Master prepared plans are appropriate in this situation, or they are not. The partisan makeup of the judge, or judges involved, should have no bearing on whether this remedy is appropriate. Thus, appointing a special master in this scenario could not only violate the state and federal constitutions, but endorse the idea that a remedy is appropriate depending on the partisan makeup of the judicial body, an undemocratic and untenable precedent.

principles of constitutional interpretation they said did not apply to Article XIX, Section 1(C)/1(F). Petitioners argue that because Article XIX lacks the reference to the prohibition on this Court's remedy, which does appear in Article XI, Section 9(D) of the Constitution, that this Court is free to pass a congressional district plan of its own in whole or in part, whereas it could not for a general assembly district plan. (*See Neiman* Br. p. 44) ("Article XIX, in contrast to Article XI, contains no restrictions on this Court's remedial powers."). While certainly more of a precedential interpretation than their earlier, novel read of Article XIX, Section 1(C)/1(F), Petitioners' interpretation still falls short of being complete because it ignores the application of the Election Clause in the federal constitution.

The text of the Elections Clause is clear: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. CONST. art. I, § 4, cl. 1 (*emphasis added*). The word "Legislature" in the Elections Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id*. The Election Clause's limitation on who could draw congressional plans was well established by 2018 when the people of Ohio adopted Article XIX regarding *congressional* apportionment. *See City of Centerville v. Knab*, 162 Ohio St. 3d 623, 621, 2020-Ohio-5219, 166 N.E.3d 1167, 1174, ¶ 28 ("[W]e presume that the voters who approved an amendment were aware of existing Ohio law."). The Elections Clause prevents this Court from enacting a congressional plan of its own.

This Court was one of the first to tackle the interpretation of the federal Elections Clause in *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 160, 114 N.E. 55, 57 (1916). There,

interpreting Ohio's referendum check on legislative power, this Court answered the question of how far the definition of "Legislature" goes. The United States Supreme Court affirmed this Court's decision. It viewed the issue "from three points of view—the state power, the power of Congress, and the operation of the provision of the Constitution of the United States." *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567 (1916). As to the validity of this application of the referendum as a matter of Ohio's "Constitution and laws," the Court held that "the decision below" in this Court upholding the challenged use of the referendum "is conclusive." *Id*. at 568. With respect to "the power of Congress," the Court cited legislation establishing Congress's view "that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Id*. And with respect to the constraints imposed by the U.S. Constitution itself, the Court reasoned that the plaintiffs' challenge "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power," an assumption the Court rejected. *Id*. at 569.

More recently, in *Wilson v. Kasich*, 2012-Ohio-5367, ¶¶ 19-22, 134 Ohio St. 3d 221, 227–28, 981 N.E.2d 814, 821–22 (2012), this Court held that it would treat the redistricting plans of the apportionment board as part and parcel of the legislative process for three reasons: (1) the apportionment board was performing a legislative function, (2) a presumption of validity attaches to the adopted plans, and (3) "because the people of Ohio placed apportionment authority in the hands of the board, the apportionment plan should be accorded the same, if not greater, consideration as a statute enacted by the General Assembly." *Id*. And earlier this year in a separate case, this Court noted that the work of the Commission is legislative and the subject of highest standard of deference. *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-

Ohio-65 ¶76 (summarizing the holding of *Wilson*, in part, that "apportionment is a legislative task (albeit now delegated by the Ohio Constitution to the redistricting commission) and that the public officers are presumed to have properly carried out their duties."). Upholding a commission charged with redistricting in Arizona as being consistent with the federal Elections Clause, the United States Supreme Court held that its "precedent teaches that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking[.]" *Arizona State Legislature v. Arizona Independent Redistricting Com'n*, 576 U.S. 787, 808 (2015). Consistent with this Court's holding in *Wilson* and the United States Supreme Court's holding in *Arizona Independent Redistricting Commission*, Ohio's Redistricting Commission undoubtedly falls comfortably within the ambit of the Elections Clause.

