**IN THE SUPREME COURT OF OHIO**

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| **Meryl Neiman, *et al.*,**<br><br>**League of Women Voters of Ohio, *et al.*,**<br><br>**Petitioners,**<br><br>**v.**<br><br>**Secretary of State Frank LaRose, *et al.*,**<br><br>**Respondents.** | **Case No. 2022-298**<br><br>**Case No. 2022-303**<br><br>***Consolidated***<br><br>Original Action Filed Pursuant to Ohio Constitution, Article XIX, Section 3(A) |

# NEIMAN PETITIONERS' MERITS BRIEF

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**TABLE OF CONTENTS**


I. INTRODUCTION ..... 1

II. STATEMENT OF FACTS ..... 2

A. This Court invalidated the November 20 Plan as an unconstitutional gerrymander. ..... 2

B. The General Assembly took no action to adopt a remedial plan. ..... 6

C. The Commission adopted a new plan that was drawn without regard to Article XIX, Section 1(C)(3)(a) or 1(C)(3)(b). ..... 8

1. The Commission did not introduce any congressional plans for the first half of its remedial period. ..... 9

2. The Republican Commissioners developed and passed a plan that was not released to Democratic Commissioners or the public until the day before its passage. ..... 10

D. The March 2 Plan is a partisan gerrymander and partisan outlier. ..... 16

1. The March 2 Plan excessively advantages the Republican Party and its incumbents. ..... 16

2. Neither the technical-line drawing requirements of Article XIX nor Ohio's political geography explain the extreme Republican skew of the March 2 Plan. 18

3. The March 2 Plan's treatment of Ohio's urban areas unduly splits communities and starkly disadvantages Democrats, to the benefit of Republicans. ..... 22

III. ARGUMENT ..... 25

A. Proposition of Law 1: The Commission ignored the clear mandate of this Court's opinion in *Adams*. ..... 26

B. Proposition of Law 2: The March 2 Plan is nearly identical to the invalidated November 20 Plan, and similarly and unduly favors Republicans and Republican incumbents. ..... 31

C. Proposition of Law 3: The Commission's revised plan again unduly splits governmental units. ..... 35

IV. REMEDY ..... 37

A. The Court should strike down the March 2 Plan, order the General Assembly and the Commission to adopt a new map that does not violate Section 1(C)(3), and retain jurisdiction. ..... 38

B. While the General Assembly and Commission work to enact a remedial plan, this Court should prepare to adopt a remedial plan of its own in the event the General Assembly and Commission do not timely adopt a constitutional remedial plan. ..... 39

1. This Court has authority to implement a congressional map. ..... 39

2. Courts regularly use special masters to draft remedial plans to be implemented by the court, and Ohio courts have the power to appoint a special master. ..... 44

V. CONCLUSION ..... 46

## TABLE OF AUTHORITIES

**Case Law**

*Adams v. DeWine*,
Slip Opinion No. 2022-Ohio-89 ..... *passim*

*Ariz. State Leg. v. Ariz. Indep. Redistricting Comm.*,
576 U.S. 787 (2015) ..... 42

*Bates v. United States*,
522 U.S. 23 (1997) ..... 40

*Branch v. Smith*,
538 U.S. 254 (2003) ..... 42

*Carter v. Chapman*,
No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022) ..... 45

*Chapman v. United States*,
500 U.S. 453 (1991) ..... 40

*City of Centerville v. Knab*,
162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167 ..... 40

*Grande Voiture D'Ohio v. Montgomery Cnty. Voiture No. 34*,
2d Dist. Montgomery No. 29064, 2021-Ohio-2429 ..... 44

*Grothman v. Wisconsin Elections Comm'n*,
142 S. Ct. 1410 (2022) ..... 43

*Growe v. Emison*,
507 U.S. 25 (1993) ..... 42

*Harkenrider v. Hochul*,
2022 NY Slip Op 02833 (N.Y. Apr. 27, 2022) ..... 45

*Harper v. Hall*,
868 S.E.2d 499 (N.C. Feb. 12, 2022) ..... 44

*Harper v. Hall*,
No. 21-CVS-500085 (Sup. Ct. N.C. Feb. 23, 2022) ..... 45

*Johnson v. Wisconsin Elections Comm'n*,
2021 WI 87, 399 Wis. 2d 623 ..... 45

*League of Women Voters of Ohio v. Ohio Redistricting Comm.* ("*LWV I*"),
Slip Opinion No. 2022-Ohio-65 .....27, 30, 42

*League of Women Voters of Ohio v. Ohio Redistricting Comm.* ("*LWV II*"),
Slip Opinion No. 2022-Ohio-342 .....1, 7, 27, 32, 35

*League of Women Voters of Ohio v. Ohio Redistricting Comm.* ("*LWV III*"),
Slip Opinion No. 2022-Ohio-789 .....32

*League of Women Voters of Ohio v. Ohio Redistricting Comm.* ("*LWV IV*"),
Slip Opinion No. 2022-Ohio-1235 .....1, 27, 32, 35

*Moore v. Harper*,
142 S. Ct. 1089 (2022).....43

*Rucho v. Common Cause*,
139 S. Ct. 2484 (2019).....42

*Russello v. United States*,
464 U.S.16, 23 (1983).....40

*Salinas v. United States RRB*,
141 S. Ct. 691 (2021).....40

*Scott v. Germano*,
381 U.S. 407 (1965).....42

*State of Ohio ex rel. Davis v. Hildebrant*,
241 U.S. 565 (1916).....43

*State ex rel. Allstate Ins. Co. v. Gaul*,
131 Ohio App.3d 419, 722 N.E.2d 616 (8th Dist. 1999).....44

*State ex rel. Dispatch Printing Co. v. Wells*,
18 Ohio St.3d 382, 481 N.E.2d 632 (1985) .....30

*State v. Powell*,
2019-Ohio-4286, 148 N.E.3d 51 (6th Dist.) .....43

*Toth v. Chapman*,
142 S. Ct. 1355 (2022).....43

*Wattson v. Simon*,
No. A21-0243, 2022 WL 456357 (Minn. Feb. 15, 2022).....41, 45

*Wesberry v. Sanders*,

376 U.S. 1 (1964).....43

**Constitutional Provisions**

Minnesota Constitution, Article IV, Section 3.....41

Ohio Constitution, Article XI, Section 1 .....7, 30

Ohio Constitution, Article XI, Section 9 .....39, 40, 41

Ohio Constitution, Article XIX, Section 1..... *passim*

Ohio Constitution, Article XIX, Section 3..... *passim*

## I. Introduction

The Ohio Redistricting Commission adopted a second congressional plan (the "March 2 Plan"), in response to the Court's decision in *Adams v. DeWine*, Slip Opinion No. 2022-Ohio-89 ("Opinion"). This Court found that the original congressional plan (the "November 20 Plan"), passed by the General Assembly, did not comply with Article XIX, Sections 1(C)(3)(a) and (b) of the Ohio Constitution, because it was "infused with undue partisan bias" and "unduly split[]" governmental units. *Id.* at ¶ 77, 101. The Court gave clear guidance for what was required of a remedial plan: the map-drawers had "to draw a map that comports *with the directives of* [*the Court's*] *opinion*." *Id.* at ¶ 99 (emphasis in original). And because of the significant constitutional defects in the November 20 Plan, the Court concluded that the plan "defie[d] correction on a simple district-by-district basis" and "therefore [saw] no recourse but to invalidate the entire congressional-district plan." *Id.* at ¶ 96. The Opinion could not have been clearer: a map that favors or disfavors a political party or its incumbents, or that unduly splits political subdivisions, would not comply with the Constitution. And, as a result, the November 20 Plan, with its excessive and unwarranted partisan favoritism and subdivision splits, was void *in toto* under the Ohio Constitution. It was time for the General Assembly and, if necessary, the Commission to start from scratch.

But complying with the Court's Opinion would not have served the partisan ends of the majority party, and so the Court's directives were not followed. After the General Assembly made no effort to pass a new congressional plan, it passed the baton to the Commission, which "began with an invalidated plan." *League of Women Voters of Ohio v. Ohio Redistricting Comm.* ("*LWV II*"), Slip Opinion No. 2022-Ohio-342, ¶ 63 (discussing General Assembly redistricting); *League of Women Voters of Ohio v. Ohio Redistricting Comm.* ("*LWV IV*"), Slip Opinion No. 2022-Ohio-

1235, ¶ 41 (same). It made largely cosmetic changes to that invalidated plan, doing nothing to address the fundamental constitutional deficiencies the Court had identified. This was no oversight. Senate President Matt Huffman announced that the Commission now *was not required to comply* with the anti-gerrymandering provisions of Section 1(C)(3) at all.

It is unsurprising, then, that the final product approved by the Commission does not comply with the anti-gerrymandering provisions of Section 1(C)(3). The March 2 Plan bears a striking resemblance to the plan struck down by the Court on January 14. It is infused with the same partisan bias as before. It is an extreme partisan outlier again. It eschews sensible, compact districts that respect Ohio's political geography—because bizarre, noncompact districts of the ilk contained in the new congressional plan are required to secure extreme partisan advantage for the majority party.

The Court should strike down the second congressional plan, order the General Assembly and the Commission (if necessary) to draw a new constitutionally compliant map within the timelines set forth in Section 3, retain jurisdiction, and appoint a special master to draw a plan for the Court to implement in the event the Commission and General Assembly fail to timely adopt a constitutional remedial plan.[1]

## II. Statement of Facts

### A. This Court invalidated the November 20 Plan as an unconstitutional gerrymander.

Last year marked the first congressional redistricting cycle governed by Article XIX of the

[1] Petitioners previously challenged the March 2 Plan in a Motion to Enforce filed with this Court in *Adams v. DeWine*. *See* Pet'rs' Motion to Enforce, *Adams v. DeWine*, No. 2021-1428 (Mar. 4, 2022). The Court thereafter issued an order clarifying that Petitioners needed to file a new action in order to challenge the Commission's latest plan, which Petitioners promptly did by instituting this action on the first business day following the Court's order. Because the Motion to Enforce and this action are similar, the "Statement of Facts" and "Argument" sections of this brief largely mirror the memorandum in support of that motion.

Ohio Constitution. In 2018, the General Assembly passed a joint resolution to amend the Ohio Constitution to include a proposal for congressional redistricting reform. When the proposed amendment was placed on the ballot, Ohioans voted overwhelmingly to approve it. (NEIMAN_EVID_00052 (Jessie Balmert, "Ohio voters just approved Issue 1 to curb gerrymandering in Congress," Cincinnati Enquirer (updated May 9, 2018, 8:30 AM))). They voted to impose new procedural requirements, technical line-drawing rules, and, for congressional plans passed on a party-line vote, additional anti-gerrymandering requirements, specifically that a congressional districting plan (1) cannot unduly favor a party or its incumbents, and (2) cannot unduly split political subdivisions. Ohio Constitution, Article XIX, Section 1(C)(3)(a)-(b). Ohioans also tasked the Commission with serving as a back-up to the General Assembly and instituted anti-gerrymandering protections for the Commission too; the Commission cannot adopt a congressional map unless at least two members of the minority party vote for it. *Id.*, Section 1(B).

