

IN THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, et al., :
: **Case No. 2021-1193**
Relators, :
: **Original Action Filed Pursuant to Ohio**
v. : **Constitution, Article XI, Section 9(A)**
: **[Apportionment Case Pursuant to S. Ct.**
Ohio Redistricting : **Prac. R. 14.03]**
Commission, et al., :
: **Respondents.** :
:
:
:

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I. INTRODUCTION

Respondent, Senator Vernon Sykes (“Co-Chair Sykes”), Co-Chair of the Ohio Redistricting Commission (“Commission”), is currently the state Senator for the 28th district of the Ohio Senate. He is a Democrat, who has devoted much of his career in public office working to ensure fair legislative districts so that the vote of every Ohio citizen is of equal value. To this end, Co-Chair Sykes, who as a person of color understands the impact of gerrymandering all too well, has worked for decades to achieve proportional fairness for all racial and ethnic minorities, as well as political partisans, as they struggle to have their votes matter.

Respondent, Leader Emilia Sykes (“Leader Sykes”), Commissioner and Leader of the Minority Caucus in the Ohio House, currently serves as the Representative for House District 34. She is a Democrat and the current co-chair of the Ohio Legislative Task force on Redistricting, Reapportionment, and Demographic Research. Her roles on the Legislative Task Force and on the Commission are an extension of her career’s focus on social justice issues such as voter rights. Not only is Leader Sykes the only woman on the Commission but she is the first woman in our State’s history to serve on an Apportionment Board or Redistricting Commission.

Co-Chair Sykes and Leader Sykes (collectively the “Democratic Commissioners”) ask this Court to grant the relief sought for the reasons explained below. Granting the requesting relief would end Ohio’s history of secret partisan gerrymandering and in doing so would give voice to the efforts of the Democratic Commissioners, the vast majority of Ohio voters who voted in 2015 for the Fair District Amendments to the Ohio Constitution, and every other citizen in this state.

A. Ohio’s History of Partisan Gerrymandering

Ohio has a long and sordid history of partisan gerrymandering which has been described in sufficient detail by the Relators in their briefs and will not be repeated here. In 2011 the Republicans, who controlled Ohio’s then-Apportionment Board, secluded themselves in a

“bunker” and produced a redistricting map that insured a super-majority for the Republicans for the next decade.

The 2011 maps were challenged in litigation, but this Court ultimately held in *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, that the Ohio Constitution did not require maps that are neutral or even fair. In rejecting the challenge to the 2011 maps, this Court stated:

The words used in Article XI do not explicitly require political neutrality, or for that matter, politically competitive districts or representational fairness, in the apportionment board's creation of state legislative districts. Unlike Ohio, some states specify in either constitutional or statutory language that no apportionment plan shall be drawn with the intent of favoring or disfavoring a political party.

Id. at ¶ 14.

B. The Campaign to Amend the Ohio Constitution for Fair Districts

The outcry from Ohio citizens to the 2011 maps brought together public interest groups and elected officials from both parties to heed the words of this Court. This bipartisan effort led to amending Ohio’s Constitution with the Fair District Amendments, removing the partisan thumb of the map drawers, and making representational fairness part of Article XI of our Constitution.

In 2014, current Commissioners Co-Chair Sykes and State Senate President Huffman (“Commissioner Huffman”) came together in their roles as State Representatives and jointly sponsor the Ohio Bipartisan Redistricting Commission Amendment (“Issue 1”) which was put on the November 3, 2015 ballot. With respect to redistricting maps, a majority yes vote for Issue 1 would “[e]nd the partisan process for drawing Ohio House and Senate districts, and replace it with a bipartisan process with the goal of having district boundaries that are more compact and politically competitive.” (HIST_0096, Issue 1 Ballot Language).

In the November 2015 election, 71.47% of Ohioans, including a majority of the voters in each of Ohio's 88 counties, voted in favor of the Issue 1 which resulted in the current version of Article XI of the Ohio Constitution. (HIST_0121, Statewide Issue History).

The Amendment, now part of Article XI, eliminates partisan gerrymandering with a series of common-sense provisions to limit the partisan pen of the mapmakers and to avoid maps that favor one political party. Further, it requires the Commission to develop a map that corresponds closely to the statewide preference of Ohio voters expressed as the ten-year average of the percentage of voters who favor each party. In Ohio, this ten-year average of the 16 statewide partisan elections necessitates a map with 54% of the seats favoring Republicans and 46% of the seats favoring the Democrats. It also established the formation of the bipartisan the Commission, composed of 7 members including the Governor, the Auditor of State, the Secretary of State, and four members appointed by the majority and minority leaders of the General Assembly.

C. The 2021 Redistricting Process

The inaugural Commission, formed in 2021, was made up of House Speaker Robert Cupp, Senate President Matt Huffman (collectively the "Republican Legislative Commissioners"), Governor Mike DeWine, Auditor Keith Faber, Secretary of State Frank LaRose (collectively "Statewide Commissioners"), and the Democratic Commissioners.

In June 2021, Leader Sykes sent a letter to encourage Governor DeWine to convene the Commission, so that the Commission could enact the rules and distribute the funds before the census data came in. (DEPO_00410, E. Sykes Dep. 95:1-22). But "[e]verything was delayed until the last minute." (DEPO_00923, V. Sykes Dep. 90:11). Under Article XI, the Commission was required to adopt a bipartisan plan by September 1, 2021. *See* Article XI, Section 1(B)(3). The first meeting of the Commission was not convened until August 6, 2021, and only lasted seven minutes. (STIP_0001-0002). On August 31, 2021, one day before the deadline, the Commission held a

hearing where Leader Sykes demanded to know when the Commission was going to produce a map for the public to review and comment on. (STIP_0163).

It wasn't until September 9, 2021 when Commissioner Huffman introduced the plan prepared by the Republican Legislative Commissioners. (STIP_0170-0175). Co-Chair Sykes asked Ohio Senate Finance Director Ray DiRossi, the map drawer from the 2011 debacle, how he complied with Section 6(B)'s representational fairness provision, to which DiRossi responded that the "analysis is ongoing, [and] is not complete as of today." (STIP_0174).

D. More Flawed Map Drawing

Instead of following the will of the voters, the Republican Legislative Commissioners created and put forth redistricting maps to the Commission which failed to meet the constitutional requirements of Article XI. These maps were created by mapmakers engaged by the Republican Legislative Commissioners and were drafted behind closed doors. They used loopholes to bypass requirements of the Ohio Open Meetings Act and hastily enacted a plan in the eleventh hour that was drawn almost exclusively by DiRossi, who worked for Commissioner Huffman. (DEPO_01573, 01643, Huffman Dep. 13:4-17, 83:11-13). All of this was done while ignoring the proportional fairness standards incorporated in Article XI, Section 6, by 71% of Ohio voters in 2015.