At no point, however, has this Court or the United States Supreme Court held that the judiciary, exercising judicial review, is part of the legislative process. To the contrary, "[a] fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch is the ultimate arbiter of public policy." *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 21, 116 Ohio St. 3d 468, 472, 880 N.E.2d 420, 428 (2007). "It necessarily follows that the legislature has the power to continually create and refine the laws to meet the needs of the citizens of Ohio." *Id*. If a court determines that a statute, or in this case a congressional district plan, is unconstitutional, it cannot make the policy choices to rewrite the plan itself directly under its own pen or indirectly through a line-by-line mandate to other officials; rather, it must hold the act unconstitutional and allow the policymakers, under Article XIX either the general assembly or the Commission, to redraw. In other words, the power of judicial review does not include the power to legislatively implement a judicial remedy. Even if there was a basis for determining that the Commission's Second Plan is unconstitutional (which there is not), this

Court, consistent with the Elections Clause of the federal constitution could not redraw the plan on its own or dictate changes with such specificity that the Court is the "invisible hand" drawing the districts. While this is true all the time, this is especially true when there is already an election secured for this cycle, and the next congressional election cycle is two years away.

Long ago this Court held that "in this state the validity of an act passed by the legislature must be tested alone by the constitution, and that the courts have no right or power to nullify a statute upon the ground that it is against natural justice or public policy." *Probasco v. Raine*, 50 Ohio St. 378, 390–91, 34 N.E. 536, 538 (1893). "When the legislature, within the powers conferred by the constitution, has declared the public policy, and fixed the rights of the people by statute, the courts cannot declare a different policy, or fix different rights." *Id*.

Accordingly, "[t]he only provision in the Constitution that specifically addresses" the crafting of congressional districts "assigns [the matter] to the political branches," not to judges. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019). What is more, the Elections Clause is the *sole* source of state authority over congressional elections. Regulating elections to federal office is not an inherent state power. Instead, the offices of Senator and Representative "aris[e] from the Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995); *see also Cook v. Gralike*, 531 U.S. 510, 522 (2001). And because any state authority to regulate election to federal offices could not precede their very creation by the Constitution, such power "had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc.*, 514 U.S. at 804; *cf.* 1 Joseph Story, Commentaries on the Constitution § 627 (1833). ("It is no original prerogative of state power to appoint a representative, a senator, or president for the Union"). Thus, whatever power the state has to craft congressional districts *must* derive from—and be limited by—the Elections Clause. Any other exercise of power is *ultra vires* as a matter of federal law.

Petitioners' citation to *Wattson v. Simon*, No. A21-0243, 2022 WL 456357 (Minn. Feb. 15, 2022) does not appear to support a contrary point, especially not here, where the nearest election at issue is over two years away. In *Wattson,* the Court, looking at history of Minnesota jurisprudence, drew a state legislative map as a remedy to a failure to act by the legislature of Minnesota. Given that judicial remedies for a failure of the map-drawing authority to act are not on point here where the Commission has timely acted, those cases dealing with such a circumstance are not persuasive. Moreover, while such action is certainly foreclosed for this Court in the Ohio Constitution, the court in *Wattson* did not analyze the federal elections clause and did not draw a congressional map.

Respondents do not challenge that there is a role for this Courts to play in congressional redistricting. What Respondents challenge is a particular role: the court adopting the role of a legislative authority and, in violation of the Elections Clause, drawing a congressional district plan itself. Petitioners' argument that the Supreme Court of the United States has recently allowed instances of court-drawn maps to be used in a pending election in circumstances like this one is on shaky ground. In *Moore v. Harper*, 142 S. Ct. 1089 (2022), where the North Carolina supreme court had adopted its own congressional map, the Justices elaborated on their Election Clause thinking and, absent the upcoming election date, four Justices expressed serious reservation that the Elections Clause would permit a court-drawn congressional map over that of a legislative authority. Now with time for this Court to allow for a more developed record and additional time for judicial review of any plan or remedy, this Court should not implement a congressional district plan but instead follow Article XIX, Section 3 and evaluate whether there are any specific legal defects in the Second Plan—defects that if found can be remedied by one of Ohio's map-drawing authorities in due course.

In Ohio, congressional district plans are written by the general assembly or the Commission, not by the courts. The Elections Clause does not permit this Court—a judicial body, not a legislative body—to vest itself with the authority to draw congressional boundary lines. Article XIX, Section 3(A) provides this Court with plenary jurisdiction to invalidate a congressional district or group of congressional districts for reasons expressly set forth in Article XIX. However, the Constitution expressly places the remedy for that invalidation squarely with either the lawmaking, policy-making general assembly, *see* Article XIX, Section (B)(1), or the Commission, Article XIX, Section (B)(2), and not with the court. While acts of the Commission or the general assembly are consistent with the Elections Clause, a plan adopted by or changes specifically dictated by this Court would violate federal law.