In 2021, the congressional map-drawing process was characterized by secrecy and delay. Both the General Assembly and the Ohio Redistricting Commission declined to take any action on redistricting for several months. Finally, as the deadline to act grew near, and once the process had proceeded to a stage where the General Assembly could adopt a map by simple majority, the General Assembly drew a congressional plan in a secretive, partisan process. *See* Pet'rs' Merits Br. at 1-2, *Adams v. DeWine*, No. 2021-1428. The General Assembly passed the plan on November 18, 2021, and Governor Mike DeWine signed it on November 20. *Id.* at 16-17. The November 20 Plan was an extreme partisan outlier that was even more skewed in favor of the Republican Party than the 2011 plan, the very gerrymander that had prompted voters to add Article XIX to the Constitution.

The next business day, on November 22, the *Adams* Petitioners filed a complaint in this

Court as an original action. *See* Relators' Compl. in Original Action, *Adams*, No. 2021-1428. Petitioners argued that the November 20 Plan violated Article XIX, Section 1(C)(3)(a) and 1(C)(3)(b) of the Ohio Constitution. The Court considered the matter on an exceptionally expedited timeframe. Discovery was conducted and oral argument held within about a month of filing.

On January 14, just over two weeks after hearing oral argument, this Court held that the November 20 Plan was "invalid *in its entirety* because it unduly favors the Republican Party and disfavors the Democratic Party in violation of Article XIX, Section 1(C)(3)(a)." *Adams* at ¶ 5 (emphasis added). The Court also held that the November 20 Plan "unduly splits Hamilton, Cuyahoga, and Summit Counties in violation of Section 1(C)(3)(b)." *Id.* The Court concluded that "[d]espite the adoption of Article XIX . . . the General Assembly did not heed the clarion call sent by Ohio voters to stop political gerrymandering." *Id.* at ¶ 4.

The Court explained that Section 1(C)(3)(a) prohibits "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. It concluded that the evidence presented by Petitioners "overwhelmingly show[ed] that the [November 20 Plan] favors the Republican Party and disfavors the Democratic Party to a degree far exceeding what is warranted by Article XIX's line-drawing requirements and Ohio's political geography." *Id.* at ¶ 41. The Court looked to the November 20 Plan's overall expected partisan performance, the November 20 Plan's treatment of certain geographic areas of the state, and other measures of partisan bias. *See id.* at ¶ 52, 62, 63. In particular, the Court identified "the inescapable conclusion" that "in each of Ohio's three largest metropolitan areas, the [November 20 Plan] contains districts that . . . are the product of an effort

to pack and crack Democratic voters, which results in more safe Republican districts or competitive districts favoring the Republican Party's candidates." *Id.* at ¶ 62. In conducting this analysis, the Court held that alternative congressional plans, including computer-simulated plans, "are relevant evidence that [an] enacted plan unduly favors the Republican Party." *Id.* at ¶ 68.

In addition, the Court held that the November 20 Plan unduly split three counties in violation of Section 1(C)(3)(b). The Court explained that "[a] split may be unwarranted if it cannot be explained by any neutral redistricting criteria but instead confers a partisan advantage on the party that drew the map—regardless of whether the plan complies with Article XIX, Section 2(B)." *Id.* at ¶ 83; *see also id.* at ¶ 77 (concluding that the November 20 Plan contained undue splits because they "result[ed] in noncompact districts that cannot be explained by any neutral factor and serve no purpose other than to confer partisan advantage to the political party that drew the plan").

The Court held that the November 20 Plan's splits of Hamilton County were unwarranted and excessive, *id.* at ¶ 88, and the plan "split[] Summit and Cuyahoga Counties to confer partisan advantages on the Republican Party." *Id.* at ¶ 89.

In sum, the Court concluded that "[s]ystemic defects require[d] the passage of a new plan that complies with Article XIX." *Id.* at Section D. The Court explained:

> [I]n some circumstances, congressional plans that contain isolated defects may be subject to remediation simply by correcting the defects in the affected district or districts. But when a congressional-district plan contains systemic flaws such that constitutional defects in the drawing of some district boundaries have a consequential effect on the district boundaries of other contiguous districts, such a plan is incapable of being remediated with the surgical precision necessary to correct only isolated districts while leaving the rest of the plan intact.
>
> In this case, the partisan gerrymandering used to generate the 2021 congressional-district plan, through undue party favoritism and/or undue governmental-unit splits, extends from one end of the state to the other. This plan defies correction on a simple district-by-district

> basis, if only as a consequence of the equal-population requirement prescribed by Article XIX, Section 2 and governing law. We therefore see no recourse but to invalidate the entire congressional-district plan.

*Id.* at ¶ 95-96. The Court ordered that "[b]y 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*." *Id.* at ¶ 99 (emphasis in original).

**B. The General Assembly took no action to adopt a remedial plan.**

Article XIX, Section 3(B)(1) provides that if a congressional plan is invalidated, then "[t]he general assembly shall pass a plan not later than the thirtieth day after" a final order is issued. Yet the General Assembly did not do so.

For the first week after this Court's ruling on the November 20 Plan, the General Assembly did nothing at all. Finally, Senator Rob McColley, the sponsor of the November 20 Plan, introduced a placeholder bill for a new congressional map on January 26. (*See* NEIMAN_EVID_00014 (2022 S.B. No. 286, As Introduced); NEIMAN_EVID_00016 (General Assembly's website showing status of 2022 S.B. No. 286 as of March 3, 2022).) That same day, President Huffman said that he expected the General Assembly to begin debating and potentially voting on a new map starting on February 7. (NEIMAN_EVID_00011-00012 (Laura Hancock, "As congressional redistricting deadline looms, Ohio Senate Republicans head to sunny Florida for top-dollar fundraiser," Cleveland.com (Jan. 26, 2022).) Committees in both the House and the Senate scheduled hearings for February 8. (*See* NEIMAN_EVID_00024 (Notice and agenda for the Ohio Senate Government Budget Committee's Feb. 8, 2022 meeting).) A second Senate hearing was scheduled for February 9, and an "if needed" House hearing scheduled for February 10. (*See* NEIMAN_EVID_00026 (Notice and agenda for the Ohio Senate Government Budget

Committee's Feb. 9, 2022 meeting); NEIMAN_EVID_00032 (Feb. 8, 2022, 10:10 AM Tweet by reporter Josh Rultenberg).)

In the meantime, out of public view, the Republican caucus was formulating a map. Republican caucus map-drawer Blake Springhetti emailed "Proposed Plan Information," including detailed images of congressional districts, to House Speaker Bob Cupp on February 2. (NEIMAN_EVID_579-585 (CUPP00010).) Despite the scheduled committee hearings, however, Speaker Cupp told Governor DeWine on February 5 that he did not believe Democrats would vote for the Republicans' map and that he instead expected the map-drawing process to end up with the Commission. (DISC_0027 (GOV_000503).) Governor DeWine emailed his staff to let them know that Speaker Cupp "want[ed] to do the commission work in a week" and "[h]ope[d] that Republicans who are on the commission will be familiar enough with the map that is being proposed by the senate and house that we I'll [sic] be able to vote for it." (*Id.*)

As it turned out, Republicans never proposed a map in the General Assembly at all. The Republican caucus's approach to the remedial process changed dramatically on February 7. That day, this Court issued an order invalidating the Ohio Redistricting Commission's remedial General Assembly Plan, which the Commission had passed on January 22. *See LWV II*, at ¶ 3. The Court explained that the Commission had once again failed to comply with the partisan fairness and proportionality requirements of Article XI, Section 6. *See id.* The Court concluded: "Our instruction to the commission is—simply—to comply with the Constitution." *Id.* at ¶ 64.

Following the issuance of that order, the House Government Oversight Committee abruptly removed consideration of congressional maps from the agenda of its February 8 hearing. (NEIMAN_EVID_00021-00022 (Announcement and agenda for the Ohio House Government Oversight Committee's Feb. 8, 2022 meeting (2d Rev.).) The next day, the Senate Budget

Committee also announced that it would not introduce a congressional map. (NEIMAN_EVID_00028 (Feb. 8, 2022, 9:18 AM Tweet by Josh Rultenberg); NEIMAN_EVID_00030 (Feb. 8, 2022, 9:19 AM Tweet by Josh Rultenberg); NEIMAN_EVID_00032 (Feb. 8, 2022, 10:10 AM Tweet by Josh Rultenberg).)

On February 8, the Senate Democratic caucus released a proposed map, Senate Bill 237 ("February 8 Democratic Caucus Plan"). (NEIMAN_EVID_00034-00036 (Feb. 8, 2022, 11:20 AM Tweet by Josh Rultenberg).)[2] That same day, Speaker Cupp acknowledged that the Republican caucus would not even attempt to reach bipartisan agreement. (NEIMAN_EVID_00038 (Feb. 8, 2022, 12:30 PM Tweet by Josh Rultenberg).) The Republican caucus thus chose not to introduce any congressional plan in the General Assembly and let the clock run out on the remedial period, expressly because it did not want to try to reach bipartisan compromise. Instead, it chose to keep the already-drafted congressional plan "in the can" until it could be passed by the Republicans on the Commission.

The General Assembly's February 14 deadline for a new congressional map passed without a single committee hearing, a single plan introduced by the majority caucus, or a single vote.

### C. The Commission adopted a new plan that was drawn without regard to Article XIX, Section 1(C)(3)(a) or 1(C)(3)(b).

When the General Assembly fails to pass a remedial congressional district plan, Article XIX, Section 3(B)(2) provides that the task next falls to the Ohio Redistricting Commission. The Commission then must adopt a plan within thirty days after the General Assembly's deadline to pass a remedial plan. *See* Article XIX, Section 3(B)(2). Given the General Assembly's failure to

[2] The February 8 Democratic Caucus Plan is available on the Commission's website. *See* Maps, Ohio Redistricting Commission, https://www.redistricting.ohio.gov/maps (last accessed May 3, 2022) (available under "Congressional District Plans – Commission Member Sponsors" and labeled "Yuko/Sykes SB 237 Revision").

do anything by its February 14, 2022 deadline, the responsibility to pass a new congressional district plan fell to the Commission.

### 1. The Commission did not introduce any congressional plans for the first half of its remedial period.

The Commission did nothing publicly for the first week of its remedial period.[3] Nevertheless, behind the scenes, Huffman and Cupp (collectively the "Republican Legislative Commissioners") worked to ensure that other Republicans would support the plan that Speaker Cupp's staff had prepared for him. To that end, on February 21, the Republican Legislative Commissioners shared a proposed plan—the same one that Springhetti had emailed Speaker Cupp on February 2—with Auditor Faber. (*See* NEIMAN_EVID_00620-00631 (SPRINGHETTI_000032-000043); NEIMAN_EVID_579-585 (CUPP00010).)