Commissioner Huffman controlled this process through DiRossi, who was assigned to reprise his work. Commissioner Huffman first instructed DiRossi and the map makers to ignore the provisions of Section 6 and focus solely on the splitting requirements of the other sections of Article XI. (DEPO_01730-01736, Huffman Dep. 28:6-34:22). DiRossi testified that the only Commissioner he spoke to about Section 6 was Commissioner Huffman, who told him that Section 6 was not his responsibility, and that he should focus on following the "construction rules." (DEPO_00610, DiRossi Dep. 158:5, 11-17). In so following directions, DiRossi was under the

belief that the Commissioners would deal with Article XI, Section 6. (DEPO_00609, DiRossi Dep. 157:17-22).

However, in his deposition, Commissioner Huffman candidly acknowledged that he, as a Commissioner, had ignored the provisions of Section 6. We “never got to Section 6.” (DEPO_01819-01820, Huffman Dep. 117:10-13, 118). He further stated that he did not need to consider Section 6 because the map, in his opinion, was otherwise constitutional by meeting the provisions of Sections 2, 3, 4, 5, and 7. (DEPO_01820, Huffman Dep. 118:9-17)

When asked about why he didn’t follow Section 6, by his own admission, Commissioner Huffman denied that “shall attempt” imposed any obligation on the Commissioners. Even Co-Chair Cupp, a former justice on this Court, readily conceded in his sworn testimony that “shall attempt,” the language of Section 6, imposes is a mandatory obligation for the Commissioners. (DEPO_01626, Cupp Dep. 66:17-19). While Commissioner Huffman acknowledges that “shall” is mandatory, “generically speaking” the word “shall” has a different meaning in Section 6. (DEPO_01809-01810, Huffman Dep. 107:25-108:10).

Next, in his deposition, Commissioner Huffman testified that he applied the term “aspirational” to Section 6, a term that does not appear in the text. Worse, he does not give “aspirational” the same meaning as Webster’s dictionary (ambitious, driven toward a particular goal), but understands “aspirational” to mean only “not mandatory.” He refers to this core provision, proportional fairness of Section 6 which he helped author, as a word “salad.” (DEPO_01740, Huffman Dep. 37:21-38:5).

The Commissioners never discussed the meaning of Sections 6(A) or 6(B) before voting along partisan lines to approve the map on September 15, 2021. The only discussion of the meaning of the proportional fairness provisions of Section 6(B) occurred after the vote, when the

Republican Commissioners had to issue a statement under Section 8(C)(2) to explain what the Commission “determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years favor each political party corresponds closely to those preferences, as described in division (B) of Section 6 of this article.” (STIP_0418-0419).

Commissioner Huffman claimed the Commission never even needed to consider the “non-mandatory” provisions of Section 6. (DEPO_01820, Huffman Dep. 118:9-17). He admitted in his deposition that he had been surprised to learn, just before the vote on September 15, that the Commissioners voting in favor of the four-year map needed to issue the Section 8(C)(2) statement. (DEPO_01773, Huffman Dep. 71:10-18). Commissioner Huffman’s confusion is understandable. Why would Article XI 8(C)(2) require the Republican Commissioners to explain their determination about the meaning of, and compliance with, Section 6(B) when Commissioner Huffman himself testified under oath that the Commission was not required to and did not deal with Section 6 because the map complied with Sections 2, 3, 4, 5, and 7? Obviously, Commissioner Huffman’s interpretation of Section 6 is mistaken as a matter of law.

E. Article XI, Section 8(C) Statements

The Section 8(C)(2) statement approved by the Republican Commissioners rendered meaningless the anti-gerrymandering protections of Section 6 by distorting the calculation of the historical partisan average of Republican and Democratic votes over the previous ten years which showed a 54% Republican to 46% Democrat voter preference. Although no one admits authoring the Section 8(C)(2) statement, Commissioner Huffman testified that the statement included information he thought should be in it. (DEPO_01748, Huffman Dep. 46:2-25). By using the percentage of elections won by Republicans as a part of the proportional fairness calculation, the

Republican Commissioners effectively eviscerated the protections of Section 6(B) by providing a range for proportional fairness (81% to 54%) as the calculation of the preferences of Ohio voters for Republican office holders. However, the number of times a party wins elections, even by a small margin, does not show the percentage of voters who prefer one party over the other. Such an analysis might show consistency, but not the percentage of voters who prefer one party over the other.

As the Democratic Commissioners wrote in their Section 8(C)(2) Minority Report, the “GOP-adopted map lays out an absurd description of how it allegedly meets the requirements of Section 6(B). The voters of Ohio do not favor Republicans in a range of 54% to 81%.” (STIP_0424). The anti-gerrymandering provisions enshrined in the Ohio Constitution through the Fair Districting Amendments requires partisan fairness. (STIP_0420). Fairness means that “[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party.” (*Id.*). In fact, in his deposition, Commissioner Huffman testified that “gerrymandering is drawing a district in favor of one political party.” (DEPO_01822, Huffman Dep. 120:14-17). But the district maps adopted by the Republican Commissioners gutted the anti-gerrymandering provisions and “in no way reflect the statewide preferences of voters in Ohio and do not closely correspond to the statewide election results of the last ten years.” (*Id.*).

Instead, the maps the Republican Commissioners adopted went to “absurd lengths to create a Republican monopoly on legislative power that they have not earned at the ballot box.” (STIP_0421). The result is that Ohioans are in an even worse position than in 2011. (STIP_0422). The Democratic Commissioners agree with the Relators that an injustice has occurred and urge this Court to find that the Commission erred as a matter of law in failing to comply with Article XI, Section 6. This Court should order the Commission to draw maps that closely correspond to

statewide voter preferences and do not favor or disfavor a political party, as is required by the letter and intent of the 2015 Fair District Amendments.

II. STATEMENT OF FACTS

The Statements of Facts provided by all Relators are thorough and accurate and will therefore not be repeated here. However, the Democratic Commissioners will highlight certain facts that demonstrate how the Republican Commissioners betrayed the 71% of Ohio voters who voted in favor of the Fair District Amendments.

A. The Republican Legislative Commissioners Excluded the Other Commissioners From the Map Drawing Process While the Democratic Commissioners Attempted to Work in a Bipartisan Way to Create a Constitutional Map.

