

THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, et al., : Case No. 2021-1193
:
Relators, : APPORTIONMENT CASE PURSUANT
: TO ARTICLE SECTION 9
v. :
:
Ohio Redistricting Committee, et al., :
:
Respondents. :

The Ohio Organizing Collaborative, et al. : Case No. 2021-1210
:
Relators, : APPORTIONMENT CASE PURSUANT
: TO ARTICLE SECTION 9
v. :
:
Ohio Redistricting Committee, et al. :
:
Respondents. :

Bria Bennett, et al. : Case No. 2021-1198
:
Relators, : APPORTIONMENT CASE PURSUANT
: TO ARTICLE SECTION 9
v. :
:
Ohio Redistricting Commission, et al. :
:
Respondents. :

BRIEF OF AMICUS CURIAE RENEW OHIO IN SUPPORT OF RESPONDENTS

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STATEMENT OF AMICUS INTEREST

Renew Ohio files this amicus curiae brief in support of the Respondents in the above-captioned matters, pursuant to S.Ct.Prac.R. 16.06.

Founded in 2013, Renew Ohio is an independent, nonprofit organization under section 501(C)(4) of the Internal Revenue Code whose singular goal is to support wise policymaking by Ohio's leaders. Renew Ohio's express hope is that its work will encourage all State leaders, Republicans and Democrats alike, to make the right decisions to improve Ohio's future.

With this goal in mind, Renew Ohio actively supported the 2014-2015 bipartisan reform of Ohio's legislative reapportionment law, believing the best policy decisions are made by legislators who faithfully represent their constituents, and that fair districts produce faithful legislators.

Jeff Jacobson, a Renew Ohio board member, has been an extensive part of Ohio's redistricting efforts for nearly thirty (30) years, including leading for legislative Republicans the bipartisan negotiations that resulted in passage through the General Assembly of the aforementioned 2014-2015 constitutional amendment reforming Ohio's redistricting process. *See*, Affidavit of Jeff Jacobson, attached hereto, ¶¶ 1-5.

Renew Ohio urges all members of the Ohio Redistricting Commission to follow the letter and spirit of the Constitution. In furtherance of this purpose, Renew Ohio broke down several of the maps proposed during the 2021 Ohio redistricting process – reviewing each map vis-à-vis the constitutional requirements contained in Article XI of the Ohio Constitution.

Considering the foregoing, Renew Ohio has a strong interest in the present case, which raises issues of central importance to all Ohio citizens and strikes at the core of Anglo-American independence – the Constitutional right to vote.

SUMMARY OF ARGUMENT

Article XI, Section 6 of the Ohio Constitution contains aspirational elements. While Section 6(B) asks the redistricting commission to “attempt” to accomplish what has been variously termed “representational fairness” or “partisan fairness”, this aspirational goal is but one among many directives in Article XI, and is both subordinate and conditional upon achieving the mandatory provisions of Article XI.

In fact, the mandatory provisions of Article XI, Section 3(C) and Ohio’s current geographic, population and partisan demographics make it impossible to constitutionally vary more than a few districts to a degree sufficient to change which party is in the majority in any district.

Indeed, what Relators propose as alternatives to the commission’s plan would require unlawful gerrymandering – which the commission’s plan avoids. Because the approved General Assembly district plan complies with the requirements of Article XI, Amicus Curiae Renew Ohio submits that the Court should uphold the approved district plan.

STATEMENT OF FACTS

Amicus Renew Ohio adopts by reference the procedural and factual history set forth in Respondents’ merit briefs and in the attached Affidavit of Jeff Jacobson.

LAW AND ARGUMENT

I. CONTRARY TO RELATORS’ CLAIMS, SECTION 6(B)’S DIRECTIVE THAT THE REDISTRICTING COMMISSION ATTEMPT WHAT HAS BEEN VARIOUSLY TERMED “REPRESENTATIONAL FAIRNESS” OR “PARTISAN FAIRNESS” IS BUT ONE AMONG MANY DIRECTIVES IN ARTICLE 11 AND IS BOTH SUBORDINATE AND CONDITIONAL.

A. As is clear from the text of the Constitution, the primary directive of Article XI, both as originally adopted in 1967 and as amended in 2015, is the protection of voice and voting power of communities of interest—counties, municipalities, and townships.

The current version of Article XI, Section 3 contains the primary directive of Article XI: Limit the discretion of the Apportionment Board (now the Redistricting Commission) to dilute the ability of voters in a given political subdivision to select their own representatives.

That directive is not new, but was the subject of great detail in the original version of Article XI adopted in 1967.

Former Section 7(A) directed the Apportionment Board to include one or more whole counties in a district “to the extent consistent with” having districts of appropriate population size.

Section 7(B) required districts that were not whole counties to be formed by combining whole counties, townships, municipalities, and wards, in that order. Only where the Board could not draw a district from whole political subdivisions was it permitted to split a subdivision, but only one per district.

Section 9 required the Board to create districts containing one county when the county’s population was within a certain range—and gave the Board discretion to create single-county districts when a county’s population was just outside that range.

While providing rules that limited the Board’s ability to “crack” the influence of political subdivisions, Article XI also provides severe limits on the Board’s ability to draw districts in which

residents of large counties could outvote and take away self-determination of residents of smaller cities and counties.

Section 8 limits the ability of a large county to outvote smaller ones in House elections by requiring that the Board draw districts entirely within the boundaries of a county and that only after it is impossible to create another whole district within the county could a portion of it be combined with residents of other counties in a district. And that “remainder” must itself be kept intact. At most only one district outside a large county would have voters from that large county.

Similar restrictions animate the drawing of Senate districts. Section 11 provides that a county with a population large enough to constitute at least a Senate district must have one or more entire Senate districts drawn entirely within a county before the remainder can be combined with territory outside of the county lines. Similarly, a large county with more than one House district cannot divide its House districts between separate Senate districts except where it can draw an entire Senate district within the county. But even then, the remaining territory must all be included in the same Senate district.