CONCLUSION

At the end of the day, the Commission in this instance is exercising legislative authority in deciding Ohio's congressional district boundaries. The plan adopted by the Commission must be presumed as being constitutional. *Wilson*, 134 Ohio St.3d 227-28, 981 N.E. 2d at 821-22. The Court "does not sit as a super apportionment board to determine whether" any alternative plans are "better than the plan adopted by the [Commission]." *Wilson*, 134 Ohio St. 3d at 231, 981 N.E.2d at 824. Instead, the Court's role is to "determine whether the [Commission] acted within its broad discretion conferred upon it by the provisions of Article [XIX] when it adopted its plan." *Id*. The Commission's plan represents a "fair construction [of Article XIX] for making an apportionment "and therefore must be sustained. *Id.* (citing *Voinovich v. Ferguson,* 63 Ohio St.3d 198, 586 N.E.2d 1020 (1992)).

For the foregoing reasons, Respondents request that this action be dismissed with prejudice.

Respectfully submitted this the 25th day of May, 2022

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Exhibit 1

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE — 21 CVS 015426

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al.,
Plaintiffs,

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

JANUARY 3, 2022

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STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF WAKE — 21 CVS 500085

REBECCA HARPER, et al.,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

JANUARY 3, 2022, CIVIL SESSION

HONORABLE A. GRAHAM SHIRLEY II,
HONORABLE NATHANIEL J. POOVEY,
HONORABLE DAWN M. LAYTON,
JUDGES PRESIDING

TRANSCRIPT OF THREE-JUDGE PANEL PROCEEDING

VOLUME 1 OF 4

Maren M. Fawcett, RPR, CRR
Official Court Reporter
Wake County, North Carolina, District 10

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11:17:09 1 that. It is essentially just saying here's what happens
11:17:14 2 when you go into every Republican vote share across the
11:17:18 3 state and you swing it by negative 0.8 percent. It's not
11:17:23 4 making any particular substantive assumption. It's just a
11:17:27 5 mathematical calculation.
11:17:30 6 Q. And you didn't include anything in your expert
11:17:32 7 report, Dr. Chen, where you empirically tested that
11:17:36 8 assumption to see if, in fact, voters in North Carolina do
11:17:40 9 swing uniformly across the entire state, did you?
11:17:43 10 A. Again, I'm not making or asserting that sort of
11:17:46 11 assumption at all. So, of course, I did not do the sort of
11:17:51 12 analysis that you're kind of suggesting at. It's just -- A
11:17:56 13 uniform swing is just a standard metric or a standard tool
11:18:02 14 in the field of election analysis, of districting analysis
11:18:08 15 and political science. It's just a standard tool that
11:18:11 16 scholars use to assess or to analyze a districting plan
11:18:16 17 under different hypothetical alternative electoral
11:18:20 18 conditions.
11:18:23 19 Q. Dr. Chen, you authored -- in addition to your
11:18:25 20 December 23rd report that we've been talking about at length
11:18:30 21 today, you authored a second report in this case back in
11:18:33 22 November, correct?
11:18:36 23 A. That is correct.
11:18:37 24 Q. Okay. And from your first report to your second
11:18:40 25 report, you made some changes to the simulation algorithm,

11:18:44 1 correct?

11:18:49 2 A. That's correct.

11:18:50 3 Q. Okay. And among those changes were changes to

11:18:55 4 add, quote, several steps to, quote, further increase the

11:18:59 5 preservation of municipal boundaries. Do you agree with

11:19:03 6 that?

11:19:04 7 A. I'm just going to refer you to footnote three.

11:19:10 8 Q. And that's on page 6, for the record, correct,

11:19:12 9 Dr. Chen?

11:19:18 10 A. Yes. So I see that that's on -- that's on page 6.

11:19:21 11 And that footnote explains, I think, what you're -- what

11:19:25 12 you're trying to allude to.

11:19:27 13 Q. Okay. So you modified the algorithm to make it do

11:19:32 14 a better job at keeping municipalities whole, correct?

11:19:37 15 A. To further increase the preservation of municipal

11:19:40 16 boundaries.

11:19:42 17 Q. And how is that different from what I just said --

11:19:45 18 asked you?

11:19:50 19 A. I was just using my own words in the footnote.