With the passage of the Fair District Amendments, Ohio voters had overwhelmingly demanded a bipartisan redistricting commission that would operate in public view with public discussion, debate and decision-making occurring in the open. The Republican Legislative Commissioners, acting as if Article XI had not been amended, returned to their 2011 approach. This year, instead of being holed up in a “bunker” at a downtown hotel, mapmaker DiRossi and his team worked out of a “mapping sanctum” so secret that even the Statewide Commissioners did not know where it was. “To this day I’m not exactly sure . . . where the Republicans were drawing their maps.” (DEPO_01021, Faber Dep. 37:15-18).

The Republican Legislative Commissioners prevented the Statewide Commissioners, who themselves are Republicans, from having any input into the drawing of the maps proposed by the Republican Legislative Commissioners. Not only were the Statewide Commissioners physically shut out of the process, but they were not provided mapping software, even though the Republican Legislative Commissioners had promised them otherwise. Both Commissioners Faber and LaRose requested and were denied access to, and input in, the actual mapping process taking place in the mapping sanctum.

In contrast, the Democratic Commissioners were completely transparent with not only their fellow Commissioners but also with the public. They uploaded each draft of their maps, positions, and amendments onto the Commission website. (DEPO_00888, V. Sykes Dep. 55:9-15). They also invited and welcomed all five of their fellow Commissioners to sit down and discuss the map-drawing process with them. Despite an invitation to all, only Commissioners LaRose and Faber collaborated with them and worked cooperatively with the Democratic mapmakers, discussing various changes to the proposed map that would move the Commission toward proportional fairness. (DEPO_00927, V. Sykes Dep. 94:12-17).

Commissioner Faber testified that Co-Chair Sykes “and his staff were very gracious . . . So, long story short, they were helpful in going through maps. And I wanted to understand why they made the decisions they made in certain areas in drawing maps, to try and understand their interests. They were very helpful to do that.” (DEPO_01019, Faber Dep. 35:10, 19-24). Commissioner Faber explained that “I had input as to what they were trying to achieve and gave them some of our input.” (DEPO_1020, Faber Dep. 36:12-14). “But the Democrats [sic] leaders welcomed us into their map drawing sanction – or sanctum and let us go through the programs. Because, remember, we didn’t have any of that.” (DEPO_01021, Faber Dep. 37:19-22). Commissioner Faber explained that, working with the Democratic Commissioners he “spent a lot of time on northwest [sic] Ohio – Dayton, Cincinnati – and central Ohio. LaRose . . . because they’re all from Akron and they drew around Summit County and northeast Ohio.” (DEPO_01024, Faber Dep. 40:5-10).

Commissioner LaRose testified that “I started working with the members of the Minority caucus, the Senate Democrats and House Democrats and their mapmakers, in several meetings that I had with them to at least try to put some drafts down.” (DEPO_00035, LaRose Dep. 34:5-

10). Commissioner LaRose testified that he met with Co-Chair Sykes and “Brainstorming occurred with both sets of maps, again with the spirit of trying to find that opportunity to reach a compromise.” (DEPO_00047, LaRose Dep. 46:5-7).

This directly contrasts with the Republican Legislative Commissioners’ map-drawing process. Commissioner LaRose testified that he only saw the September 9th maps “one day before, [he] was shown a copy of the map. But it was not a particularly detailed copy.” (DEPO_00019, LaRose Dep. 18:4-7). “[I]t was maybe a ten-minute conversation about what the map looks like.” (DEPO_00021, LaRose Dep. 20:19-21). Commissioner LaRose explained that the Legislative Republican Commissioners “were going to exclude me from the mapmaking” and detailed his frustrations during his deposition:

Throughout the process, I had wanted to be part of the collaborating with those that were making the maps. I was not given the opportunity to do so. That is, with the two mapmakers working on behalf of the [the Republican Legislative Commissioners].

Although repeatedly I had asked to be part of that process and asked to collaborate with them, I was not given the ability to do so.

(DEPO_00034, LaRose Dep. 33:19-22, 25).

Commissioner Faber was even more blunt:

A. We wanted to sit down with their map drawers at their computers and go through the maps.

Q. Okay.

A. We were never given access.

Q. Access to the map drawers?

A. Correct.

(DEPO_01021, Faber Dep. 37:1-7).

The Statewide Commissioners, left only with the publicly available programs like Dave’s Redistricting, a tool which would not allow them to reconfigure the maps, had to rely on the

representations of the Republican Legislative Commissioners that the plan which was approved on September 15, met the Section 6(B) constitutional standard.

The Legislative Republican Commissioners shut-out all other Commissioners and used the same map-drawer, Ray DiRossi, who drew the 2011 maps challenged in *Wilson*. They did not even let other Statewide Commissioners, including Commissioners LaRose and Faber, participate in the map-drawing process. (DEPO_0034, LaRose Dep. 33:13-22; DEPO_01013-01025, Faber Dep. 29:14-41:9; DEPO_01613-01614, Cupp Dep. 53:8-54:18).

Moreover, without their own mapping software, Commissioners LaRose and Faber were unable to draft their own maps and/or do a comparison of maps against one another. Had they been able to do so, they could have participated more fully in their roles on the Commission. Without the mapping software to evaluate for themselves the proportion of Republican and Democratic districts and how the Statewide Commissioners could change the partisan proportionality of the map, they could not fully function as independent members of a bipartisan commission.

The Democratic Commissioners cooperated with the Statewide Commissioners to produce fair maps that correspond with voter preferences. They tried to provide the same level of cooperation with the Republican Legislative Commissioners. Co-Chair Sykes' staff worked tirelessly with the majority's staff to try to collaborate, cooperate, and promote bipartisanship, "but in most cases, it just was not well-received." (DEPO_00935, V. Sykes Dep. 102:12-17). It was also Leader Sykes' impression that the Republican Legislative Commissioners were unwilling to work together on a map. (DEPO_00412, E. Sykes Dep. 97:11-13). Any conversations with Co-Chair Cupp and Commissioner Huffman were fruitless because "they were not forthcoming with any kind of suggestions or input to make any changes." (DEPO_00887, V. Sykes Dep. 54:5-10).