While the 2015 amendment to Article XI did add some new standards that the Board (now expanded and renamed the Redistricting Commission) must attempt to meet, it retained, emphasized, streamlined, and clarified its primary directive.

Section 3(C)(1) requires districts to be drawn from the county with the largest population on down, drawing entire districts within a county and the remainder contained in only one district—as was previously required.

Section 3(C)(2) mandates single-county districts within a certain population range.

Section 3(C)(3) limits “where feasible” the number of times a county can be split to one.

A new provision protects against unnecessary splitting any city or township that is larger than half a district and smaller than a full district. Section 3(D)(3).

The Senate districting rules, now contained in Section 4, are exactly the same as they were in the original version.

B. Section 6(B)'s districting goal does not rise to the level of an enforceable districting rule but is limited by the text of Article XI in several important ways.

1. Section 6 itself makes clear that its directives are subordinate to every other directive in Article XI.

Article XI, Section 6 is clear: "Nothing in this section permits the commission to violate the district standards described in Section 2, 3, 4, 5, or 7 of this article."

Those sections referenced in Section 6 are binding directives and restrictions on the power of the Commission. Section 6 does not carry the same weight but is subordinate to those other sections. Claims to the contrary made in the campaign supporting the issue do not supersede the language of the Amendment.

2. Section 6(B)'s "partisan fairness" goal is not to be read in a vacuum but in balance with the other two divisions of Section 6, and as such does not permit gerrymandering in furtherance of the goals of Section 6(B).

Sections 6(A) and 6(B) are equal standards. Section 6 does not subordinate the prohibition on gerrymandering to the goal of proportional districts. They are to be read together: Attempt to be as proportionally fair as you can be *without gerrymandering*.

C. Relators conflate aspirational provision with the required provisions of Ohio Constitution Article XI.

Under traditional standards of constitutional and statutory construction, Respondents were to *attempt* to meet the aspirational standards of Ohio Constitution Article XI, Section 6(A)-(C) in

drawing a district plan. This means Respondents were not required to successfully meet Section 6's requirements prior to approving a district plan.

In construing statutes, Courts are required to:

[E]valuate a statute "as a whole and giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." Indeed, as we determined in *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004 Ohio 6549, 819 N.E.2d 1079, statutes "may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act." *Id.* at ¶ 13, quoting *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 36 O.O. 554, 78 N.E.2d 370, paragraph five of the syllabus.

Boley v. Goodyear Tire & Rubber Co., 125 Ohio St. 3d 510, 513, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21 (2010). The Court's duty is to give effect to words used, not to delete words or to insert words not used. *State v. White*, 103 Ohio St. 3d 580, 583, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 14; see *Bernardini v. Conneaut Area City School Dist. Board of Education*, 58 Ohio St. 2d 1, 4, 12 O.O.3d 1, 3, 387 N.E.2d 1222 (1979) (further citations omitted).

The Court applies the same rules of construction whether construing the Constitution or a statute. *Toledo City Sch. Dist. Bd. of Educ. V. State Bd. of Educ. Of Ohio*, 146 Ohio St. 3d 356, 2016-Ohio-856, 56 N.E.3d 950, ¶ 16; see *Miami Cty. v. Dayton*, 92 Ohio St. 215, 223, 110 N.E. 726 (1915). Words used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning. *Id.* at ¶ 16; see also *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 584, 651 N.E.2d 995 (1995).

Given the principles above, “**shall**” connotes a mandatory obligation unless other language evidences a clear and unequivocal intent to the contrary while “**attempt**” means to make an effort to do, accomplish, solve, or effect or the act or instance of trying to do or accomplish something:

an act or instance of attempting something. *See State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St. 3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 28 (defining shall); *see also* Merriam-Webster Dictionary, Definition of Attempt, (accessed November 2, 2021).

Article XI, Section 6 requires only that the Redistricting Commission attempt to meet the subsequent aspirational statements contained in subsections (A) – (C). Attempt means to try. It does not mean to complete.

From the plain reading of Article XI, Section 6’s language, the statements contained in (A) – (C) are aspirational. Section 6 itself make clear that the provisions contained therein are subordinate to Sections 2, 3, 4, 5, and 7. Sections 6(A) - (C) cannot be considered if it results in the violation of mandatory requirements contained in Sections 2, 3, 4, 5, and 7. Therefore, the language in Article XI, Section 6, clearly falls below the mandatory requirements of Sections 2, 3, 4, 5, and 7.

Relators’ effectively ask the Court to either (1) ignore the opening sentence of Section 6, Article XI completely, or (2) remove a portion of the sentence from the Court’s review.

Ignoring the first sentence of Section 6, would impose a mandatory obligation upon the redistricting commission to successfully complete subsections (A)-(C). Article XI, Section 6 reads:

The Ohio redistricting commission shall attempt to draw a general assembly district plan that meets all of the following standards:

(A) No general assembly district plan shall be drawn primarily to favor or disfavor a political party.

(B) The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely

to the statewide preferences¹ of the voters of Ohio.

(C) General assembly districts shall be compact. Nothing in this section permits the commission to violate the district standards described in Section 2, 3, 4, 5, or 7 of this article. (*Id.*)

Alternatively, interpreting the first sentence of Section 6 to read “the Ohio redistricting commission shall ~~attempt to~~ draw a general assembly district plan...” has the same impact. However, by ignoring the word attempt, Relators violate a principle of constitutional and statutory interpretation by failing to give effect to every word used in the provision. In either instance, the Court is asked to rewrite Ohio’s Constitution by changing the Section 6 language from aspirational to mandatory.

1. Article XI, Section 9 supports this interpretation of Article XI’s hierarchy.

The hierarchy of Article XI is clear – the aspirational components of Sections 6(A) and (B) are subsumed if it comes at the cost of violating any of the mandatory requirements in Sections 2, 3, 4, 5, and 7. Only if Sections 6(A) and (B) do not violate the Sections listed above may the redistricting commission attempt to comply with Section 6. The jurisdictional limitations imposed upon the Court for remedies under Section 9(D)(3) clearly support this conclusion.