The Commission finally met at noon on February 22 to discuss congressional redistricting for the first time since October 2021. (STIP_0001 (2/22/22 Ohio Redistricting Commission Agenda).) Commission Co-Chair Senator Vernon Sykes stated that morning that he did not have any idea what the agenda of the meeting would be. (NEIMAN_EVID_00040 (Feb. 22, 2022, 9:37 AM Tweet by Josh Rultenberg).)

The meeting lasted less than ten minutes. (*See* STIP_0004-0006 (2/22/22 Ohio Redistricting Commission Transcript).) The Commission Co-Chairs, Speaker Cupp and Senator Sykes, announced that the Commission would hold public hearings, but only individuals and organizations that had previously submitted full congressional plans would be permitted to speak. (*Id.* at STIP_0005.) The Commissioners then discussed scheduling a meeting regarding the General Assembly district plan and adjourned the meeting. (*Id.* at STIP_0006.)

[3] This was also during the period where, in theory, the Commission was tasked with drawing a remedial General Assembly plan, before it declared "impasse" on February 17 and was required to address the Court's show cause order of February 18.

The Commission held another meeting on February 23, during which three individuals who had previously submitted congressional plans testified. (STIP_0007 (2/23/22 Ohio Redistricting Commission Agenda); (STIP_0011-0033 (2/23/22 Ohio Redistricting Commission Transcript).) On February 24, the Commission heard testimony on congressional plans from two individuals, and then shifted to discussing and adopting a new General Assembly district plan. (STIP_0034-0041 (2/24/22 Ohio Redistricting Commission Transcript).)

**2. The Republican Commissioners developed and passed a plan that was not released to Democratic Commissioners or the public until the day before its passage.**

The Democratic Commissioners' staff reached out to the Republican Commissioners' staff about meeting as soon as the Commission reconvened on February 22. (NEIMAN_EVID_00591-00592 (DiRossi_000154-000155).) Although the statewide officials' staff responded promptly, the Republican Legislative Commissioners' map-drawers did not respond and, even after follow-up messages, said they were unavailable to meet. (*Id.*)

Finally, on February 27, a meeting occurred between the Democratic caucus's staff and the Republican caucus's staff, including Republican map-drawers Raymond DiRossi and Springhetti. (*See* NEIMAN_EVID_00589 (DiRossi_000125); NEIMAN_EVID_00633-00644 (SPRINGHETTI_000098-000106); STIP_0211 (3/1/22 Ohio Redistricting Commission Transcript).) As explained above, before this meeting, Springhetti had shared files and images of a proposed congressional map with Speaker Cupp on February 2 and with Auditor Faber's staff on February 21. None of this was shared with Democratic staff. Instead, "Ray [DiRossi] and Blake [Springhetti] told [the Democratic caucus staff] they had no map and don't know when a vote will take place or when a map will be produced or what any area of the state will look like in the next map they produce." (NEIMAN_EVID_00589 (DiRossi_000125).)

This was misleading at best, a flat lie at worst. Secretary LaRose confirmed that he viewed a working draft of a congressional district map that same day, February 27. (NEIMAN_EVID_00717 (Secretary LaRose's Interrogatory Responses).) Also on that same day, Secretary LaRose texted Auditor Faber an image of a congressional plan that appears identical to the one that the Republican Legislative Commissioners proposed two days later on March 1. (NEIMAN_EVID_00611 (SOS_000780).) And just minutes before he texted Auditor Faber, LaRose also texted Republican congressional candidate Madison Gesiotto Gilbert to ask her to give him a call, presumably to discuss the same map (as their later text messages suggest). (NEIMAN_EVID_00613-00616 (SOS_000781-000784).)

None of this was shared with Democratic Commissioners. According to House Minority Leader Allison Russo, no actual maps were shared with her staff at the February 27 meeting, and her staff did not receive answers to any of their questions about the Republican proposal. (*Id.* at STIP_0216.) Senator Sykes would later say that the meeting "was just a one way communication for the most part," in which the Democratic caucus was "sharing [its] ideas" but did not receive "suggestions from the majority as it relates to the map." (*Id.* at STIP_0215.)[4]

On March 1, Co-Chair Speaker Cupp told a reporter that a Republican proposal would be introduced at 2 p.m. that afternoon, with a vote to be scheduled the next day, on March 2. (NEIMAN_EVID_00042 (March 1, 2022, 12:25 PM Tweet by Josh Rultenberg).) The Democratic Commissioners did not receive the proposal until about an hour prior to the 2 p.m. meeting. (*See*

[4] Republican Commissioners disputed this characterization, although the precise reasons why are not clear from the public record. (*See* STIP_0217-0218 (3/1/22 Ohio Redistricting Commission Transcript).) Petitioners cannot say exactly what did or did not occur—because the discussion occurred behind closed doors rather than in a public and transparent Commission meeting.

(NEIMAN_EVID_00587 (DiRossi_000078); NEIMAN_EVID_00046 (March 1, 2022, 12:51 PM Tweet by Josh Rultenberg).)

President Huffman then presented his proposal. Leader Russo explained that she would have additional questions once she had more time to review the plan, but as an initial matter asked why the proposal did not place Cincinnati in a district entirely within Hamilton County. (STIP_0211 (3/1/22 Ohio Redistricting Commission Transcript).) President Huffman responded that under Article XIX, Section 3(B)(2), the Commission was required to make "no other changes" beyond remedying the "legal defects in the previous plan identified by the court." (*Id.* at STIP_0212.) President Huffman acknowledged that the court "identif[ied] Cuyahoga County and Hamilton County as two problematic areas," but said that his proposal complied with the Court's directions and that the proposal's treatment of Hamilton County simply reflected (unidentified) "policy preferences and choices that commission members make." (*Id.*)

Leader Russo followed up, asking if President Huffman believed that his proposal addressed the Court's finding that the November 20 Plan "carve[d] out Hamilton County's northern [B]lack population from its surrounding neighborhoods and combines it with mostly a rural district that ends 85 miles to the north. . . ." *Adams* at ¶ 86; (STIP_0212 (3/1/22 Ohio Redistricting Commission Transcript).) President Huffman again cited "policy preferences." (*Id.*) Next, Leader Russo suggested drawing a district entirely within Hamilton County. (*Id.*). President Huffman demurred. (*Id.*).

Notably, but unbeknownst to Leader Russo or the Democratic caucus, the proposed plan that Springhetti had shared with Auditor Faber's staff just eight days prior, on February 21, *did* include a district entirely within Hamilton County. (NEIMAN_EVID_00620-00631 (SPRINGHETTI_000032-000043).) The reasons for the reversion to a Cincinnati-Warren County

pairing are not apparent based on the documents that the Republican Commissioners produced in discovery.

Leader Russo also suggested drawing District 9 to be more compact. (STIP_0212 (3/1/22 Ohio Redistricting Commission Transcript).) President Huffman responded that the map-drawers had not made changes to District 9 because "the court did not comment on . . . that district." (*Id.* at STIP_0213.) Leader Russo then asked why District 15 was not drawn to be more compact. President Huffman acknowledged that District 15 was a "Frankenstein district" that resulted from other "choices in particular places." (*Id.* at STIP_0213-0214.) Finally, Leader Russo asked why District 7 was drawn in a noncompact manner. President Huffman said that District 7 "is a little bit like [District 15] where it's made up of parts." (*Id.* at STIP_0215.)

Leader Russo suggested that President Huffman amend his map to address the abovementioned regions and asked on what timeline the Republican Commissioners would like to receive proposed amendments to the map. (*Id.* at STIP_0217.) Speaker Cupp said he was available that day but added the caveat that "one of the constraints, of course, is the time it would take to move things around." (*Id.*) Leader Russo responded that she had repeatedly asked for a draft of the map since the February 27 meeting but never received one. (*Id.*) It was also her understanding that other members of the Commission actually saw the map on the evening of February 27. (*Id.*) Although Secretary LaRose and Auditor Faber had been provided a copy of a map on February 27 that looked identical to map President Huffman introduced on March 1, (NEIMAN_EVID_00611 (SOS_000780),) President Huffman responded that DiRossi presented only "concepts" to members of the Commission on February 27 and that the discussed map did not exist until February

28.[5] (STIP_0217 (3/1/22 Ohio Redistricting Commission Transcript).) Leader Russo contested that characterization, stating that her staff was not even presented with any "concepts" during the February 27 meeting. (*Id.* at STIP_0218.) Indeed, the Democratic caucus staff reported that, on February 27, the Republican map-drawers told them that they "d[id]n't know . . . what any area of the state will look like in the next map they produce." (NEIMAN_EVID_00589 (DiRossi_000125).) The Commission then recessed until 10 a.m. the next day.

During the recess, Secretary LaRose exchanged messages and plan information with Republican congressional candidate Madison Gesiotto Gilbert, whom he had previously reached out to on February 27 for a call—within minutes of sending an image of the then still-unreleased draft plan to Auditor Faber. (NEIMAN_EVID_00611-00616 (SOS_000780-000784).) Secretary LaRose promised to keep Gilbert apprised of any additional changes before the next day's vote. (NEIMAN_EVID_00615 (SOS_000783).)

When the Commission reconvened, Senator Sykes moved that the Commission vote on the February 8 Democratic Caucus Plan. (STIP_0223 (3/2/22 Ohio Redistricting Commission Transcript).) President Huffman expressed his opposition to the Democratic proposal, stating that he viewed it as "a step backwards." (*Id.* at STIP_0226). Backwards from what is unclear: this was the first and only proposal offered by the Democratic caucus after the Court issued its January 14 decision. The Commission then immediately proceeded to a vote, rejecting the Democratic proposal on a 5-2 party-line vote (*Id.*)

President Huffman then moved that the Commission vote on an updated version of the map he had introduced the previous day. Only two changes were made between the March 1 and March

[5] President Huffman did not explain why the map was not shared with Leader Russo on February 28 and was instead provided approximately one hour before the March 1 meeting.

2 versions of President Huffman's plan. First, the boundary of District 15 was shifted slightly so that Republican Congressman Mike Carey's residence fell within that district. Second, certain subdivision splits were eliminated in District 1. (*Id.* at STIP_0227-0228.)

Leader Russo proposed four amendments to President Huffman's proposal, which she explained would "mak[e] the least changes necessary to get this map to a map that we feel . . . upholds the Constitution by not unduly favoring the Republicans and disfavoring the Democrats." (*Id.* at STIP_0229.) She proposed swapping territory in Districts 1 and 8 so that District 1 would be wholly within Hamilton County; swapping territory between Districts 5 and 9 so that District 9 would be more compact and its Democratic vote share would move above toss-up range; changing the boundaries between Districts 15, 4, and 3 so that Districts 15 and 4 would be more compact, and swapping territory between Districts 7 and 11 to move District 7 into the Democratic-leaning tossup range. (*Id.*) Leader Russo stated that these changes would "result[] in an overall map . . . that does not unduly favor the Republican Party and disfavor the Democratic Party." (*Id.*)

President Huffman then expressed his view that the requirements of Article XIX, Section 1(C)(3)(a) and (b) do not apply to the Commission when it draws a congressional plan to replace an invalidated map. (*Id.* at STIP_0230-0232.) He argued that because Section 3(B)(2) did not replicate the text of those sections, "there's no unduly requirement." (*Id.* at STIP_0230-0231.) President Huffman further claimed that Article XIX was intentionally framed so that the majority party could act unilaterally and without the constraints of Sections 1(C)(3)(a) and 1(C)(3)(b) when drawing a map under Sections 3(B)(1) or (2), because such a remedial process would most likely occur close to the date of primary elections. (*Id.* at STIP_0231-0232.)