B. The Republican Legislative Commissioners Used the Same Partisan Secrecy That Was Widely Derided in 2011.

Leader Sykes repeatedly asked the Republican Commissioners when the Commission would fulfill its obligation of generating a map. During the August 31 Commission meeting, Leader Sykes stated:

I think that's pretty clear that it is the commission who is responsible for putting forth a plan to, and as it subsequently says, for it to be considered to have those three hearings that we just voted for in the rules, in rule 9. And again, I would just like to, for the third or fourth time, inquire as to when as a commission can we expect this, or if we don't have an answer to that at this very moment, perhaps we can set a date on our next commission meeting and figure this out.

(STIP_0164).

At the same meeting, Leader Sykes also lamented the apparent decision of the Republican Legislative Commissioners to go back to the secret partisan map drawing that had been so soundly rejected by Ohio voters:

You did refer to maps being drawn currently, using the data, it being delayed. I can only speak for myself on this one. I have not been privy to any of those conversations. And so, again, my question that I mentioned from last week, which I am carrying over this week, who on this commission is participating in that? I am I am not aware of such activity and have not been contacted about the data that you are looking at or considering in these maps that the commission, that I am a member of, is considering to put forth. So is this a, so I guess I'm restating the question from last week. Is this a commission map by the majority party? Is it just by the legislative leaders? Is it just the Republican legislative leaders? And what can I expect in terms of participating in that, if anything at all?

(STIP_0163-0164).

Finally, during the September 15 Commission meeting, when it was clear that the Republican majority was going to proceed with its gerrymandered map by party-line vote, Leader Sykes explained the constitutional shortcomings of their actions:

People ask me pretty regularly, why do I wear white all of the time. And if you indulge, it'll all make sense and all come together. I often wear white, especially in moments of importance. To honor the women of the suffrage movement who fought so hard for the right to vote... As the only woman on this commission, I take my responsibility incredibly, incredibly seriously. And beyond just what this vote may mean for a 10 year map I bring

with me those women who suffered for generations for the right to speak up so that someone like me could have the audacity to stand up and speak out on a commission that is made of six men and one woman... And to put forth something that so arrogantly flies in the face of what people, our voters, asked us to do not once but twice, through a citizen-led initiative that forced the hand of the legislature to ensure that people had the right to vote to... And not only that, they have that right that they feel that it is counted and they can make a difference in their government.

(STIP_0396-0397).

C. The Democratic Commissioners Strongly Objected to the Section 8(C) Statement Prepared by the Republican Legislative Commissioners.

The Democratic Commissioners are aware that Commissioner Huffman claimed in his sworn testimony that the agreement of the majority Commissioners' statement under Section 8(C) was unanimous. (DEPO_01750, 01804, Huffman Dep. 48:6, 102:16-23). This is simply wrong. The transcript and record of the Commission meeting of September 15-16, 2021 demonstrates that the Democratic Commissioners vehemently disagreed with the tardiness and rationale of the Republican Commissioners' statement under Section 8(C). Co-Chair Sykes made his position clear during the September 15 meeting: "I just want to make it clear that this is just the opinion of a majority on this particular issue. *So by no way am I agreeing to any of this....*" (STIP_0404).

Leader Sykes read into the record the Democratic Commissioners' strong dissenting view about the process used by the Republican Commissioners. She and Co-Chair Sykes also objected to the majority's strained and illogical explanation of the concept of proportional fairness which is defined in Section 6(B). Although the Democratic Commissioners may not have gone as far as Commissioner LaRose (who privately described the Republican Commissioners' 8(C) statement as "asinine"), there is no reasonable reading of the Commission's proceedings that would suggest that the Democratic Commissioners agreed with the Republican Commissioners' 8(C) statement.

Commissioner Huffman's contention that the approval of the section 8(C) statement was unanimous conflicts with the transcript of the Commission's proceeding. Co-Chair Sykes asked

specifically whether the vote was only to include in the record the Section 8(C) statement with which he and Leader Sykes disagreed. Commissioner Cupp clarified that the vote would make the majority *and* minority statements part of the record, nothing more. The transcript of the hearing quotes Co-Chair Sykes seeking clarification from the Co-Chair Cupp: “Since we’re not voting to agree with this, just to allow it to officially go into the record, then I think it should go both statements without objection.” (STIP_0407). Co-Chair Sykes then further explained, “Just to be clear, this is simply to accept the report.” (STIP_0408). This Court should reject any claim that Co-Chair Sykes or Leader Sykes *agreed* with the Republican Legislative Commissioners’ 8(C)(2) statement, as the Court should ignore any claim that the acquiescence of Commissioners Huffman, Cupp, LaRose, DeWine and Faber to the admission of the Minority Report without objection into the record should be treated as votes showing that they agreed with the Minority Report.

Finally, the Democratic Commissioners’ Minority Report on Section 6(B) could not be clear. As Co-Chair Sykes and Leader Sykes wrote in their Section 8(C)(2) Minority Report, the “GOP-adopted map lays out an absurd description of how it allegedly meets the requirements of Section 6(B). The voters of Ohio do not favor Republicans in a range of 54% to 81%.” (STIP_0424). The anti-gerrymandering provisions enshrined in the Ohio Constitution through the Fair Districting Amendments requires partisan fairness. (STIP_0420). Fairness means that “[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party.” (*Id.*). But the district maps adopted by the Republican Commissioners gutted the anti-gerrymandering provisions and “in no way reflect the statewide preferences of voters in Ohio and do not closely correspond to the statewide election results of the last ten years.” (*Id.*). Instead, the maps the Republican Commissioners adopted went to “absurd lengths to create a Republican monopoly on

legislative power that they have not earned at the ballot box.” (STIP_0421). The result is that Ohioans are in an even worse position than in 2011. (STIP_0422).

III. LAW AND ARGUMENT

Article XI, Section 6 of the Ohio Constitution provides the following:

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 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 preferences of the voters of Ohio.
- C. General assembly districts *shall* be compact.

Ohio Constitution, Article XI, Section 6 (emphasis added). The Commission therefore has a constitutional duty to attempt to meet each of the standards set forth above. These standards must be read in conjunction with all other constitutional and statutory requirements. The requirement that the Commission attempt to meet these standards is just that—a requirement. It is not optional. It is not aspirational. The Republican Commissioners, particularly the Republican Legislative Commissioners, did not make this constitutionally required attempt. Despite knowing full well what Section 6 requires, the Republican Commissioners paid mere lip service to the standards in an effort to maintain their legislative supermajority, at the expense of the creation of fair legislative districts. As a result, the enacted Plan, as enacted along party lines, violates Section 6 of the Ohio Constitution.