Article XI, Section 9(D)(3) limits the Court’s jurisdiction to the following:

(3) If the supreme court of Ohio determines that a general assembly district plan adopted by the commission does not comply with the requirements of Section 2, 3, 4, 5, or 7 of this article, the available remedies shall be as follows:

(a) If the court finds that the plan contains one or more isolated violations of those requirements, the court shall order the commission to amend the plan to correct the violation.

¹ In response to Relators’ anticipated arguments, it should be noted that Article XI, Section 6(B) states “preferences” not proportions or percentages.

(b) If the court finds that it is necessary to amend not fewer than six house of representatives districts to correct violations of those requirements, to amend not fewer than two senate districts to correct violations of those requirements, or both, the court shall declare the plan invalid and shall order the commission to adopt a new general assembly district plan in accordance with this article.

(c) If, in considering a plan adopted under division (C) of Section 8 of this article, the court determines that both of the following are true, the court shall order the commission to adopt a new general assembly district plan in accordance with this article. (emphasis added).

The absence of Section 6 above is notable for at least two reasons. First, it confirms the hierarchy of Sections 2, 3, 4, 5, and 7 versus Section 6. Second, and more interestingly, it limits the potential remedies available to this Court by first requiring that a section *other* than Section 6 be violated for the Court to have the ability to order the district plan be revised under 9(D)(3). Not one of Relators' Complaints allege a violation of Article XI, other than Section 6(A) and (B). While a violation of Section 6 is not listed as justiciable under Section 9, the *districting standard* described in Section 6(B) is mentioned as a tool by which the Court can judge the severity of a violation of the actionable sections in order to prescribe the proper remedy. (Section 9(D)(3)(i)).

2. At the time it was passed, Section 6 was the only place that the words “shall attempt” appear in the Ohio Constitution, and are intended along with the careful wording of Section 9 to make it clear that Section 6 goals are aspirational, and not justiciable or enforceable.

Starting with the unprecedented use of the phrase “shall attempt,” the drafters of the 2015 constitutional amendment were careful in selecting the terminology used in Section 6. The goals stated in Sections 6(A) and 6(B) are described as “standards” that the Commission “shall attempt” to attain. If the drafters of the 2015 constitutional amendment had intended to *require* partisan fairness under 6(B), they would not have made 6(B) co-equal with 6(A)'s prohibition on gerrymandering. They would not have made it subordinate to Sections 2, 3, 4, 5, and 7. They would

not have called partisan fairness a “standard” that the Commission “shall attempt,” and instead would have plainly stated that the Commission “shall draw.”

Subsequent embellishments and election statements does not negate or supersede the plain wording of the Amendment itself, no matter how many times repeated by those who wish to imbue Section 6(B) with a force that it was not intended to merit.

II. GIVEN SECTION 3(C)’S DIRECTIVES AND OHIO’S CURRENT GEOGRAPHIC, POPULATION, AND PARTISAN DEMOGRAPHICS, THERE ARE VERY FEW COUNTIES WHERE THE COMMISSION HAS THE ABILITY TO VARY DISTRICT COMPOSITION TO A DEGREE SUFFICIENT TO CHANGE WHICH PARTY IS IN THE MAJORITY IN ANY DISTRICT.

Section 3(C)’s line-drawing directives are differentiated based upon county population. All districts are required to have populations within 95%-105% of a “ratio of representation,” defined as 1/99th of the population of the State. Any county that falls within that range must be assigned its own House district. Section 3(C)(2).

More complex rules apply when a county has a greater population than the maximum permitted in a single district (i.e., greater than 105% of a “ratio of representation”). Section 3(C)(1) directs the Commission to begin drawing House districts from the most populous of these counties (hereinafter “Large Counties”) on down, and within each such Large County drawing House districts entirely within that county until less than a full district’s population remains unassigned to any district. The Commission must then assign the entire “remainder” to a single House district that will, of necessity, take in territory from another county in order to meet minimum population standards. Ohio has twenty-two such Large Counties, according to the 2020 Census.

No similar rules restrict the assignment of the remaining counties, all with a population less than 95% of a “ratio of representation.” [hereinafter “Small Counties”] Some, in part or in whole, will be assigned to districts that include the “remainders” of Large Counties. All the rest will be assigned to districts that include only whole or partial Small Counties.

A. Section 3(C)(2)'s directive and not the Commission's discretion mandates the drawing of two single-county districts.

Richland and Wayne Counties are the only ones whose population in the 2020 Census is within 5% of a "ratio of representation," and thus each must be assigned to its own single-county House district. The Commission has no discretion to do otherwise.

B. At the very most, only one Democrat-majority district can be constitutionally drawn in Ohio's Small Counties.

Whereas in the not-too-distant past there were Small Counties whose voters favored Democrat Party candidates,² today few remain. Athens County is the strongest for Democrats with about a 60% "partisan lean" for the decade. Erie County, at the opposite end of the State, comes next at about 57% Democrat. What complicates things even further is that all of the other Small Counties that traditionally favored Democrats have seen a collapse of Democrat support so strong that they are now rated as firmly Republican on Dave's Redistricting website.

While there are occasional college towns or county seats in Small Counties that favor Democrats, they are few and far between and outvoted (other than in Athens County) by their Republican neighbors living in townships or in other towns and villages.

Finally, submissions from both the Commission Democrats³ and the self-named "Citizens Redistricting Commission" proposed only one Small County district that in which Democrats were

² Unless stated otherwise, data regarding the partisan composition of proposed legislative districts is taken from the website Dave's Redistricting. The composition of Ohio's voting precincts changed in 2012 and 2014 in ways that are not easily traceable, if not unknown and unavailable, rendering it difficult if not impossible to have confidence in any ten-year district analysis. Dave's Redistricting has been cited by press and members of the Commission alike.