Leader Russo expressed her view that this position was absurd, explaining that it was like "robbing a bank and saying that is my money." (*Id.* at STIP_0232.) Senator Sykes expressed

similar concerns. After Leader Russo once more urged the other Commissioners to take additional time to discuss and attempt to reach bipartisan agreement, the Commission voted against her amendments on a party-line 5-2 vote. (*Id.* at STIP_0235-0236.) The Commission then immediately voted to adopt President Huffman's proposal, on a party-line 5-2 vote. (*Id.* at STIP_0236-0237.)

The same day the plan was passed, Secretary LaRose sent a memo to "County Boards of Elections Board Members, Directors, and Deputy Directors" ordering them to "immediately begin the process of reprogramming their voter registration systems based on the March 2, 2022 congressional district maps" and certify partisan candidate petitions by March 14, 2022. (*See* NEIMAN_EVID_00054-00056 (Secretary of State's Directive 2022-27).) Secretary LaRose and Ohio's 88 counties administered the May 3 primary under the gerrymandered March 2 plan.

**D. The March 2 Plan is a partisan gerrymander and partisan outlier.**

Like the November 20 Plan, the March 2 Plan is an extreme partisan outlier that unduly favors the Republican Party and disfavors the Democratic Party.

**1. The March 2 Plan excessively advantages the Republican Party and its incumbents.**

Democrats have received about 47% and Republicans about 53% of the statewide vote share in recent years (2016-2020). (*See* NEIMAN_EVID_00345 (Affidavit of Dr. Jonathan Rodden, *Adams v. DeWine*, No. 2021-1428 at ¶ 12 (Mar. 4, 2022) ("Rodden Aff.").) The March 2 Plan comes nowhere near to approximating this partisan split. (*Id.* at NEIMAN_EVID_00346, ¶ 23.) It, like the November 20 Plan before it, starkly advantages Republicans.

Dr. Jonathan Rodden concludes that the March 2 Plan is likely to award Republicans *at least* 11 (or 73%) of Ohio's 15 congressional seats. (*Id.*) The March 2 Plan creates only three seats with Democratic majorities greater than 52% (indeed, one of those is at just 52.15%), and it creates two seats with bare Democratic majorities of 50.23% and 51.04%. (STIP_0273 (Statistics for

congressional districts); NEIMAN_EVID_00345 (Rodden Aff. at ¶ 14).) Even if one were to assume that Democrats are likely to win the seat indexed at 52.15% and to win one of the two razor-thin toss-up seats—a highly optimistic outcome for Democrats—Democrats can anticipate winning only four, or a mere 27%, of the state's congressional seats. (*See id.* at NEIMAN_EVID_00346, ¶ 20.) Again, this is despite a statewide vote share of 47%—a full 20 percentage points greater than the share of congressional seats Democrats would realistically be able to achieve under the March 2 Plan.

In addition, while most of the Democratic-leaning seats are barely Democratic, the Republican-leaning seats are all highly Republican. None of the ten Republican-leaning seats in the new plan has a Republican majority in the 50-52% vote share range. The most "competitive" Republican-leaning seat still gives Republicans a 53.3% expected vote share. (*See id.* at NEIMAN_EVID_00348, ¶ 26.) The advantage that this gives Republican candidates—even before one considers incumbency effects—is dramatic. Even if Democrats won 50% of the statewide vote—which would be 3% more than their average performance over the last three election cycles—they would win, at most, five of the state's 15 seats, and not pick up *any* of the Republican-leaning seats. (*Id.* at NEIMAN_EVID_00348, ¶ 27.) Yet, if Republicans were to experience an equivalent shift of 3% above their average performance in the same last three election cycles, and win 56% of the statewide vote, they would win 13 of the state's 15 seats, a total of approximately 87% of Ohio's congressional delegation. (*Id.* at NEIMAN_EVID_00348, ¶ 28.) The Commission's manipulation of competitive seats to create a durable ceiling on Democrats' ability to translate votes into political power evinces highly unequal treatment of Ohio's two major parties. Partisan metrics confirm this: the March 2 Plan has an efficiency gap of 10%—much higher than the alternative plans that Dr. Rodden considered—and an electoral bias measure of

around 17%—exactly the same as that in the November 20 Plan. (*Id.* at NEIMAN_EVID_00361, ¶ 47-48.)

The Republican partisan advantage is even starker in the treatment of incumbent candidates. Much like the November 20 Plan, Republican incumbents largely continue to enjoy Republican majorities in their districts based on the electoral data described above. Of the 12 Republican incumbents that held seats under the 2011 plan, one is not running for re-election, ten are still in safe Republican seats, and only one (Congressman Chabot) is in a nominally Democratic-leaning district. (*Id.* at NEIMAN_EVID_00348-00349, ¶ 31.) As Dr. Rodden notes, even Congressman Chabot's seat is safer for Republicans than it appears: he consistently out-performs the statewide Republicans running in his district and has a four-point incumbency advantage. (*Id.* at NEIMAN_EVID_00346, ¶ 15.) Given that his district under the March 2 Plan retains about 70 percent of its population under the 2011 plan, Congressman Chabot is still likely to win re-election (*Id.*) The story is entirely different for Democratic incumbents. Of the four congressional incumbents, only two reside in safe Democratic districts, and the other two live in dramatically reconfigured ones. Congressman Ryan (who is running for Senate) is placed in a safely Republican district already held by a Republican incumbent. (*Id.* at NEIMAN_EVID_00349, ¶ 32.) And Congresswoman Kaptur is placed in a district with a bare Democratic majority with only about half of the population from her previous district. (*Id.* at NEIMAN_EVID_00346, ¶ 16.)

**2. Neither the technical-line drawing requirements of Article XIX nor Ohio's political geography explain the extreme Republican skew of the March 2 Plan.**

The Court is already familiar with the 1,000 computer-simulated congressional plans generated by Dr. Jowei Chen using the non-partisan criteria specified by the Ohio Constitution, including equal population, contiguity, and minimizing splits of political subdivisions. (*See*

NEIMAN_EVID_00153-00155 (Affidavit of Dr. Jowei Chen, *Adams v. DeWine*, No. 2021-1428, at ¶ 11-12, 14. (Dec. 10, 2021)); *see also Adams* at ¶ 50, 57-65 (relying upon Dr. Chen's simulations).) As Dr. Chen has explained, these simulations "fully account for Ohio's unique political geography, its political subdivision boundaries, and its unique constitutional districting requirements." (*Id.* at NEIMAN_EVID_00197, ¶ 94.) They were *not* programmed to achieve any partisan outcome. (*Id.* at NEIMAN_EVID_00154-00155, ¶ 14.) Nevertheless, using the same elections dataset used by the Commission, his simulations most frequently produced nine Republican-leaning districts and six Democratic-leaning districts. (NEIMAN_EVID_00395 (Affidavit of Dr. Jowei Chen ¶ 19 (Mar. 4, 2022) ("Chen Aff.")) (explaining that, again using the same dataset, the 10th-most Republican district in the simulated maps has an average Republican vote share of approximately 48%, meaning that out of 15 total districts, most often nine (not 10) of the simulated districts lean Republican).)[6] Dr. Chen previously used this "districting simulation analysis" "to identify how much of the electoral bias in [the November 20 Plan] is caused by Ohio's political geography and how much is caused by the map-drawer's intentional efforts to favor one political party over the other." (*See* NEIMAN_EVID_00197 (Affidavit of Dr. Jowei Chen, *Adams v. DeWine*, No. 2021-1428, at ¶ 95 (Dec. 10, 2021)).)[7]

[6] Respondents Huffman and Cupp have previously misrepresented Dr. Chen's affidavit, asserting that "a majority of Dr. Chen's simulations result in 10 Republican districts and 5 Democratic districts." Response to Motion for Scheduling Order, *Neiman v. LaRose*, No. 2022-298 (Mar. 22, 2022), at 7. Respondents also have incorrectly claimed Dr. Kosuke Imai's analysis is unreliable because he finds that his 5,000 simulated plans most often result in eight Republican-leaning districts and seven Democratic-leaning districts. *See id.* But Dr. Imai clearly explained that he used the same dataset that the General Assembly used when it passed the November 20 Plan, which included only statewide federal elections. (*See* NEIMAN_EVID_00228-00229 (Affidavit of Dr. Kosuke Imai, *Adams v. DeWine*, No. 2021-1428, at ¶ 17-18 (Dec. 10, 2021)).) These different datasets result in slightly different outcomes in the most common seat allocation.

[7] The block assignment files of each of Dr. Chen's 1,000 simulated congressional plans were provided to the Court and Respondents on April 25, 2022. (*See* NEIMAN_EVID_00008 (Affidavit of Derek S. Clinger ¶ 84 (Apr. 25, 2022)).)

Dr. Chen has examined the March 2 Plan using the same analysis and found that, like the November 20 Plan, the new plan "is an extreme partisan outlier, both at the statewide level and with respect to the partisan characteristics of its individual districts." (NEIMAN_EVID_00389 (Chen Aff. at ¶ 3).) The point is made most clearly by a comparison of the district-level partisan vote share of the March 2 Plan's districts and the corresponding districts in the computer-simulated plans. Similar to its predecessor, the March 2 Plan packs Democratic voters into a small number of districts, improving Republican performance in other districts. The most Democratic district in the March 2 Plan, District 11, is more heavily Democratic than ***98.8%*** of the most-Democratic districts in each of the 1,000 computer-simulated plans. (*Id.* at NEIMAN_EVID_00394, ¶ 14.) District 11 achieves this by packing Democratic voters in the Cleveland area to a more extreme extent than nearly all of the computer-simulated plans. Similarly, the second-most Democratic district in the March 2 Plan, District 3, is more heavily Democratic than ***90.4%*** of the second-most Democratic districts in each of the 1,000 computer-simulated plans. (*Id.* at NEIMAN_EVID_00394-00395, ¶ 15.) District 3 packs Democratic voters in the Columbus area, making it a more Democratic district than the second-most Democratic district in the vast majority of the computer-simulated plans. Meanwhile, the March 2 Plan's most Republican district, District 2, is *less* heavily Republican than ***90.1%*** of the most Republican districts in each of the 1,000 computer-simulated plans. (*Id.* at NEIMAN_EVID_00395, ¶ 16.) Dr. Chen explains that these partisan characteristics "are consistent with an effort to favor the Republican party by packing Democratic voters into a small number of districts that very heavily favor the Democratic party." (*Id.* NEIMAN_EVID_00392, ¶ 11.)