A. Propositions of Law

1. Proposition of Law 1: Section 6 Sets Forth a Mandatory Prohibition of Partisan Gerrymandering.

The Democratic Commissioners agree with Relators' first Proposition of Law. As explained herein, Section 6 requires the Commission to attempt to meet proportionality standards.

2. Proposition of Law 2: Respondents Violated Section 6(B) of Article XI.

The Democratic Commissioners generally agree with Relators' second Proposition of Law. However, Relators characterize their Proposition under the assumption that the Commission acted as a single unit. That is not the case. The entire process could not have been more disjointed. The Commission did not convene until three weeks before the constitutional deadline. For his part, Senator Sykes timely produced a map for consideration by the full Commission. The Republican Commissioners refused to consider it. President Huffman and Speaker Cupp, on the other hand, did not produce a map for full Commission consideration until eight days after the constitutional deadline. By then, the rest of the Commission did not have enough time to review and provide input before it was too late. The result was a plan that is severely disproportionate to the preferences of the Ohio voters.

3. Proposition of Law 3: Respondents Violated Section 6(A) of Article XI.

The Democratic Commissioners agree with Relators' third Proposition of Law. As presented by Relators, despite a clear mandate that the *Commission* propose a plan, the Commission never actually proposed a plan. And it was not because the Democratic Commissioners failed to try. Both of them made good faith efforts to uphold their oath to put forth a Commission-drawn plan by timely producing a plan of their own, and by circulating revisions to the DiRossi plan. Republican Commissioners failed to reciprocate these efforts.

4. Proposition of Law 4: Respondents Did Not Attempt to Comply with Section 6.

The Democratic Commissioners agree with Relators' fourth Proposition of Law. The Republican Commissioners did not even consider the Section 6 standards. Nor did they instruct DiRossi, their main mapmaker, to focus on Section 6 compliance. Despite knowing full well that the enacted Plan did not comply with Section 6, the Republican Commissioners voted on it anyway.

5. Proposition of Law 5: The Violation of Section 6 Was Not Justified by the Need to Comply with Other Provisions of Article XI.

The Democratic Commissioners agree with Relators' fifth Proposition of Law. As stated herein, no single requirement contained in Article XI takes precedence over any other. They all must be read and considered simultaneously and in conjunction with one another. The record evidence shows that a map that complies with all provisions of Article XI *can* be drawn, it is just that the Republican Commissioners made the conscious decision not to even try to meet the Section 6 standards.

B. Burden of Proof

When assessing a challenge to the Commission's enacted Plan, this Court has found it must defer to the Commission's "reasonable construction of the principles expressed in Article XI." *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶¶ 17-18, 24. Thus, to prevail, the Court has historically required the party challenging the constitutionality of the plan to show the Plan is unconstitutional beyond a reasonable doubt.

Not all parties believe this burden of proof should still apply in light of the amendment to Article XI, however. OOC argues the deferential standard and discretion has been stripped away from the Commission through the creation of mandatory requirements and concrete remedies for violations of those requirements. (OOO Merit Br. 20-21). The Democratic Commissioners do not

disagree with OOC's reasoning. For purposes of this brief, the Democratic Commissioners will analyze the merits under the higher, "beyond a reasonable doubt" burden. Irrespective of which standard is applied, there is no doubt the enacted Plan is unconstitutional.

C. Article XI, Section 6 imposes a binding duty on the Commission to attempt to meet the applicable standards.

The Republican Legislative Commissioners did not attempt to meet the standards set forth in Article XI, Section 6, despite a duty and obligation to do so. The record reveals that Commissioner Huffman, Co-Chair Cupp, and the rest of the Republican Commissioners did not even consider the Section 6 standards when they voted to implement the enacted Plan, even though the plain language of Article XI includes mandatory and affirmative obligations.

1. By Its plain and unambiguous terms, the phrase "shall attempt" contained in Section 6 imposes an affirmative duty on the Commission to meet the standards set forth therein.

The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself. *State ex rel. King v. Summit Cty. Council*, 99 Ohio St.3d 172, 2003-Ohio-3050, 789 N.E.2d 1108, ¶ 35. Where the meaning of the questioned provision is clear on its face, a court need only look to the provision itself to divine a meaning. *Toledo City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*, 2016-Ohio-2806, 146 Ohio St.3d 356, 56 N.E.3d 950, ¶ 16; *State ex rel. Taft v. Franklin Cty. Ct. of Common Pleas*, 81 Ohio St.3d 480, 1998-Ohio-333, 692 N.E.2d 560, 561.

Black's Law Dictionary defines the word "shall" as follows:

Shall vb. (bef. 12c) 1. Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. • This is the mandatory sense that drafters typically intend and that courts typically uphold.

Shall, Black's Law Dictionary (11th ed. 2019). The term "shall" is widely recognized by courts and practitioners to be used in the mandatory sense. When drafters use the word "shall," they

typically do so with the intent that the action that follows it will be mandatory and binding. The word is a command; it is not something that indicates discretion or choice. It imposes a duty.

The mandatory nature of the term “shall” is so engrained in the law of the State of Ohio that this Court has held that the phrase “shall attempt” is, in fact, mandatory. When used, it requires an attempt on the part of the relevant official to fulfill the law’s command. This Court construed the phrase “shall attempt” to impose a duty on the part of the clerk of court. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 14. The use of the phrase conferred no discretion on the part of the clerk. *Id.* There, this Court held that, under the provisions of R.C. 2929.14, “[t]he clerk is therefore required to certify a bill of costs and attempt collection from nonindigent defendants.” *Id.* Similarly, this Court held that the phrase “shall endeavor” connotes a duty, not discretion. *State ex rel. Republic Steel Corp. v. Ohio Civil Rights Comm’n*, 44 Ohio St.2d 178, 180, 339 N.E.2d 658 (1975) (concluding that “it is clear the General Assembly intended a completed attempt at conciliation to be a condition precedent to the issuance of a complaint” by the Ohio Civil Rights Commission).

Here, the use of the phrase “shall attempt” in Article XI, Section 6, by its plain terms, means that the Commission is *required* to attempt to meet the standards set forth therein. Namely, the Commission is *required* to attempt to enact a legislative district plan that (1) does not favor or disfavor any one political party, (2) is proportional to the preferences of the Ohio voters, and (3) is compact. There is no reasonable interpretation of the phrase “shall attempt” except that it is mandatory and binding.