³ This brief discusses only the proposal from Commission Democrats made on September 2, 2021. That proposal is used because it contains 44 districts in which Democrats are favored. Their previous plan, proposed just two days earlier, had been withdrawn in favor of the proposal referenced here. Their later versions proposed fewer districts with a Democrat majority.

avored, and in that one district only by a small margin. Despite their protestations against the Commission’s map, neither ever proposed any way to draw more than one Small County district that favors Democrats. The same is true for Relators. The twenty-one districts of rural Ohio cannot be drawn in a way that yields more than one district favoring Democrats.

Analyzing the twenty-one rural districts drawn by the Commission shows that the “partisan lean” of those districts collectively is 31% D – 69% R. Using Relators’ own interpretation of Section 6(B), Democrats should be favored in 6 or 7 of those 21 Small County districts. But Ohio’s geographic, population, and partisan demographics—along with Section 3’s inviolable directives—make it impossible to do so. *See*, Jacobson Affidavit, ¶ 12.

C. Sections 3(C)(1) and 4(B) of Article XI—which cannot be violated in furtherance of Section 6 directives—effectively determine the partisan leaning of districts drawn in fourteen of Ohio’s twenty-two Large Counties.

As stated previously, Section 3(C)(1) directs the Commission to draw House districts entirely within Ohio’s Large Counties until the number of residents of that county who remain unassigned is too small to constitute a district, and the “remainder” can only be assigned to one district.

For most Large Counties, district lines cannot be drawn in ways that affect which Party is favored. Butler County will have three House districts that favor Republicans, no matter how the lines are drawn; Lucas County will have three districts that favor Democrats and one that favors Republicans. Springfield City may still favor Democrats, but the rest of Clark County favors Republicans so strongly that a full House district will favor Republicans no matter which other parts of Clark County are added to Springfield. *See*, Jacobson Affidavit, ¶ 13.

With the exception of the aforementioned Lucas County and the eight counties discussed *infra*, only in Trumbull County can even a single House district be drawn that favors Democrats.

Both the Commission majority as well as the Democrat members of the Commission drew a Democrat-favoring district in Trumbull County, as did Relators' expert Dr. Jonathan Rodden.⁴ Similarly, both (as well as Dr. Rodden) drew a House district in Portage County in which neither Party has a majority. *See*, Jacobson Affidavit, ¶ 14.

In fact, the Commission majority and the Commission Democrats agree on the partisan outcome of every one of the 28 House districts drawn in Butler, Clark, Clermont, Delaware, Fairfield, Greene, Lake, Licking, Lucas, Medina, Portage, Trumbull, Warren, and Wood Counties. Outside of three districts in Lucas County and one in Trumbull that favor Democrats, and one in Portage that favors neither party, the remaining 23 districts all favor Republicans in the plans proposed by both the Commission majority and Commission Democrats.⁵ *See*, Jacobson Affidavit, ¶ 15.

D. For the 51 House districts drawn outside the eight Large Counties yet to be discussed, the partisan breakdown of the Commission Democrats' proposal matches the Commission's adopted map in all but one district.

The following table summarizes the partisan breakdown of the three types of districts discussed thus far. *See*, Jacobson Affidavit, ¶¶ 16, 17. With the sole exception of one Small-County district, there is complete unity between the two sides over which Party is favored in each of these 51 districts:

⁴ Although Dr. Jonathan Rodden is only cited as an expert in two of the cases, and Dr. Kosuke Imai in two as well, only Dr. Rodden produced a map showing how he would draw 44 Democrat-majority districts, as Relators demand. In contrast, Dr. Imai ran 5,000 simulations to demonstrate that it is possible to draw a map with 44 Democrat-majority districts. Unlike the map proposed by Dr. Rodden, Dr. Imai's maps have not been produced and thus no comparison is possible. Dr. Imai's contentions will be addressed briefly *infra*.

⁵ The "Citizens Redistricting Commission" and Relators' expert Dr. Rodden do not propose otherwise with regard to districts in these fourteen counties.

Counties where Commission has little discretion over which Party has the district's majority

District Type	Single-County Districts	Districts containing only Small Counties	14 Large Counties where the Commission Democrats' proposal mirrors the adopted map on partisan breakdown	Totals
Total Districts	2	21 ⁶	28	51
Republican Majority districts				
Adopted plan	2	21	23	46
Commission Democrats proposal	2	20	23	45
Democrat Majority districts				
Adopted plan	0	0	4	4
Commission Democrats proposal	0	1	4	5
Toss-up districts				
Adopted plan	0	0	1	1
Commission Democrats proposal	0	0	1	1

Relators' rhetoric and reams of expert affidavits notwithstanding, Section 3's directives dictate the drawing of Ohio's single-county districts. Those directives, coupled with Ohio's geographic, population, and partisan demographics, make it almost impossible for the Commission

⁶ The Democrat Commission proposal actually had 20 rather than 21 House districts entirely composed of Small Counties. The twenty-first district included a very small piece of Wood County that in no way affected the partisan majority of the district. For ease of comparison, because the Commission Democrat and the Commission's adopted plan agree on the partisan breakdown of the two districts (Republicans favored in both), and Relators' expert Dr. Rodden does as well, this table ignores the small portion of Wood County in that twenty-first district and groups it as if it were composed only of Small Counties.

to change which Party is favored in districts created in Small Counties and in fourteen of 22 Large Counties.

Thus, if the Commission were to have violated Section 6(B), as Relators allege, those violations must have occurred in the eight counties where demographics and Section 3's directives do not severely limit the Commission's discretion.

E. In the eight Large Counties where the Commission has sufficient discretion under Sections 3 and 4 and demographics allow the Commission to substantially affect the proportion of districts that favor each Party, the Commission's adopted district lines more "closely correspond" to the partisan lean of voters in those districts than what either Relators or Commission Democrats propose.

Relators insist that Section 6(B) requires the Commission to draw 44 House districts in which Democrats are favored. Assuming arguendo that their interpretation of "the statewide preferences of the voters of Ohio" (and their math) is correct, and that no more than 4 or 5 districts favoring Democrats can be drawn among the 51 districts already discussed, Relators are more specifically demanding that the Commission be required to draw 39 or 40 Democrat districts in these eight counties. That is, 39 or 40 districts out of a total of 48—a minimum of 81% of districts favoring Democrats and a maximum of 19% of districts favoring Republicans.