As Dr. Chen explains, the three districts described above (Districts 11, 3, and 2) contain more Democratic voters than the vast majority of their counterparts in the 1,000 computer-

simulated plans. (*Id.* at NEIMAN_EVID_00395, ¶ 17.) By placing "extra" Democratic voters in the three most partisan-extreme districts, the map-drawers of the March 2 Plan allocated fewer Democratic voters to other districts, thus improving likely Republican performance in those other areas. (*Id.*) Indeed, four districts in the March 2 Plan have a Republican vote share that is higher than over ***95%*** of their counterpart districts in the computer-simulated plans, demonstrating that packing Democrats into the three abovementioned districts allowed for the emergence of four unusually safe Republican districts. (*Id.* at NEIMAN_EVID_00395-00396, ¶ 17-23.) Like the November 20 Plan, the March 2 Plan is a partisan outlier that packs Democratic voters into a small number of districts to maximize Republican performance in the remaining districts. The March 2 Plan favors the Republican Party in a manner and to an extent that is unexplainable by Ohio's political geography.

The March 2 Plan is also a statistical outlier in terms of the number of districts it creates that are safely Republican versus safely Democratic. Using the definition of competitiveness articulated by the General Assembly during the passage of the November 20 Plan, Dr. Chen found that the March 2 Plan contains nine safe Republican seats, one *more* than the November 20 Plan. (*Id.* at NEIMAN_EVID_00396, 000397, ¶ 25, 27.) The March 2 Plan also contains more safe Republican seats than 97% of the 1,000 computer-simulated plans. (*Id.* at NEIMAN_EVID_00400, ¶ 31.) Moreover, it contains only two safe Democratic seats, the same number as the November 20 Plan and fewer than 95.1% of the computer-simulated plans. (*Id.* at NEIMAN_EVID_00397, ¶ 28, 30.)

Finally, the March 2 Plan is a statistical outlier in terms of its compactness. Dr. Chen noted that every single one of the 1,000 computer-simulated plans had a greater average Polsby-Popper

score and a greater average Reock score[8] than the March 2 Plan. Thus, the plan "is significantly less compact . . . than what could reasonably have been expected from a districting process adhering to the Ohio Constitution's requirements." (*Id.* at NEIMAN_EVID_00401, ¶ 36.)

Again, none of this should be surprising. The data merely confirm what the naked eye can see when comparing the March 2 Plan with its predecessor: The March 2 Plan does not remedy the constitutional infirmities of the November 20 Plan; it mirrors them.

**3. The March 2 Plan's treatment of Ohio's urban areas unduly splits communities and starkly disadvantages Democrats, to the benefit of Republicans.**

Like the November 20 Plan, the March 2 Plan prevents the emergence of Democratic-majority districts by needlessly splitting communities and subordinating traditional redistricting principles, particularly in metropolitan areas, which tend to favor Democrats. (NEIMAN_EVID_00343, 000361 (Rodden Aff. at ¶ 4, 46).) For example, Dr. Rodden explains that in Hamilton County, the March 2 Plan separates the city of Cincinnati from its northern suburbs, combining the city of Cincinnati with rural white areas in Warren County that tend to favor candidates of the opposite party. (*Id.* at NEIMAN_EVID_00352-00353, ¶ 36-37.) That is the same play from the same playbook as the November 20 Plan, and it ensures that District 1 is attainable by Republicans.

Likewise, in Franklin County, the March 2 Plan packs the most Democratic part of Columbus into District 3 and submerges other Democratic-leaning parts of the city and suburbs in a safe Republican-leaning District 15 that includes the most rural, Republican communities in west-central Ohio. (*Id.* at NEIMAN_EVID_00355, ¶ 39.) The Court can see this for itself:

[8] Polsby-Popper and Reock are widely accepted measurements for measuring district compactness. Higher Polsby-Popper scores or higher Reock scores suggest higher compactness. (NEIMAN_EVID_00354 (Rodden Aff. at ¶ 38).)

downtown Columbus, where this Court sits, is in the same congressional district as half of Shelby County, almost 100 miles away. Given this geography, it should not be surprising to learn that District 15 is extremely noncompact compared to Columbus-area districts in alternative plans that were before the Commission. (*Id.* at NEIMAN_EVID_00356, ¶ 40.)

The configuration of Cuyahoga County in the March 2 Plan follows this same pattern. The most Democratic communities in the Cleveland area are packed into District 11, while Democratic-leaning suburbs are split off and combined with rural areas in the south to produce a safely Republican District 7. (*Id.* at NEIMAN_EVID_00357, ¶ 41.) Similarly, the March 2 Plan extracts Lorain County from its surrounding environment altogether, combining it not with District 9 in the northwest nor with the Cleveland suburbs, but instead with rural counties reaching all the way to the western border of the state. (*Id.* at NEIMAN_EVID_00357-00358, ¶ 41-42.)

Dr. Chen's simulations analysis confirms Dr. Rodden's qualitative analysis. Dr. Chen found that the March 2 Plan's districts in Franklin, Cuyahoga, and Hamilton Counties "are outliers in terms of compactness and partisanship, in ways that systematically favor the Republican Party." (NEIMAN_EVID_00400 (Chen Aff. ¶ 32).) He explained that those districts "exhibit more favorable partisan characteristics for the Republican Party than the vast majority of districts covering the same local areas in the 1,000 computer-simulated plans." (*Id.* at NEIMAN_EVID_00400, ¶ 33.)

In Franklin County, Dr. Chen finds that the March 2 Plan's "two Columbus-area districts are clearly more favorable to Republicans than the two Columbus-area districts in the vast majority of the simulated plans." (*Id.* at NEIMAN_EVID_00405, ¶ 43.) He explains that District 3, "which contains most of Columbus' population, is more heavily Democratic than 89.6% of the 1,000 of the simulated plans' districts with the most Columbus population." (*Id.*) As a result, District 15,

"which contains the second-most of Columbus's population, is more heavily Republican than ***99.4%*** of the simulated plans' districts with the second-most Columbus population." (*Id.* (emphasis added).) Moreover, the March 2 Plan's District 15 "is less geographically compact than nearly every computer-simulated district containing the second-most of Columbus's population." (*Id.* at NEIMAN_EVID_00410, ¶ 46.) Dr. Chen concludes the March 2 Plan's "Columbus-area districts were drawn in order to create a more Republican-favorable outcome than would normally emerge from a districting process following the Ohio Constitution's Article XIX requirements." (*Id.* at NEIMAN_EVID_00407, ¶ 45.) This outcome was achieved "by sacrificing the geographic compactness of" District 15. (*Id.* at NEIMAN_EVID_00410, ¶ 46.)

In Hamilton County, the March 2 Plan's Cincinnati-based district, District 1, has a higher Republican vote share than over 84.2% of the simulated districts containing Cincinnati. (*Id.* at NEIMAN_EVID_00414, ¶ 51.) Dr. Chen explains that District 1 "achieves this unnaturally high Republican vote share by . . . connecting Warren County with the fragmented portion of Hamilton County containing Cincinnati." (*Id.* at NEIMAN_EVID_00414, ¶ 51-52.) This "increas[es] the Republican vote share of [District 1] to a significantly higher level than if the Cincinnati-based district had been drawn entirely within Hamilton County." (*Id.* at NEIMAN_EVID_00414, ¶ 51.) Dr. Chen explains that District 1 is less compact than the vast majority of simulated districts: it has "a lower Polsby-Popper score than 96.9% of the simulated districts containing Cincinnati." (*Id.* at NEIMAN_EVID_00414, ¶ 52.) Thus, "by subordinating geographic compactness, the [March 2 Plan] created a Cincinnati-based district that was more favorable to the Republican Party" than the vast majority of simulated plans. (*Id.*)

Finally, in Cuyahoga County, the March 2 Plan's "districts are clearly more favorable to Republicans than the two Cuyahoga-based districts in the vast majority of the simulated plans."

(*Id.* at NEIMAN_EVID_00419, ¶ 57). District 11, which contains Cleveland, "is more heavily Democratic than 98.8% of the 1,000 of the simulated plans' Cleveland-based districts. Consequently, [District 7], which contains the second-most of Cuyahoga's population, is more heavily Republican than all 100% of the simulated plans' districts with the second-most Cuyahoga population." (*Id.*) "In other words, every one of the 1,000 simulated plans contains one safe Democratic district based in Cleveland, as well as a second Cuyahoga-based district that is electorally competitive or Democratic leaning." (*Id.* at NEIMAN_EVID_00419, ¶ 58.) But the March 2 Plan packs Democratic voters into District 11 in order to increase the Republican vote share of District 7, making it safely Republican. (*Id.*). As with the other urban areas, both District 11 and District 7 are "significantly less geographically compact than the vast majority of their geographically analogous districts in the simulated plans." (*Id.* at NEIMAN_EVID_00421, ¶ 59.) Dr. Chen therefore concludes that the March 2 Plan's "Cuyahoga County-area districts were collectively drawn in a manner that favors the Republican Party by subordinating geographic compactness." (*Id.* at NEIMAN_EVID_00421, ¶ 61.)

## III. Argument

There is little question that the March 2 Plan violates Article XIX of the Ohio Constitution and this Court's January 14, 2022 Opinion. It was yet again drawn by the Republican Legislative Commissioners' staff, who for the last several months have dutifully churned out unconstitutional redistricting plans at their bosses' behest. It was based on its invalidated predecessor, with only modest changes. And, like that predecessor, it once again unduly favors the Republican Party and its incumbents and unduly splits governmental units. The Court found that partisan bias infused the November 20 Plan and struck it down in its entirety. In response, the Commission tinkered with the November 20 Plan around the margins; a characterization they do not dispute but, rather,

embrace.

In fact, Republican Commissioners have stated on the record—and are certain to argue before this Court—that Section 1(C)'s anti-gerrymandering requirements (and thus by implication this Court's opinion interpreting and applying those requirements) are irrelevant. In their view, those requirements apply only to the General Assembly and the Commission is now liberated to adopt a gerrymandered map by a simple majority. As Respondents would have it, this Court gets to rule on a congressional map once. After that, the Commission can do whatever it pleases. This interpretation of Article XIX—which does violence to its text, structure, and history—ignores that this Court ordered "both the General Assembly, and the reconstituted Commission, should that be necessary . . . to draw a map that comports with the *directives of this opinion*." *Adams* at ¶ 99 (emphasis in original). The Commission's failure to set its compass to the Court's order leaves it to this Court to set things straight.

### A. Proposition of Law 1: The Commission ignored the clear mandate of this Court's opinion in *Adams*.

The March 2 Plan is invalid because it violates the express directives of this Court's opinion in *Adams*. In striking down the invalidated November 20 Plan, this Court stated in no uncertain terms that "the partisan gerrymandering used to generate the [November 20] plan, through undue party favoritism and/or undue governmental-unit splits, extends from one end of the state to the other. . . . We therefore see no recourse but to invalidate the entire congressional-district plan." *Adams* at ¶ 96. The Court ordered "the General Assembly to pass a new congressional-district plan, as Article XIX, Section 3(B)(1) requires, that complies in full with Article XIX of the Ohio Constitution and is not dictated by partisan considerations." *Id.* at ¶ 102. Equally clear was the Court's instruction that both the General Assembly *and*, if necessary, the Commission comply with its order: "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*." *Id.* at ¶ 99 (emphasis in original).