Inclusion of the word “attempt” after the word “shall” does not negate the mandatory and binding nature of this provision. The amended provisions of Article XI were drafted for that very purpose—to provide teeth to a requirement that legislative district plans be drawn in a fair and

equitable manner by imposing an affirmative obligation on the part of the Commission to attempt to draw districts that are proportional to the ten year average of the percentage of voters favoring each party, that do not favor or disfavor any political party (what Commissioner Huffman defines as gerrymandering), and that are compact. The use of the word “attempt” simply recognizes that there are other requirements that need to be met in order to have a constitutional legislative district plan, and proportional fairness is as equally important as any other constitutional requirement.

As explained by Co-Chair Sykes, a principal author, the map drawer “shall” get as close as possible to the voter preferences ratio while still meeting the other line drawing requirements of Sections 2, 3, 4, 5, and 7. (DEPO_00893, V. Sykes Depo 60:9-12). The key here is “shall attempt.” “[I]f it is possible to be done, and you attempt to do it, then you will accomplish it.” (*Id.*). The representational fairness is considered simultaneously with the requirements of Sections 2, 3, 4, 5, and 7, (DEPO_00895, V. Sykes Dep. 62:5-11). A map could meet the requirements of Sections 2, 3, 4, 5, and 7 and not comply with the fairness component, which is the most significant aspect and reason why the amendment was passed in the first place (DEPO_00896, V. Sykes Dep. 63)

The rules of statutory interpretation apply equally to constitutional provisions as they do for legislation. *Athens v. McClain*, 163 Ohio St.3d 61, 2020-Ohio-5146, 168 N.E.3d 411, ¶ 29. When interpreting statutes, courts must avoid an interpretation that renders a provision meaningless, inoperative, void, superfluous, or insignificant. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 2002-Ohio-4172, 96 Ohio St. 3d 250, 773 N.E.2d 536, ¶ 26 (citing *E. Ohio Gas Co. v. Pub. Utilities Comm'n of Ohio*, 39 Ohio St. 3d 295, 530 N.E.2d 875 (1988)); *In re Est. of Centorbi*, 129 Ohio St. 3d 78, 2011-Ohio-2267, 950 N.E.2d 505, ¶ 13.

Here, if this Court were to interpret Section 6 as being anything other than mandatory, it would render that provision meaningless. Commissioner Huffman appears to believe that the

Section 6 standards are “aspirational.” (DEPO_01768, 01809-01810, 01814, Huffman Dep. 66:22, 107:18, 108:4-18, 112:3-17). And at the same time, he testified that creating fair districts that comply with the Section 6 standards are impossible. (DEPO_01781, 01812-01814, Huffman Dep. 79:7, 110:4-14, 111:21, 112:1-10). Commissioner Huffman was obligated to put his personal skepticism aside and make every effort to comply with the constitutional standards of Section 6. What we know for sure from Commissioner Huffman’s sworn testimony is that neither he nor the mapmakers under his direction ever tried because they determined without any legal basis that the provisions of Section 6 were not mandatory. (DEPO_01819, Huffman Dep. 117:10-13).

To interpret otherwise would undermine the work done by Co-Chair Sykes, Commissioner Huffman, with the support of the then Ohio Senate President, Commissioner Faber, and then Ohio State Senator, Commissioner LaRose, to amend Article XI in 2014. It would also undermine the will of Ohio voters who decided overwhelmingly in 2015 that Ohio’s redistricting scheme needed revision in order to have fair legislative districts. To read Section 6 as being discretionary or optional or “aspirational” would be to nullify the voice of the general public. Section 6 should be interpreted as imposing an affirmative duty on the Commission to attempt to meet the proportionality standards of Section 6(B).

Reading the provisions of Section 6 as imposing mandatory obligations on the Commissioners would give meaning to other provisions within Article XI. Specifically, Article XI, Section 8(C)(2) requires the Commission to, in the event that a district plan is enacted using the impasse procedure, “include a statement explaining what the commission determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party corresponds closely to those

preferences....” If Section 6 were discretionary or merely “aspirational,” Section 8(C)(2) would also be rendered meaningless and superfluous.

The plain and ordinary meaning of the phrase “shall attempt” contained in Article XI, Section 6 requires the Commission to take affirmative action to meet the standards set forth in subsections 6(A) and 6(B).

2. The history, purpose, and structure of Article XI confirm that the Commission must attempt to meet the Section 6 standards.

If this Court is inclined to look beyond the plain meaning of Article XI, Section 6, it will find that its history, structure, and purpose demand an interpretation that imposes affirmative duty on the Commission to attempt to meet the standards set forth therein. Should this Court decide that the meaning of the phrase “shall attempt” in Article XI, Section 6 cannot be ascertained by the plain language, then the Court may look to the purpose and intent of the provision to determine its meaning. *See Toledo City Sch. Dist. Bd. of Edu.*, at ¶ 16.

Prior iterations of Article XI proved to be inadequate to prevent gerrymandering and produce fairly drawn legislative district maps. *See Wilson*, 2012-Ohio-5367, at ¶ 16 (holding that Article XI, as it was written at the time, did not require “political neutrality”). The former redistricting scheme allowed the majority party to draw maps in secret and without input from the minority party because it allowed the defunct Apportionment Board to use its discretion to choose between which provisions to follow, and which provisions to ignore. *Id.* at ¶ 17. As a result, election cycles in previous decades have been plagued by legislative district maps drawn to favor one political party over others and the courts were powerless to enforce Article XI’s provisions.

During the 2011 redistricting process, Republicans made up the majority of the Apportionment Board. As Article XI was written at the time, the Republican majority was able to draw maps that disproportionately favored the Republican Party, and the numbers do not lie—in

2012 Democratic candidates won a majority of the statewide vote, but only won a mere 39.4% of the General Assembly seats. (COMP_0022, Warshaw Expert Aff. at 18). Since then, Republicans were able to maintain their stranglehold on General Assembly seats, in spite of statewide voter preferences. For instance, during the 2020 election cycle, Democrats only controlled 35% of Ohio General Assembly seats, despite winning 45% of the statewide vote. (COMP_0022-23, Warshaw Expert Aff. at pp. 18-19). The 2020 election cycle was not an anomaly; the former Article XI process gave rise to at least a decade of elections that were unfairly biased in favor of the Republican Party. (*Id.*) This partisan bias provided fertile ground for redistricting reform.