While Democrats have a partisan lean majority in six of these eight counties (Franklin, Cuyahoga, Hamilton, Summit, Mahoning, and Lorain favor Democrats, the latter two by small margins; Stark and Montgomery Counties favor Republicans, the latter also by a small margin), Republicans are competitive in most of them in statewide elections and in fact carried the Presidential vote at least once in half of those eight counties. *See*, Jacobson Affidavit, ¶ 18.

III. THE COMMISSION’S PLAN AVOIDS GERRYMANDERING, WHILE RELATORS’ PROPOSALS WOULD REQUIRE GERRYMANDERING.

A. Drawing 44 House districts favoring Democrats is impossible without gerrymandering.

Relators tout the research of Dr. Kosuke Imai to demonstrate that it is not difficult to draw maps that award Democrats 44 House districts. Therefore, they claim, Respondents did not even attempt to meet the directives of Section 6(B).

But that argument is a red herring. Amicus readily concedes that it is possible to draw 44 districts that favor Democrats—if and only if the Commission were to gerrymander in favor of Democrats. And such a partisan gerrymander, prohibited under Section 6(A), is the only way to accomplish what Relators demand.

B. Comparing the partisan lean of these eight counties to the number of House districts in which each Party is favored under the Commission’s adopted plan, the plan proposed by Commission Democrats, and that of Relators’ own expert demonstrates the absurd outcome of Relators’ demands.

The happy existence of plans drawn by Commission Democrats and Relators’ own experts allows this Court to judge for itself what would be required in order to meet Relators’ demands under their reading of Section 6.

As has been demonstrated, it is not possible to meet Relator’s demands in any significant way in the 51 districts previously discussed. The entire burden would thus fall on the remaining 48 districts within the eight Large Counties mentioned above.

The eight counties by themselves have a combined partisan lean of 58% Democrat-42% Republican and have a combined population roughly equal to 45 House districts. However, as explained earlier, not all residents of these Large Counties can be included in the districts required to be created entirely from the territory of these counties. It is impossible, for example, to divide Montgomery or Summit Counties, with 4.5 “ratios of representation,” into either four or five legal

districts. Those counties have too many residents to legally fit into four whole districts and too few to legally populate five whole districts. Thus, some residents in each of these counties will have to be assigned to districts that have residents of other counties as well. Because line drawers have significant discretion about what outside territory gets included with the “remainders,” and some discretion as to whether or not to create remainders in the first place, it is more appropriate to look at not just these eight counties in a vacuum but the entirety of the districts that include population from these counties. *See*, Jacobson Affidavit, ¶ 19.

Both the Commission majority and Commission Democrats created 48 districts from these eight counties and additional territory. The Commission majority’s 48 districts have an overall partisan lean of 56.5% Democrat - 43.5% Republican, while the Commission Democrats’ 48 districts with slightly different outside territory have a partisan lean of 57.3% Democrat and 42.7% Republican. In contrast, Relators’ expert Dr. Rodden created one fewer district out of these eight counties and his partisan lean falls in the middle—57% Democrat and 43% Republican. *See*, Jacobson Affidavit, ¶ 20.

If Relators are correct that “partisan fairness” requires the proportion of districts favoring each Party to “closely correspond” to voters’ preferences, consider how closely these three plans correspond with those preferences: *See*, Jacobson Affidavit, ¶ 21.

“Fairness” of Plans: Commission majority, Commission Democrats, and Relators’ expert

	Commission adopted plan	Commission Democrats’ proposal	Dr. Rodden’s proposal
Total districts	48	48	47
Partisan lean-Democrat	56.5%	57.3%	57%
Fair allocation of Districts—Democrat majority (partisan lean x districts)	27.1	27.5	26.8
Actual Democrat majority districts	28	38	36
Share of districts with Democrat majority	58.3%	79.2%	76.6%
Partisan lean-Republican	43.5%	42.7%	43%
Fair allocation of Districts—Republican majority	20.9	20.5	20.2
Actual Republican majority districts	16	9	8
Share of districts with Republican majority	33.3%	18.75%	17.0%
Toss-up districts (no party majority)	4	1	3

The above table demonstrates the fundamental unfairness of the plans produced by both the Commission Democrats and Relators’ expert. The Commission Democrats’ plan takes 11 House districts that “partisan fairness” instructs would have naturally been majority Republican, makes one district a toss-up and awards the remaining 10 to Democrats. Relators’ expert produces arguably an even more unfair result, taking 12 districts from Republicans, making 3 toss-ups, and awarding the remaining 9 districts to Democrats. In contrast, the Commission’s plan is the fairest. It takes five districts away from Republicans, awards one to Democrats and makes the other four toss-ups. *See*, Jacobson Affidavit, ¶ 22.

Both the Commission Democrats and Relators' expert Dr. Rodden removed Republican majorities from more than half of the districts to which Republicans would have been had a natural majority according to "partisan fairness." In fact, they drew these 20 Republican-entitled districts in such an unfair and gerrymandered fashion that the number of such Republican districts with a superimposed, artificial Democrat majority actually exceeds the number of Republican districts they permitted to retain a Republican majority!

Relators ignore this unfairness and instead insist that Section 6(B) requires the drawing of 44 districts with Democrat majorities. Having demonstrated that it is possible to draw 44 such districts without violating the directives of Sections 3 and 4, they contend that the Commission must do so.

In making that argument, however, they overlook Section 6(A)'s prohibition on drawing district plans "primarily to favor or disfavor a political party." It seems clear on its face that a plan that awards one Party more than half of the other Party's districts has been drawn "primarily to favor or disfavor a political party." But a closer look at the evidence yields significant additional evidence of gerrymandering.

C. There is strong and clear evidence of gerrymandering in the plans proposed by Democrats on the Commission and by Relators' own expert.