By President Huffman's own admission, Republican mapmakers did not start with a new plan, but instead made small changes to the November 20 Plan. Defending this decision, President Huffman explained that, under Section 3(B), the Commission was required to make "no other changes" beyond the "legal defects in the previous plan identified by the court." But this Court invalidated the *entire* November 20 Plan. In doing so, it recognized that, "in some circumstances, congressional plans that contain isolated defects may be subject to remediation by simply correcting the defects in the affected district or districts," but *in this case*, the plan contained "systemic flaws" that "def[y] correction on a simple district-by-district basis," leaving the Court "no recourse but to invalidate the entire congressional-district plan." *Id.* at ¶ 95-96.

The Commission's small-adjustment approach was in direct violation of the Court's order. *Compare with LWV II* at ¶ 35-36 (noting, in striking down remedial General Assembly Plan as partisan gerrymander, "[w]e made clear [in *League of Women Voters of Ohio v. Ohio Redistricting Comm.* ("*LWV I*"), Slip Opinion No. 2022-Ohio-65] that we were invalidating the original plan, in its entirety, under Section 9(B). Yet the commission did not adopt an entirely new plan."), *and LWV IV* at ¶ 42 ("The third revised plan is no more than a modification of the second revised plan . . . . As before, the commission did not adopt a plan using a process that Article XI and this court's prior decisions require."). The March 2 Plan is therefore invalid.

In light of President Huffman's remarks at the Commission's March 2 meeting and the Republican Legislative Leaders' argument in an earlier-filed brief, the Commission will likely attempt to defend its decision to adopt a plan that flagrantly violates this Court's January 14 order by claiming that the Commission is free to ignore this Court. The argument goes like this: "the

Section 1(C)(3)/(F)(3) requirements do not apply to Commission-drawn plans—ever," because "[t]hese requirements expressly apply to the general assembly and are contained in the section describing the adoption of a plan by the general assembly by a simple majority vote." Response to Motion to Enforce, *Adams v. DeWine*, No. 2022-1428 (Mar. 8, 2022), at 10, 11. As a result, the Commission is free to seek undue partisan advantage in congressional maps to its heart's delight. The Commission has, in various ways, through months of litigation, sought to aggrandize to itself the power to partisan gerrymander—a power that the people of Ohio, in passing Article XI and Article XIX, took away. This novel reading of Article XIX is more of the same. It is impossible to square with the provision's text, structure, and history.

First, the argument ignores the plain meaning of the remedial process prescribed under Section 3:

> In the event that . . . any congressional district plan, or any congressional district or group of congressional districts is challenged and is determined to be invalid by an unappealed final order of a court of competent jurisdiction then, notwithstanding any other provisions of this constitution, the general assembly shall pass a congressional district plan in accordance with the provisions of this constitution that are then valid, to be used until the next time for redistricting under this article in accordance with the provisions of this constitution that are then valid.

Ohio Constitution, Article XIX, Section 3(B)(1). If the General Assembly cannot pass a new plan within thirty days of the order, the Commission is to be reconstituted to pass a plan within the next thirty days. *Id.* at Section 3(B)(2). It is under this provision that the Commission passed the March 2 Plan. The Commission is reconstituted for the sole purpose of passing a plan that "remed[ies] legal defects in the previous plan identified by the court"; it cannot make "changes to the previous plan other than those made in order to remedy those defects." *Id.* at Section 3(B)(1). Again, the "legal defects" identified by the Court were the plan's undue partisan favoritism and undue

splitting of political subdivisions. *Adams* at ¶ 41, 77. When the Commission reconvened to pass a remedial plan, it was required to remedy "those defects;" it was not free to unilaterally substitute its judgment for the Court's judgment as to the defects in the plan, nor was it suddenly unshackled from the anti-gerrymandering requirements of the Constitution that resulted in the invalidation of the November 20 Plan.

President Huffman's reading of Article XIX is also at odds with its structure. Section 1 prescribes a sequenced redistricting process that passes between the General Assembly and Commission between September and November in every year ending in one. In September, the General Assembly may pass a plan, but it must have bipartisan support. Article XIX, Section 1(A). In October, the process moves to the Commission, which may also only act with bipartisan support. *Id.* at Section 1(B). Finally, in November, the process moves to the General Assembly, which may only pass a ten-year plan with bipartisan support (albeit at a lower level than what is required in September). *Id.* at Section 1(C). It may also pass a four-year plan with a simple majority, but this plan is subject to "strict anti-gerrymandering criteria." (NEIMAN_EVID_00070 (Bipartisan statement in support of Ohio's 2018 Issue 1);) Article XIX, Section 1(C)(3). This structure allows a redistricting authority to take one of two routes (depending on the month and the authority): (1) pass a plan with bipartisan support; or (2) pass a simple-majority plan that is subject to additional guardrails to ensure partisan fairness and preclude undue political subdivision splits. Nowhere does Article XIX authorize either the Commission or the General Assembly to have its cake and eat it too: a body cannot pass a simple-majority map that is free from anti-gerrymandering requirements.

Canons of construction similarly render this interpretation untenable. First, it would render Section 1(C)'s anti-gerrymandering requirements surplusage. "[N]o part of the Constitution

'should be treated as superfluous unless that is manifestly required' . . . [this Court] should avoid any construction that makes a provision 'meaningless or inoperative.'" *LWV I* at ¶ 94. In *LWV I,* Respondents advanced an argument quite similar to the one they are likely to advance here. They argued that this Court lacked jurisdiction to review a state legislative plan's compliance with the anti-gerrymandering requirements of Article XI, Section 6, outside of very narrow circumstances. *Id.* at ¶ 92. The Court rejected this argument, in part because the interpretation would effectively render Section 6 inoperative by preventing the Court's review of the Commission's compliance with a mandatory provision. *See id.* at ¶ 94. So too here: if the Commission is free to ignore the Section 1(C) requirements after this Court has struck down a plan, then those requirements are a dead letter. And the resulting reality would be absurd: it would permit the General Assembly to pass a blatant partisan gerrymander in November, have it struck down in January, stall through February, and then the Commission could reconvene in March and repass the same gerrymander without this Court being able to say a word about it. *See State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382, 384, 481 N.E.2d 632 (1985) ("It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences.").

Such a reading of Section 1(C) would also be at odds with this Court's previous opinion, *see Adams* at ¶ 34 ("[C]ontrary to what Senate President Huffman and House Speaker Cupp argue, Ohio voters intended that the anti-gerrymandering requirements in Article XIX, Section 1(C)(3) have teeth."), and the expressed intent of the voters who approved Article XIX. (Huffman et al., Statement in Support of Issue 1 (2018), Compl. Ex. 16) ("Voting YES on Issue 1 will establish fair standards for drawing congressional districts through its requirement of bipartisan approval, or use of strict anti-gerrymandering criteria.").

Thus, under Article XIX, the Commission was required on remand to draw a map that

complied with the partisan fairness and splits requirements of Section 1(C)(3). Because the November 20 Plan's constitutional deficiencies "extend[ed] from one end of the state of the other" the Commission was required to draw a new map as well. The Commission did neither. Instead, as discussed below, the Commission's recent plan once again unduly favors Republicans and Republican incumbents and unduly splits governmental units.

**B. Proposition of Law 2: The March 2 Plan is nearly identical to the invalidated November 20 Plan, and similarly and unduly favors Republicans and Republican incumbents.**

The March 2 Plan violates Section 1(C)(3)(a)'s prohibition of undue partisanship for much the same reason as the November 20 Plan. This is unsurprising: the plans are nearly identical. As this Court explained in *Adams*, "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." *Adams* at ¶ 40. Applying this standard, the Court found that the evidence before it "compel[led] beyond any reasonable doubt the conclusion that [the November 20 Plan] excessively and unwarrantedly favors the Republican Party and disfavors the Democratic Party." *Id.* at ¶ 51. The March 2 Plan is more of the same.

First, the March 2 Plan is once again grossly out-of-sync with the statewide preferences of Ohio voters. While proportionality is not the sine qua non of partisan fairness under Section 1(C)(3)(a)'s partisan fairness requirement, this Court does not "simply ignore a gross departure from proportionality" in conducting its analysis. *Adams* at ¶ 103 (O'Connor, C.J., concurring). In statewide partisan elections from 2016 to 2020, Republicans have received about 53% of the vote on average. (*See* NEIMAN_EVID_00345 (Rodden Aff. at ¶ 12); *see also* STIP_0273 (Statistics for congressional districts) (reporting partisan seat share using same 2016-2020 statewide index

that Dr. Rodden and Dr. Chen use in their analysis)); *Adams* at ¶ 67 (crediting Dr. Rodden's and Dr. Chen's analysis using the 2016-2020 data set). The March 2 Plan, however, awards Republicans anywhere from 67% to 87% of the seats. (*Id.* at NEIMAN_EVID_00346, 00348, (Rodden Aff. at ¶ 23, 27-28.) This disparity between statewide vote share and congressional seat share is astounding.

Although the Commission nominally improved the seat allocation of the congressional plan, it did so by slightly shifting the lines of two previously Republican-leaning districts to make them nominally Democratic-leaning competitive toss-up districts—one of which contains a popular Republican incumbent. In the March 2 Plan, three out of the five "Democratic-leaning" districts favor Democrats by less than 52.15%, by the Commission's own account. (STIP_0273 (Statistics for congressional districts) (reporting seats with 52.15%, 51.04%, and 50.23% Democratic vote shares).) In stark juxtaposition, *zero* of the ten Republican-leaning seats favor Republicans by less than 53.32%. In drawing this asymmetrical map, the Commission took a page directly from its failed General Assembly districting playbook. *LWV II* at ¶ 37 (describing approach of "switching competitive Republican-leaning districts to competitive Democratic-leaning districts"). This Court has already found that this ploy is evidence of unconstitutional partisan favoritism. *LWV II* at ¶ 40 ("The commission's adoption of a plan that absurdly labels what are by any definition 'competitive' or 'toss-up' districts as 'Democratic-leaning'—at least when the plan contains no proportional share of similar 'Republican-leaning' districts—is demonstrative of an intent to favor the Republican Party."); *League of Women Voters of Ohio v. Ohio Redistricting Comm.* ("*LWV III*"), Slip Opinion No. 2022-Ohio-789, ¶ 33 ("The remarkably one-sided distribution of toss-up districts is evidence of an intentionally biased map."); *see also LWV IV* at ¶ 47 (same).

As explained above, *see supra* Part II.D, the slight adjustment of district lines from the November 20 Plan to the March 2 Plan did nothing to mitigate the extreme partisan advantage to the Republican Party and its incumbents. And critical to this Court's analysis, the bias of the March 2 Plan is unexplainable by any neutral factors, such as compliance with the remainder of Article XIX or Ohio's political geography. *See Adams* at ¶ 40 ("[Section 1(C)(3)(a)] does bar plans that embody partisan . . . favoritism not warranted by legitimate, neutral criteria."). As Dr. Chen outlines in his report, the March 2 Plan is an extreme partisan outlier, both at a statewide level and with respect to the partisan characteristics of individual districts. (NEIMAN_EVID_00389 (Chen Aff. ¶ 3).)