Acting on the surge of public support for reform, Co-Chair Sykes personally endeavored to create a process that was fair to all political parties and, more importantly, to Ohio voters. Co-Chair Sykes, with support from Commissioner Huffman, led the charge to pass redistricting reform legislation, co-chairing the Fair Districts for Ohio campaign. (*See* DEPO_00917-00918, V. Sykes Dep. 84:21-85:8; HIST_0001-00023, HJR 12). Then he successfully campaigned to put Issue 1 on the ballot for the November 2015 general election. (DEPO_00909, V. Sykes Dep. 76:10-14; HIST_0098, Issue 1 Statement). Ohioans voted overwhelmingly in favor of Issue 1, thereby ushering in a new era of legislative redistricting under Co-Chair Sykes' guidance and leadership. (HIST_0121, Statewide Issue History).

The changes that the passage of Issue 1 made to Article XI were designed to achieve fair legislative districts. Specifically, the key mechanism for achieving fair district lines are the proportionality standards set forth in Section 6(B). (DEPO_00884, 00917, V. Sykes Dep. 51:15, 84:21). Thus, the purpose of the 2015 amendments was, as articulated by Article XI's key author, to prescribe procedures and criteria such that maps can be drawn fairly. (DEPO_00906, V. Sykes Dep. 73:19). But the proportionality standards are just one of several ways in which the

amendments provide fair districts. The requirements of Sections 2-5 and 7 of Article XI are *in addition to* the proportionality standards set forth in Section 6. (DEPO_00870-00871, V. Sykes Dep. 37:5-38:16). The splitting requirements of Sections 2, 3, 4, 5, and 7 are just one tool in the toolbox of the 2015 amendments meant to alleviate gerrymandering and create fair districts. (DEPO_00907, V. Sykes Dep. 74:16). The representational fairness provisions must be considered simultaneously with the technical requirements, not as an afterthought. (DEPO_00895, V. Sykes Dep. 62:5-11).

After all, just because a legislative map complies with the requirements for district splits, population, and continuity, that does not mean the districts are drawn fairly. “Just complying with ... the technical requirements does not address the issue of fairness.” (DEPO_00896, V. Sykes Dep. 63:18-22). A technically compliant map is not necessarily a fair map, and the proportionality standards of Section 6 were enacted in order to achieve fair legislative district maps. Co-Chair Sykes and Commissioner Huffman both realized this when they drafted and campaigned for the 2015 revisions to Article XI. (DEPO_00917-00918, V. Sykes Dep. 84:21, 85:11). One need only look to the name of that campaign—Fair Districts for Ohio—to understand this simple truth.

The history and purpose of Section 6 show that the proportionality standards are more than “aspirational” goals. The term “aspirational” appears nowhere in the text of Article XI. The fairness provisions in Section 6 were the major point of the 2015 revisions to Article XI. Interpreting Section 6 to be discretionary or “aspirational” would not only belie the will of the Ohio voters, but it would also contradict the purpose and intent of the Section 6 proportionality and fairness provision.

D. The Enacted Plan violates Section 6(B) because it does not reflect Ohio’s statewide voter preferences.

The enacted Plan does not closely correspond to the preferences of Ohio’s voters; thus the Plan violates Section 6(B). Under Section 6(B), the Commission must draw a map where “[t]he 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 correspond[s] closely to the statewide preferences of the voters of Ohio.” Section 6(B) is the litmus test to determine whether the maps comply with Section 6(A)’s requirement that maps not be drawn to favor a particular political party. No reasonable person would interpret the maps enacted by the Republican Commissioners as reflecting the partisan proportional preferences of Ohio voters.

Despite the essential purpose of this provision, Commissioner Huffman described proportionality as one ingredient “in a salad of things that’s in there” (“there” being the Ohio Constitution). (DEPO_01739-01740, Huffman Dep. 37:21-38:1). This dismissive description is part and parcel of the approach the Republican Legislative Commissioners took to their map-drawing responsibilities. The Republican Legislative Commissioners said they did not consider partisan proportionality when drawing the enacted maps, resulting in a Plan that is even less fair to Ohio voters than the 2011 Plan, a plan which was so egregious that over 71% of Ohio voters supported the constitutional amendments from which the partisan proportionality requirement arises. When the time came to explain themselves, Republicans offered a nonsensical justification for their Plan which is neither supported by Ohio voting data nor consistent with any reasonable interpretation of Section 6(B).

1. The Republican members of the Commission did not consider partisan proportionality when generating the Enacted Plan.

The Commission as a whole never worked together to develop a map, nor did it have the staff or software to do so. (DEPO_01717, 01720, 01831-01832, Huffman Dep. 15:1-21, 18:7-9,

129:8-130:18). Instead, following the August 12 release of federal Census data, the Republican Legislative Commissioners began work on their redistricting maps without providing any preview to the Democratic Commissioners or their staffs. (DEPO_01284-01285, Springhetti Dep. 33:23-34:9; DEPO_00477, DiRossi Dep. 25:20-25; DEPO_01721, Huffman Dep. 19:15-20). At the direction of Co-Chair Cupp and Commissioner Huffman, only Blake Springhetti, the Director of Finance for the Ohio House of Representatives, and Ohio Senate Finance Director Ray DiRossi drew the Republican maps. (DEPO_01583-01586, Cupp Dep. 23:16-26:4; DEPO_00480, DiRossi Dep. 28:11-16; DEPO_01279-01280, 01285, Springhetti Dep. 28:24-29:8, 34:10-17).¹

Commissioner Huffman instructed his mapmakers to comply with the line-drawing requirements of the Ohio Constitution, such as those set forth in Sections 3 and 4 of Article XI, but emphasized to the mapmakers that they need not worry about complying with Section 6. (DEPO_01658-01659, Cupp Dep. 98:16-23, 99:6-12; DEPO_01733-01734, Huffman Dep. 31:19-32:5; DEPO_01285-01286, Springhetti Dep. 34:10-35:21). Commissioner Huffman directed DiRossi not to consider race or other demographic information (although Commissioner Huffman acknowledged that census data is demographic data) when preparing the Republicans' map. (DEPO_01736-01737, Huffman Dep. 34:23-35:8).

Despite the secretive process the Republicans employed, the Democratic Commissioners attempted to work with the Republicans throughout the summer and fall of 2021, but these efforts were largely disregarded. (DEPO_00935, V. Sykes Dep. 102:13-17) (“[O]ur staff was always working with the majority staff, trying to organize and promote collaboration, cooperation, and bipartisanship; but in most cases, it just was not well-received.”). Up until the day the Commission

¹ That both the House and Senate Republicans chose their respective Finance Directors to lead the map-drawing process further illustrates that the Republicans prioritized their political interests when preparing their proposed map.

voted on the Plan, “much of the negotiations were still behind the scenes. . . . different members of the caucus would go into the back room and have conversations about the map in the process, that would affect the outcome. But it wasn't a majority of the members, so it was allowable by law, but it was not a transparent process.” (DEPO_00937, V. Sykes Dep. 104:10-19).