Commission Democrats' proposed map would grant their party a majority in all 12 districts in Franklin County, along with 10 of the 11 districts in Cuyahoga County. Republicans have a 37% partisan lean in Franklin County, and a 33% partisan lean in Cuyahoga County, yet would have a majority in zero districts in either county. (The 11th Cuyahoga County district would be a toss-up). Relators' expert Dr. Rodden would also give Democrats the majority in all the districts in Franklin County and Republicans zero, but would have one Republican majority district in Cuyahoga, while granting Democrats the same 10 districts there. However, he does gerrymander Summit County to

grant Democrats the majority in all four districts, despite Republicans having a partisan lean in that county of 45%.⁷ Not to be outdone, Commission Democrats grant their party the majority in both Mahoning County districts despite Republicans having a partisan lean in that County of 47%, and awarded themselves majorities in three of the five districts in Montgomery County—even though Montgomery County Republicans have a partisan lean of greater than 50%. *See*, Jacobson Affidavit, ¶ 23.

Moreover, Republicans in these eight counties were packed tightly into the nine majority districts allocated to them under the Commission Democrats’ maps. Seven of the nine (77%) Republican-majority districts have a partisan lean of greater than 60%. In contrast, less than half of the Democrat majority districts created by the plan are so packed. At the same time, of the 16 districts where one Party had a small (<54%) majority, all but one favor Democrats. That’s a clear indication that Republicans were packed into as few districts as possible so that Democrats could attain a majority in many more districts than their total vote share would normally sustain. *See*, Jacobson Affidavit, ¶ 24.

Another way to look at it: Commission Democrats awarded their party the majority in 79% of the districts in these eight counties. 91% of the marginal districts but only 71% of the packed districts. That kind of distribution doesn’t happen absent intent, and is clear evidence that their plan was drawn “primarily to favor or disfavor a political party.” *See*, Jacobson Affidavit, ¶ 25.

⁷ Contrary to claims made by Dr. Rodden, compactness is not a neutral criterion when it comes to districting in urban counties. While no one disagrees that ridiculously non-compact, snaking district lines raise serious questions about potential gerrymandering, the opposite is not true: more compact districts in urban counties are not necessarily fairer. In fact, compactness in an urban county can be an excuse to divide up (“crack”) center cities to dilute their voting power, or an excuse to crack surrounding suburban areas so that their voice can be overwhelmed by voters from the center city. Indeed, that is exactly what Dr. Rodden did in drawing four neatly-compact, Democrat-majority districts, and zero Republican ones, in Summit County—where Republicans receive 45% of the vote.

Indeed, with only 57% of the voters in these 48 districts, Democrats would be unable to draw themselves a majority in 79% of the districts without (1) packing Republicans into a fraction of those 48 districts and (2) drawing a large number of barely-Democrat majority districts (15 of 38 Democrat-majority districts). But for the egregious partisan gerrymander in the Commission Democrats' map, as well as that of Dr. Rodden, Democrats would not be able to supplant the natural Republican majority status in more than half of these Republican-entitled districts.

D. Section 6(A) in fact prohibits the Commission from engaging in such a partisan gerrymander, even in furtherance of Section 6(B)'s "partisan fairness" goal.

Sections 6(A) and 6(B) are equal standards. Section 6 does not subordinate the prohibition on gerrymandering to the goal of proportional districts. Indeed, the language says they are to be read together: The Commission "shall attempt to draw" a districting plan for the General Assembly "that meets *all* of the following standards." (emphasis added). The two provisions are to be read—and attempted—together: Attempt to be as proportionally fair as you can be *without gerrymandering*.

Moreover, Sections 6(A) and 6(B) are "standards" that the Commission "shall attempt" to attain. The embellishments and election statements made by proponents does not negate or supersede the plain wording of the Amendment itself. If the drafters of the 2015 constitutional amendment had intended to *require* partisan fairness under 6(B), they would not have made it co-equal with a prohibition on gerrymandering. They would not have made it subordinate to Sections 2, 3, 4, 5, and 7. They would not have called partisan fairness a "standard" that the Commission "shall attempt," and instead would have plainly stated that the Commission "shall draw."

Furthermore, the inherent conflict between drawing proportional districts and not gerrymandering is exactly why Section 6 limits the Commission's duty to *attempting to draw* proportional, non-gerrymandered districts.

E. The primary directive of Article XI and Ohio’s residential, geographic, and partisan demographics—not alleged abuse of discretion by the Redistricting Commission—is why Section 6(B)’s requirements cannot be met in full.

Section 6 is very clear that the Commission cannot violate the directives of Section 3 in order to further the goal of proportional representation. To the extent that Relators are correct in defining what partisan fairness entails under Section 6(B), the failure of the Commission’s adopted map is due entirely to the inability to draw Democrat-majority districts in Small Counties—not to the failure of the Commission to gerrymander in the eight Large Counties where Relators have proposed just that.

While attainment of partisan fairness is not possible for the 51 districts where the Commission’s discretion is severely limited, the Commission actually awarded Democrats a greater proportion of seats than Section 6(B) partisan fairness without gerrymandering would suggest in the 48 districts where it could do so. Thusly, it satisfied Section 6(B)’s directive that the Commission attempt to draw fair districts.

F. This Court should uphold the Commission map and not force the Commission to undertake an egregious gerrymander.

The inability to draw Democrat majority districts in Small Counties is not a failure on the part of the Commission. As Section 6 makes clear, the inability to achieve the Section 6(B) goal of partisan fairness in one part of the State does not permit, let alone require, gerrymandering in another part of the state. More than a million Ohioans—those in Republican households in these eight Large Counties who would lose their proportionate share of districts in which they can effectively influence public policy—should not have their voices and representation diluted or taken away. The fact that the Ohio Constitution does not permit Relators to obtain the relief they seek without gerrymandering is not a reason to permit, indeed require, such gerrymandering.

CONCLUSION

For the reasons stated above, the Court should deny Relators' their requested relief and uphold Relators' approved 2021 district plan.