This Court also credited Dr. Rodden's and Dr. Chen's previous analyses "showing how the enacted plan's treatment of certain urban counties unduly favors the Republican Party and disfavors the Democratic Party." *Adams* at ¶ 52. Again, here, Dr. Rodden lays out all the ways in which the March 2 Plan dilutes Democratic votes around cities, often cracking communities of color and submerging them in overwhelmingly white, Republican districts. (*See, e.g.*, NEIMAN_EVID_00349-00361 (Rodden Aff. at ¶ 33-46).) Those case studies exemplify that the March 2 Plan's supermajority Republican advantage is in spite of, and not because of, natural groupings of precincts and communities of interest. Dr. Chen, too, shows that the urban districts in the March 2 Plan are more favorable to Republicans than comparable districts in the vast majority of his 1,000 simulated plans. (*See* NEIMAN_EVID_00400-00421 (Chen Aff. ¶ 32-61).)

Both Dr. Chen and Dr. Rodden explain that the partisan skew of the March 2 Plan again *cannot* be explained by geography or compliance with the rest of Article XIX. (*See id.* at NEIMAN_EVID_00423, ¶ 62-65; NEIMAN_EVID_00343, 00362 (Rodden Aff. at ¶ 5, 49).) Rather, if one follows the geographic-based line-drawing requirements set out in Article XIX and

avoids drawing contorted district boundaries, the result comes nowhere near the Republican advantage in the March 2 Plan. (NEIMAN_EVID_00423 (Chen Aff. ¶ 64-65); *see also* NEIMAN_EVID_00343 (Rodden Aff. at ¶ 5).) Notably, Respondents' evidentiary submission does not include any evidence purporting to critique Dr. Chen's or Dr. Rodden's methods, analysis, or conclusions.[9]

Finally, the process used to generate the March 2 Plan itself evidences partisan bias and intent. The General Assembly took no action to even attempt to pass a plan because it was unwilling to attempt to reach bipartisan agreement. *See supra* Part II.B. Even though the Republican caucus had created a new plan by February 2—almost two weeks before the General Assembly's deadline—Speaker Cupp did not allow that plan to be introduced or even shared with Democrats to see if a compromise was possible. Instead, the Republican Legislative Commissioners decided that the Republicans on the Commission should be comfortable enough with the plan to pass it within a week of convening—apparently because the new plan would be so similar to the old plan. *Id.*

When the Commission officially took up the baton, it did not take public feedback into account, despite putting up the charade of inviting testimony prior to the introduction of the March 2 Plan. The Republican Commissioners privately corresponded about their proposed map with each other and even (it appears) with Republican congressional candidates, but they did not share

[9] In opposing Petitioners' proposed expedited scheduling order Respondents Huffman and Cupp insisted the case proceed at a slower pace to give them "time to take meaningful discovery of Petitioners' experts." Respondents Huffman and Cupp's Response to Pet'rs' Mot. for Scheduling Order at 9. This representation was made in conjunction with Respondents' broader efforts to secure a scheduling order that pushed briefing past the May 3 primary date. Once the Court entered the operative scheduling order, Respondents declined the opportunity to conduct "meaningful discovery" of Petitioners' experts—they did not bother to depose Petitioners' experts.

a draft map with the Democratic Commissioners or their staff until just before it was released to the public. Instead, Republican Commissioners repeatedly represented to the Democrats that they "had no map." All the while, the Democratic Commissioners and their staff made countless overtures to the Republican caucus map-drawers to work together as a Commission as the Court had instructed, but to no avail. *See* supra Part II.C.

Likewise, after releasing a near-final map the day before the final vote, no modifications were made in response to the Democratic Commissioners' concerns or suggestions; instead, one of the only changes it made in the final 24 hours was in response to feedback from a Republican member of Congress, for whom the Commission shifted lines to ensure that he was not double-bunked with a Democratic incumbent. (*See* STIP_0227 (3/2/22 Ohio Redistricting Commission Transcript).) The Commission's decision to flout the order of this Court and use the invalidated November 20 Plan as the basis for its new plan also shows an unwarranted degree of partisan favoritism. As this Court found in the analogous context of General Assembly redistricting: "We clearly invalidated the entire original plan in [*LWV I*]. The commission's choice to nevertheless start with that plan and change it as little as possible is tantamount to an intent to preserve as much partisan favoritism as could be salvaged from the invalidated plan." *LWV II* at ¶ 38; *see also LWV IV* at ¶ 41-42. Similarly, here, the Commission opted to keep most of the November 20 Plan intact.

### C. Proposition of Law 3: The Commission's revised plan again unduly splits governmental units.

The March 2 Plan once again unduly splits governmental units. Article XIX, Section 1(C)(3)(b) prohibits a congressional plan from "unduly split[ting] governmental units, giving preference to keeping whole, in the order named, counties, then townships and municipal corporations." This Court previously found that the November 20 Plan unduly split urban counties throughout the state. *Adams* at ¶ 77. While the Commission purported to cure constitutional defects

in the November 20 Plan by lowering the *number* of splits to urban areas, it duplicated the same *pattern* of partisan splitting as the previous plan. As this Court has previously explained, "the splitting of a governmental unit may be 'undue' if it is excessive or unwarranted. A split may be unwarranted if it cannot be explained by any neutral redistricting criteria but instead confers a partisan advantage on the party that drew the map—regardless of whether the plan complies with Article XIX, Section 2(B)." *Adams* at ¶ 83.

Certain of the March 2 Plan's splits continue to defy explanation by any neutral criteria. For example, in Hamilton County, the March 2 Plan nominally improves upon the November 20 Plan by lowering the number of districts branching out of Hamilton County from three to two. Good. But the point remains that it is possible to draw a highly compact Cincinnati-based district that is fully contained within Hamilton County (as was seen in several maps submitted to the Commission *and the Republican caucus's own previously-undisclosed map—which it was circulating as late as February 21*). (*See* NEIMAN_EVID_00105 (Affidavit of Dr. Jonathan Rodden, *Adams v. DeWine*, No. 2021-1428, at ¶ 88 & fig. 12 (Dec. 10, 2021)); NEIMAN_EVID_00620-00631 (SPRINGHETTI_000032-000043).)

While the *number* of splits in Hamilton County may not show a violation in-and-of-itself, the question remains *why* Hamilton County is split the way that it is, especially when the Republican caucus seemed willing and able to draw a more compact, single-county district just a week before revealing the March 2 Plan. And there is no neutral explanation for the bizarre districts before the Court.

District 1 once again pairs its urban core of Cincinnati proper with rural, Republican Warren County by way of a narrow corridor through northeast Hamilton County. There is no reason to do this, except to ensure the district is as Republican-leaning as possible without splitting

Hamilton County between more than two districts. Another parallel between the invalidated November 20 Plan and the March 2 Plan is its decision to pair the primarily Black suburbs to the north of Cincinnati with white rural counties to the north of Hamilton County. Again, no valid explanation exists for this separation of Cincinnati from its immediate suburbs, or the pairing of both primarily Democratic areas with rural counties. The Court noted substantially similar (and unwarranted) pairings in the November 20 Plan when it struck down that plan for unduly splitting Hamilton County. *See Adams* at ¶ 86. Undeterred, the Commission has repackaged this strategy with two districts instead of three, but has once again offered no explanation for making the pairings beyond a vague allusion to "policy preferences." The March 2 Plan therefore unduly splits counties.

## IV. Remedy

The Commission ignored this Court's directives and passed another unconstitutional plan. As the Court noted in its opinion, "Gerrymandering is the antithetical perversion of representative democracy. It is an abuse of power—by whichever political party has control to draw geographic boundaries for elected state and congressional offices and engages in that practice—that strategically exaggerates the power of voters who tend to support the favored party while diminishing the power of voters who tend to support the disfavored party." *Adams* at ¶ 2. The Commission has shown, yet again, that it is seeking to create undue partisan advantage for the Republican Party, demonstrating ambivalence, and even contempt, for the anti-gerrymandering provisions of Article XIX. In passing the March 2 Plan, the Commission did not even pretend that the plan complied with Section 1(C)(3)(a)'s partisan fairness standard. Instead, it dismissed any responsibility to draw fair maps wholesale.

We are thus not proceeding on a blank slate. The General Assembly and Commission have already had two opportunities to pass a constitutional congressional districting plan and—due to their unrelenting pursuit of partisan advantage forbidden by the Ohio Constitution—have failed. Their efforts have yielded at least one election under an unconstitutional congressional map. But bad faith politicking should not be rewarded. The Commission's duty is to adhere to the constitution, not do what is politically expedient. Plainly, the unconstitutionality of the March 2 Plan must be remedied, and must be remedied now.

Petitioners respectfully submit that the Court has many tools at its disposal to fix the problems with the plan that Petitioners have identified above. The Court's deployment of those tools should be tailored to the task at hand: ensuring that a constitutionally-compliant congressional plan is in place for future elections as soon as possible, notwithstanding certain Commissioners' unrelenting and voracious appetite to flout this Court's orders in service of seeking undue partisan advantage. Specifically, the Court should declare the March 2 Plan unconstitutional, order the General Assembly, led by Speaker Cupp and President Huffman, and the Commission (if necessary) to adopt a constitutional plan, retain jurisdiction, and appoint a special master to draft a remedial plan for the Court to implement if the General Assembly and Commission do not timely adopt a constitutional remedial plan.

### A. The Court should strike down the March 2 Plan, order the General Assembly and the Commission to adopt a new map that does not violate Section 1(C)(3), and retain jurisdiction.

This Court should declare the new plan unconstitutional for the reasons described above. *See supra* Part III. The Commission, as well as the General Assembly, is bound by this Court's order to adopt maps that comply with Article XIX, Section 1(C)(3). *Adams* at ¶ 99. As a result, the March 2 Plan should be struck down, and this Court should order the General Assembly to pass a new plan that complies with all requirements of Article XIX of the Ohio Constitution and, in

particular, does not violate Section 1(C)(3). If the General Assembly is unable or unwilling to do so in the period set out in Article XIX, Section 3(B)(1), the Commission should again be given the opportunity per Article XIX, Section 3(B)(2). Given the General Assembly's and the Commission's repeated passage of unconstitutional maps throughout the congressional and state legislative redistricting cycle thus far, the Court should set forth specific directives for the remedial plan and retain jurisdiction to ensure the remedial plan complies with those directives.

### B. While the General Assembly and Commission work to enact a remedial plan, this Court should prepare to adopt a remedial plan of its own in the event the General Assembly and Commission do not timely adopt a constitutional remedial plan.