11:19:53 20 Q. Okay. Okay. But, essentially, you're trying to

11:19:55 21 reduce the number of cities that are split in your simulated

11:19:59 22 plans, correct?

11:20:01 23 A. It's following municipal -- preserving municipal

11:20:05 24 boundaries. Sure, I mean, that's generally -- that's

11:20:08 25 generally what's meant by -- by avoiding splits.

11:31:04 1 math.

11:31:05 2 Q. I am. Is that correct, that we can take the

11:31:08 3 average and that will give us the average, right?

11:31:10 4 A. I'm sure you could take the average.

11:31:11 5 Q. Okay. If we could please do so.

11:31:14 6 Okay. That gives us 16.387 municipal splits in

11:31:18 7 your simulated plans on December 23rd, right?

11:31:22 8 A. Yeah, I see that number.

11:31:24 9 Q. Okay. So although you say you were trying to

11:31:26 10 improve municipal preservation, it appears that the changes

11:31:30 11 to your algorithms actually increased the number of average

11:31:33 12 municipal splits from 13.864 to 16.837, right?

11:31:38 13 A. That's not necessarily a fair conclusion because

11:31:42 14 obviously, as we've talked about, there were other changes

11:31:44 15 to the algorithm as well regarding -- regarding double

11:31:50 16 traversals.

11:31:51 17 (Legislative Defendants' Exhibit 152 identified.)

11:31:52 18 Q. Okay. All right. Let's briefly pull up your

11:32:04 19 preliminary injunction phase report, Legislative Defendants'

11:32:08 20 Exhibit 152. I'd like to go to page 32 and Figure 7.

11:32:13 21 JUDGE SHIRLEY: We're going -- We've been going

11:32:14 22 for an hour and a half. We're going to take a midmorning

11:32:17 23 recess until 11:45.

11:32:26 24 (Court in recess from 11:32 a.m. to 11:47 a.m.)

11:47:13 25 JUDGE POOVEY: We've been told it was the

<u>Exhibit 2</u>

Marc E. Elias @marceelias · May 21

If you care about voting rights, please read this and then share it.

Hakeem Jeffries @RepJeffries · May 21

The map prepared by an unelected, out-of-town special master and rubber-stamped in the dead of night by a partisan Republican judge in Steuben County is a constitutional travesty.

"The map prepared by an unelected, out-of-town special master and rubber-stamped in the dead of night by a partisan Republican judge in Steuben County is a constitutional travesty.

The Court of Appeals recklessly ripped away the redistricting process from the elected representatives of New York State and set in motion a flawed process predetermined to benefit a Republican Party that embraces violent insurrectionists and refuses to denounce white supremacist replacement theory. The fix was in from the beginning.

The restoration of the iconic neighborhood of Bedford Stuyvesant into one Congressional District is a small step. We will not let modest changes to a severely flawed draft map whitewash the violence done to communities of color throughout New York City.

As a result of the Court of Appeals decision, a partisan Republican Judge in Steuben County has degraded the Black and Latino populations in five New York City-based congressional districts. Equally troublesome, the most Jewish district in the country has been unnecessarily and gratuitously obliterated, resulting in severe collateral damage to neighboring districts in Brooklyn, Queens and the Bronx. That's outrageous.

We will not allow those responsible for an unconscionable redistricting process and unconstitutional result to escape accountability."

The map released in the dead of night:

- Degrades the Black voting age population in NY-05 by nearly four percent (44.7 to 40.8);
- Significantly erodes the Hispanic voting age population in NY-07 by three percent (37.1 to 34.1) and guts the core of the current 7th by over half (only 48.5% remains);
- Degrades the Black voting age population in NY-08 by two percent (43.6 to 41.6);
- Degrades the Black voting age population in NY-09 by half a percent (42.9 to 42.5);
- Eliminates the most Jewish district in the country by severing the historic connection between the Upper West Side and Borough Park in NY-10, doing violence to the district's core by 71.8%;
- Reduces the core of NY-12 by over 40%;
- Guts the South Bronx's opportunity to vote in a singular district, NY-15, and reduces its Hispanic voting age population by over 10 percent (64.1 to 53.5);
- Eliminates nearly half of the core of NY-14 by 42.4% and
- Egregiously degrades the Black population of NY-16, reducing it by nearly 10 percent (30.2 to 21.0) and splits the predominantly Black Assembly District 83 in the Bronx into three different Congressional Districts.

154 · 5,335 · 7,634