Respectfully submitted,

/s/ Donald C. Brey

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Renew Ohio*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 5, 2021, a true copy of the foregoing Brief of Amicus Curiae Renew Ohio in Support of Respondents was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Donald C. Brey _____
Donald C. Brey (0021965)
Counsel for Amicus Curiae
Renew Ohio

AFFIDAVIT OF JEFF JACOBSON

STATE OF OHIO :
COUNTY OF FRANKLIN : SS.

Jeff Jacobson, being first duly sworn, deposes and says as follows.

1. I am a resident of Franklin County.
2. I served for more than 16 years in the Ohio legislature, eight in the House of Representatives and eight in the Senate.
3. I was a County Republican Party Chairman in Montgomery County for 13 years.
4. I was an active inside participant in designing the 2001 reapportionment. I was an active outside participant in 1991.
5. I was lead negotiator for then-State Rep. Matt Huffman in the 2014 constitutional amendment negotiations, and my lead negotiating partner was then Rep. Vern Sykes on the Democrat side. In that role, I drafted the compromise language contained in Article XI, Section 6.
6. During our negotiations, Democrats pushed for the “partisan fairness” standards listed in Article XI Section 6(B) to be made mandatory requirements. Republicans did not agree because we rightly foresaw that “partisan fairness” would be used as an excuse to violate the line-drawing rules contained in Sections 2, 3, 4, 5, and 7 of Article XI and to gerrymander to achieve a desired partisan outcome.
7. After some discussions, agreement was reached on a compromise:
 - a. “Partisan fairness” would be an aspirational goal that the Redistricting Commission should attempt to accomplish.
 - b. “Partisan fairness” would be omitted from the judicial review provisions of Article XI, and thus would not be independently justiciable. However, its standard would be used by the Court to evaluate the

severity of violations of the line-drawing rules of Sections 2, 3, 4, 5, and 7 and in determining the appropriate sanction for violations of those sections.

- c. We carefully chose the words “shall attempt” in order to be clear that “partisan fairness” was a goal and not mandatory. It was not our agreement that “shall attempt” meant that it must be done if not impossible.

8. We also added the anti-gerrymandering provision out of fears that the “partisan fairness” language would be used to justify or to require gerrymandering of districts in furtherance of Section 6(B)’s goal, which was intended to be aspirational.

9. Unless stated otherwise, data regarding the “partisan lean” of proposed legislative districts is taken from the website Dave’s Redistricting. The composition of Ohio’s voting precincts changed in 2012 and 2014 in ways that are not easily traceable, if not unknown and unavailable, rendering it difficult if not impossible to have confidence in any ten-year district analysis. Dave’s Redistricting has been cited by press and members of the Commission alike.

10. The Commission’s adopted map and the map proposed by Commission Democrats on September 2, 2021 were both available publicly and in a format that works with Dave’s Redistricting.

11. For analyzing the map created by Relators’ expert Dr. Jonathan Rodden, I worked from his expert report and created a Dave’s Redistricting map that contained the territory he included in the eight large counties’ districts discussed infra. In three places his map excerpts did not show clearly all the details of the district lines, and I was forced to make educated guesses. I estimate that the total population in the territory for which I made such a guess constitutes less

than .02% of the territory in his maps that I analyze, and thus have no meaningful impact on my conclusions.

12. Analyzing the twenty-one rural districts drawn by the Commission shows that the “partisan lean” of those districts collectively is 31% D – 69% R. Using Relators’ own interpretation of Section 6(B), Democrats should be favored in 6 or 7 of those 21 Small County districts. But Ohio’s geographic, population, and partisan demographics—along with Section 3’s inviolable directives—make it impossible to do so. In fact, no one has demonstrated how more than one district in rural Ohio can be drawn with a Democrat majority, and the one district, centered on Athens County, would have a bare majority at that.

13. For most Large Counties, district lines cannot be drawn in ways that affect which Party is favored. Butler County will have three House districts that favor Republicans, no matter how the lines are drawn; Lucas County will have three districts that favor Democrats and one that favors Republicans. Springfield City may still favor Democrats, but the rest of Clark County favors Republicans so strongly that a full House district will favor Republicans no matter which other parts of Clark County are added to Springfield.

14. With the exception of the aforementioned Lucas County and the eight counties discussed *infra*, only in Trumbull County can even a single House district be drawn that favors Democrats. Both the Commission majority as well as the Democrat members of the Commission drew a Democrat-favoring district in Trumbull County, as did Relators’ expert Dr. Jonathan Rodden. Similarly, both (as well as Dr. Rodden) drew a House district in Portage County in which neither Party has a majority.

15. In fact, the Commission majority and the Commission Democrats agree on the partisan outcome of every one of the 28 House districts drawn in Butler, Clark, Clermont,

Delaware, Fairfield, Greene, Lake, Licking, Lucas, Medina, Portage, Trumbull, Warren, and Wood Counties. Outside of three districts in Lucas County and one in Trumbull that favor Democrats, and one in Portage that favors neither party, the remaining 23 districts all favor Republicans in the plans proposed by both the Commission majority and Commission Democrats.

16. In sum, for the 51 House districts drawn outside the eight Large Counties yet to be discussed, the partisan breakdown of the Commission Democrats’ proposal matches the Commission’s adopted map in all but one district.

17. This table summarizes the partisan breakdown of the three types of districts discussed thus far:

Counties where Commission has little discretion over which Party has the district’s majority

District Type	Single-County Districts	Districts containing only Small Counties	14 Large Counties where the Commission Democrats’ proposal mirrors the adopted map on partisan breakdown	Totals
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¹ The Democrat Commission proposal actually had 20 rather than 21 House districts entirely composed of Small Counties. The twenty-first district included a very small piece of Wood County that in no way affected the partisan majority of the district. For ease of comparison, because the Commission Democrat and the Commission’s adopted plans agree on the partisan breakdown of the two districts (Republicans favored in both), and Relators’ expert Dr. Rodden does as well, this table ignores the small portion of Wood County in that twenty-first district and groups it as if it were composed only of Small Counties.