It is regrettable that the General Assembly and Commission have demonstrated that they cannot be trusted to comply with the directives of this Court. While Article XIX gives the General Assembly and Commission the power to pass a plan in the first (or even second) instance, it is silent as to what occurs if a remedial process fails to produce a constitutionally compliant congressional plan. In the interests of finality and judicial economy, the Court should look to additional remedial mechanisms to ensure that Article XIX's reforms actually result in a constitutionally-compliant congressional map. Specifically, while the remedial process continues in the General Assembly and the Commission, this Court should appoint a special master who can draft a remedial plan to be put in place in the likely event the General Assembly and Commission fail to timely adopt a constitutional remedial plan. Alternatively, the Court could order the parties to submit proposed remedial plans that the Court will adopt in the absence of a compliant plan adopted by the General Assembly or Commission.

#### 1. This Court has authority to implement a congressional map.

First, there can be no dispute that this Court has the authority to implement a congressional map of its own. While Article XI, Section 9(D) of the Ohio Constitution, which governs General Assembly redistricting, provides that "no court shall order" the implementation or adoption of any

specific plan for legislative districts, Article XIX, which governs congressional redistricting, does not contain any provision limiting this Court's remedial authority. *See* Article XIX, Section 3. This omission is particularly telling given that the provision in Article XI was adopted before Article XIX. *Compare* Article XI, Section 9 (adopted 2015) *and* Article XIX, Section 3 (adopted 2018). The drafters and voters who approved Issue 1 (and consequently Article XIX) were aware of Article XI, Section 9's limitation on judicial intervention and made a conscious choice to exclude it from the new process for congressional maps. *See City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 28 ("[W]e presume that the voters who approved an amendment were aware of existing Ohio law.").

Familiar principles of interpretation require the Court to give meaning to textual differences such as these. When a drafter includes particular language in one section of a statute, but excludes it in another, it is generally presumed that the drafter acted "intentionally and purposely in the disparate inclusion or exclusion." *Salinas v. United States RRB*, 141 S. Ct. 691, 698 (2021) (quoting *Russello v. United States*, 464 U.S.16, 23 (1983)); *Bates v. United States*, 522 U.S. 23, 29 (1997) (finding that the choice to include the "intent to defraud" language in one provision and exclude it in another was intentional); *Chapman v. United States*, 500 U.S. 453, 459 (1991) (finding that because U.S. sentencing guidelines distinguished between a "mixture or substance" containing a drug and a "pure" drug, it was proper to conclude that Congress's failure to so distinguish with respect to LSD was not inadvertent). A similar negative inference is warranted here.

In fact, Section 3(B)(1) of Article XIX, which speaks directly to this Court's jurisdiction, only says that in the event a plan is ruled unconstitutional, the "general assembly shall pass that [remedial] plan not later than … the thirtieth day after the day on which the order is issued." If the

general assembly fails, the Commission "shall adopt a congressional district plan" that "remed[ies] any legal defects in the previous plan identified by the court." Article XIX, Section 3(B)(2). After that timeline concludes, there is nothing in Article XIX that prevents this Court from ordering a plan of its own. Again, that precise prohibition exists in Article XI, Section 9(D) ("No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.") but does not appear in the analogous Article XIX, Section 3.

Likewise, the mere fact that Article XIX, Section 1 provides that "the general assembly shall be responsible for the redistricting of this state for congress," does not deprive this Court of the power to draw its own map. *Compare, e.g.*, Minn. Const. art. IV, § 3 ("[T]he legislature shall have the power to prescribe the bounds of congressional and legislative districts.") *with Wattson v. Simon*, No. A21-0243, 2022 WL 456357 (Minn. Feb. 15, 2022) (adopting court-drawn congressional districts). As an initial matter, any action on the part of this Court will be because the General Assembly abdicated its responsibility to pass a constitutionally-compliant map four times—in September 2021, November 2021, February 2022, and (one can expect) summer 2022—not because this Court has deprived the General Assembly of its power. And, like the interpretation above, any reliance on Article XIX, Section 1 to bar a court-drawn map would equate the conferral of power on a legislative body with the exclusion of state court's power of judicial review. Such a sweeping aggrandizement of the legislative power at the expense of the judiciary finds no precedent in the Ohio constitution nor, for that matter and as discussed below, in the federal constitution.

A comparison with Article XI also confirms the weakness of this interpretation. Article XI analogously provides that the Commission "shall be responsible for the redistricting of this state for the general assembly." Ohio Constitution, Article XI, Section 1(A). But Article XI also

specifically provides that this Court may not "adopt a particular general assembly district plan" or "order, in any circumstance, the implementation or enforcement of any general assembly district plan that has not been approved by the commission in the manner prescribed in this article." *Id.*, Section 9(D). If the vesting of redistricting power in the Commission were enough to eliminate the Court's power to draw General Assembly maps, 9(D) would be surplusage. *See LWV I* at ¶ 94 ("[N]o part of the Constitution 'should be treated as superfluous unless that is manifestly required' . . . [this Court] should avoid any construction that makes a provision 'meaningless or inoperative.'"). Once again, Article XIX's omission of such a provision makes clear that its framers intended this Court to play a role in the adoption of remedial maps.

Moreover, there is a century of unbroken precedent from the United States Supreme Court recognizing the role state courts play in congressional redistricting. *See, e.g., Rucho v. Common Cause,* 139 S. Ct. 2484, ____ (2019) ("[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply" in partisan gerrymandering cases challenging congressional maps) (emphasis added); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm.*, 576 U.S. 787, 817-18 (2015) ("[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."); *Branch v. Smith*, 538 U.S. 254, 272, 278 (2003) (explaining that federal law enacted by Congress "embraces action [concerning redistricting] by state and federal courts when the prescribed legislative action has not been forthcoming"); *Growe v. Emison*, 507 U.S. 25, 34, 42 (1993) (holding "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's . . . federal congressional districts" and in "ignoring the . . . legitimacy of state judicial redistricting"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a State to require valid reapportionment

or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."); *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) ("[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction"); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (holding that state legislatures may not enact laws under the Elections Clause that violate "the Constitution and the laws of the state."). Indeed, just this year, the United States Supreme Court refused to intervene to block elections from running under court-ordered maps when they were challenged on the theory that state courts lack the power to draw maps of their own. *Grothman v. Wisconsin Elections Comm'n*, 142 S. Ct. 1410 (2022); *Toth v. Chapman*, 142 S. Ct. 1355 (2022); *Moore v. Harper*, 142 S. Ct. 1089 (2022). Respondents' approach to Article XIX would turn this scheme on its head by granting the General Assembly effectively unreviewable power to gerrymander the state.

Of course, this Court need not adopt a map right away. Article XIX, Section 3 contemplates a sixty-day period in which the General Assembly and the Commission will have a single opportunity to implement an order from this Court requiring a plan redraw. In any event, a remedial constitutional map drawn by the General Assembly or the Commission with bipartisan support, that can remain in place for the rest of the decade, is surely the best solution to the ongoing crisis. Nevertheless, justice delayed is justice denied. And though "the possibility of delayed justice must be balanced against the principles of judicial economy," *State v. Powell*, 2019-Ohio-4286, 148 N.E.3d 51, ¶ 41 (6th Dist.), here, both factors weigh in the same direction. The state is already holding elections in 2022 under a badly gerrymandered plan. This Court can and should exercise its map-drawing authority to break the continuous cycle of lawlessness and wasted resources being

perpetuated by the General Assembly and the Commission. Doing so would not break any new ground. Courts routinely enforce applicable state and federal constitutional provisions by adopting districting plans if the redistricting authority fails to adopt a constitutional plan, often by choosing from maps offered by parties in the case or by a special master. *See infra* Part IV.B.2 (citing cases). Allowing the General Assembly and the Commission infinite bites at the redistricting apple would ultimately result in nothing other than the Commission poisoning Ohioans' right to vote in constitutional congressional districts.

**2. Courts regularly use special masters to draft remedial plans to be implemented by the court, and Ohio courts have the power to appoint a special master.**

In order to assist in its implementation of a constitutional remedial plan, this Court can, should it deem necessary, appoint a special master. The Court's authority to appoint a special master pursuant to its "inherent power to enforce [its] final judgments" is "well established." *Grande Voiture D'Ohio v. Montgomery Cnty. Voiture No. 34*, 2d Dist. Montgomery No. 29064, 2021-Ohio-2429 (collecting cases). "[A]s jurisprudence developed in Ohio, it is clear that the appointment of a special master was inherent in courts of equity and in actions to which the parties were not entitled to a jury." *State ex rel. Allstate Ins. Co. v. Gaul*, 131 Ohio App. 3d 419, 431, 722 N.E.2d 616 (8th Dist. 1999). And again, nothing in Article XIX limits this Court's ability to make such an appointment or to adopt a plan drafted by a special master. As discussed above, Article XIX, in contrast to Article XI, contains no restrictions on this Court's remedial powers.

It is also commonplace for courts in other states to adopt remedial maps with the help of a special master. In North Carolina, for example, the state's highest court struck down the congressional map passed by that state's General Assembly and gave the General Assembly a chance to pass a remedial plan. *Harper v. Hall*, 868 S.E.2d 499, 559 (N.C. Feb. 12, 2022). Next, the trial court struck down that remedial plan upon a showing that the plan was constitutionally

deficient, and simultaneously adopted a plan drawn by a special master. Order on Remedial Plan, *Harper v. Hall*, No. 21-CVS-500085 (Sup. Ct. N.C. Feb. 23, 2022), *pet. denied* No. 413PA21 (N.C. Feb. 23, 2022). Just last week, New York's highest state court struck down the congressional plan passed by the legislature as a partisan gerrymander and ordered the adoption of a plan to be drafted by a special master; the legislature was not given another chance to pass a remedial map. *Harkenrider v. Hochul*, 2022 NY Slip Op. 02833, at 32 (N.Y. Apr. 27, 2022).

The appointment of a special master will enable this Court to ensure compliance with its order and at the same time guarantee that a constitutional congressional plan will be in place for upcoming elections. Through the appointment of a special master, the Court would establish a dual-track remedial process. On one track, the General Assembly and Commission would work to enact a constitutional plan in the prescribed 60-day period. On the second track, a special master would work on a back-up remedial map, which the Court would implement in the event the General Assembly and Commission either fail to (1) adopt a map within 60 days or (2) once again adopt a map that violates Article XIX. Alternatively, the Court could take the same basic approach, but eschew a special master in favor of considering remedial plans submitted directly by the parties for the Court's consideration. *See Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 72, 399 Wis. 2d 623, 630; *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022); *Wattson*, 2022 WL 456357, at *8.

Under either approach, the assurance that this Court would adopt a constitutionally-compliant map in the event the General Assembly and Commission fail to follow the law would send a clear message to the two bodies that they cannot—as they have done thus far in both the congressional and state legislative context—continue to flout the partisan fairness requirements of the Ohio Constitution with no consequences.

## V. Conclusion

For the foregoing reasons, Petitioners request that this Court declare the March 2 Plan invalid, order the General Assembly and Commission to adopt a new remedial plan, and appoint a special master to draft a remedial plan for the Court to implement in the event the General Assembly and Commission do not timely adopt a constitutional remedial plan.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via email this 5th day of May, 2022 to the following:

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