18. Democrats have a partisan lean majority in six of these eight counties (Franklin, Cuyahoga, Hamilton, Summit, Mahoning, and Lorain favor Democrats, the latter two by small margins; Stark and Montgomery Counties favor Republicans, the latter also by a small margin), Republicans are competitive in most of them in statewide elections and in fact carried the Presidential vote at least once in half of those eight counties.

19. The eight counties by themselves have a combined partisan lean of 58% Democrat-42% Republican and have a combined population roughly equal to 45 House districts. However, as explained earlier, not all residents of these Large Counties can be included in the districts required to be created entirely from the territory of these counties. It is impossible, for example, to divide Montgomery or Summit Counties, with 4.5 “ratios of representation,” into either four or five legal districts. Those counties are too populous for four districts and underpopulated for five. Some residents in each of these counties will have to be assigned to districts that have residents of other counties as well. Because line drawers have significant discretion about what outside territory gets included with the “remainders,” and some discretion as to whether or not to create remainders in the first place, it is more appropriate to look at not just these eight counties in a vacuum but the entirety of the districts that include population from these counties.

20. Both the Commission majority and Commission Democrats created 48 districts from these eight counties and additional territory. The Commission majority’s 48 districts have an overall partisan lean of 56.5% Democrat - 43.5% Republican, while the Commission Democrats’ 48 districts with slightly different outside territory has a partisan lean of 57.3% Democrat and 42.7% Republican. In contrast, Relators’ expert Dr. Rodden created one less districts out of these eight counties and his partisan lean falls in the middle—57% Democrat and 43% Republican.

21. If Relators are correct that “partisan fairness” requires the proportion of districts favoring each Party to “closely correspond” to voters’ preferences, consider how closely these three plans correspond with those preferences:

“Fairness” of Plans: Commission majority, Commission Democrats, and Relators’ expert

	Commission adopted plan	Commission Democrats’ proposal	Dr. Rodden’s proposal
Total districts	48	48	47
Partisan lean-Democrat	56.5%	57.3%	57%
Fair allocation of Districts—Democrat majority (partisan lean x districts)	27.1	27.5	26.8
Actual Democrat majority districts	28	38	36
Partisan lean-Republican	43.5%	42.7%	43%
Fair allocation of Districts—Republican majority	20.9	20.5	20.2
Actual Republican majority districts	16	9	8
Toss-up districts (no party majority)	4	1	3

22. As is clearly shown in the above table, both the Commission Democrats and Relators’ expert have produced fundamentally unfair plans. The Commission Democrats’ plan takes 11 districts from Republicans, makes one a toss-up and awards the remaining 10 to Democrats. Relators’ expert produces arguably an even more unfair result, taking 12 districts from Republicans, making 3 toss-ups and awarding the remaining 9 districts to Democrats. In contrast, the Commission’s plan is the most fair. It takes five districts away from Republicans, awards one to Democrats and makes the other four toss-ups.

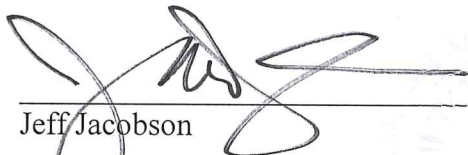
23. Further evidence of gerrymandering can be seen in Commission Democrats' proposed map, which would grant their party a majority in all 12 districts in Franklin County, along with 10 of the 11 districts in Cuyahoga County. Republicans have a 37% partisan lean in Franklin County, and a 33% partisan lean in Cuyahoga County, yet would have a majority in zero districts in either county. (The 11th Cuyahoga County district would be a toss-up). Relators' expert Dr. Rodden would also give Democrats the majority in all the districts in Franklin County and Republicans zero, but would have one Republican majority district in Cuyahoga, while granting Democrats the same 10 districts there. However, he does gerrymander Summit County to grant Democrats the majority in all four districts, despite Republicans having a partisan lean in that county of 45%.² Not to be outdone, Commission Democrats grant their party the majority in both Mahoning County districts despite Republicans having a partisan lean in that County of 47%, and awarded themselves majorities in three of the five districts in Montgomery County—even though Montgomery County Republicans have a partisan lean of greater than 50%.

24. Moreover, Republicans in these eight counties were packed tightly into the nine majority districts allocated to them under the Commission Democrats' maps. Seven of the nine (77%) Republican-majority districts have a partisan lean of greater than 60%. In contrast, less than half of the Democrat majority districts created by the plan are so packed. At the same time, of the 16 districts where one Party had a small (<54%) majority, all but one favor Democrats. That's a clear indication that Republicans were packed into as few districts as possible so that Democrats could attain a majority in many more districts than their total vote share would normally sustain.

² Contrary to claims made by Dr. Rodden, compactness is not a neutral criterion when it comes to districting in urban counties. While no one disagrees that ridiculously non-compact, snaking district lines raise serious questions about potential gerrymandering, the opposite is not true: more compact districts in urban counties are not necessarily fairer. In fact, compactness in an urban county can be an excuse to divide up ("crack") center cities to dilute their voting power, or an excuse to crack surrounding suburban areas so that their voice can be overwhelmed by voters from the center city. Indeed, that is exactly what Dr. Rodden did in drawing four neatly-compact, Democrat-majority districts, and zero Republican ones, in Summit County—where Republicans receive 45% of the vote.

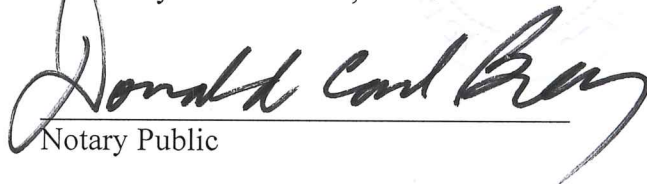
25. Another way to look at it: Commission Democrats awarded their party the majority in 79% of the districts in these eight counties. 91% of the marginal districts but only 71% of the packed districts. That kind of distribution doesn't happen absent intent, and is clear evidence that their plan was drawn "primarily to favor or disfavor a political party."

Further affiant sayeth naught.



Jeff Jacobson

Sworn to before me and subscribed in my presence this 5th day of November, 2021.



Notary Public

DONALD CARL BREY, Attorney-At Law
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.