2. The Enacted Plan is less fair than the 2011 Plan.

The enacted Plan is even less fair than the 2011 Plan, a plan which was so dramatically unfair that it motivated Ohio voters to go to the polls twice to ensure that fairness and equity would be reflected in future redistricting processes. Indeed, Co-Chair Cupp expressed surprise at the “number of Republican leaning districts” contained in the version of the enacted Plan he reviewed on September 9. (*See* DEPO_01666, Cupp Dep. 106:9-18). In particular, Co-Chair Cupp testified, “I didn’t expect [the number of Republican seats] would be as – that high. . . . There were more Republican leaning seats [on the September 9 map] than there are current Republican members.” (DEPO_01666-01667, Cupp Dep. 106:23-24, 107:5-11). If Ohio voters’ preferences were reflected in the Plan, the Plan would create “close to” 54 House Districts and 18 Senate districts that Republican candidates would likely win. Instead, the enacted Plan is likely to yield approximately 62 Republican-majority House districts (and possibly more), and 23 Republican-majority Senate districts. (Rodden Expert Aff. at ¶ 18). This Republican supermajority fails to reflect from the partisan proportionality of the Ohio electorate, and unconstitutional under Section 6(B).

i. *The enacted Plan departs even further from the Constitution’s standards than what the high level numbers reveal.*

The enacted Plan departs even further from true proportionality than an initial review of the partisan indices of the legislative districts discussed *supra* suggest. Not only are Republicans likely to pick up more seats compared with the 2011 Map, their districts are less competitive than

the Democratic districts. As one of Relators’ experts explained, **all** the majority-Republican House seats are drawn from districts where the average partisan vote share over the past 10 years was 52 percent Republican. (Rodden Expert Aff. at ¶ 21). By comparison, of the 37 majority-Democratic House seats, only 32 districts have an average partisan vote share of 52 percent Democratic or higher. (Rodden Expert Aff. at ¶ 21). “All 5 of the toss-up seats” have historically had “slim Democratic majorities.” (Rodden Expert Aff. at ¶ 21). As a result, while all of the Republican House members are likely to win re-election comfortably, the only competitive districts are lumped in with the “Democratic-leaning” seats, even though all 5 of these seats could easily be won by Republicans. By generating such a large number of seats with comfortable Republican majorities, the enacted Plan “would provide the Republican Party with a majority of seats even in the event of a comfortable Democratic statewide victory.” (Rodden Aff. at ¶ 21). Such a disconnect defies the constitutional mandate of Section 6(B).

ii. *Communities of color suffer disproportionately under the enacted Plan.*

The Republicans’ plan is particularly harmful to communities of color. For example, experts Dr. Rodden and Dr. Handley focused on the Plan’s division of Black communities in the Cincinnati metro area, wherein Republicans “extracted” a toss-up district from the eastern suburbs despite the area’s general preference for Democratic candidates. (Rodden Expert Aff. at ¶¶ 75-77). This is particularly harmful to Black voters. Dr. Handley explains, “voting in Hamilton County is consistently racially polarized,” with Black voters overwhelmingly supporting their preferred candidates in every one of the last 13 statewide general elections while white voters “strongly favored the opponents of these candidates.” (LH_001, Handley Expert Aff. at ¶ 4). By “extracting” predominantly white districts from otherwise-diverse areas, Republicans ensure their seats remain predictably safe, while creating an over-representation of Black voters in other districts.

This problem is even more pronounced in the Dayton metropolitan area. As Dr. Rodden explains, the enacted Plan:

takes the relatively compact Black community of metropolitan Dayton, which votes overwhelmingly for Democratic candidates, and scatters it across 4 separate districts. The district with the largest Black community—number 38—is a majority-Democratic district. In fact, it is a super-majority Democratic district, where on average, Democrats win 69 percent of the vote. However, all of the other fragments of Dayton’s Black community are combined with sufficient numbers of surrounding white, suburban populations in the 4 other Montgomery districts to generate 1 true toss-up (District 36) and 3 districts with comfortable Republican majorities.

(Rodden Expert Aff. at ¶ 83).

By “packing” and “cracking” communities of color as needed to suit the Republicans’ agenda, the enacted Plan disproportionately impacts these communities in violation of Section 6(B).

3. The scant rationale Republicans provided that the Plan complies with Section 6, by their own admission, makes no sense.

i. *Republicans provided scant rationale to support their methodology.*

According to the Section 8(C)(2) Statement, Republican Commissioners determined that Republican candidates won thirteen out of the sixteen statewide state and federal general election contests during the last ten years, supposedly demonstrating that 81% of voters favor Republican candidates. The Statement notes that if the “number of votes cast in each of those elections” is considered instead, then the statewide proportion of voters favoring Republican candidates drops to 54%. With these two figures in mind, the Statement concludes that “the statewide proportion of voters favoring statewide Republican candidates is between 54% and 81%,” and thus because the percentage of districts in the enacted Plan favoring Republican candidates (approximately 64.4%) falls between 54% and 81% – a 27-point spread – it “correspond[s] closely to the statewide preferences of the voters of Ohio.” To quote Secretary LaRose, the rationale described in the Statement is “asinine.”

ii. *The range from 54% - 81% renders Article XI's standards meaningless.*

Additionally, the 8(C)(2) statement's interpretation of 6(B) effectively reads the phrase "correspond[s] closely" out of the Constitution. *Wilson*, 2012-Ohio-5367, at ¶ 21 ("A court must presume a statute's effectiveness, meaning that all words should have effect and no part should be disregarded.") (quotation marks and citation omitted). Under Section 6(B), the likely partisan breakdown for a map must "correspond closely to the statewide preferences of the voters of Ohio." (emphasis added). By the Commission's telling, however, a plan can pass muster under Section 6(B) if it awards 54% of seats to Republicans, or 81% of seats to Republicans, or any percentage in between that the Commission arbitrarily selects. If the word "closely" is to mean anything, surely it must require more than a range representing more than a quarter of all possible seat allocations.

iii. *Several Republicans testified that the Plan is not proportional.*

Republican Commissioners publicly and privately stated that the proposed maps were constitutionally suspect – but voted for them anyway. At a Commission hearing on September 13, Secretary LaRose described the Democratic Caucus Plan as "a good faith proposal." By contrast, he described the majority's 8(C)(2) statement presented by Commissioner Huffman on the evening of September 15 as "asinine" in a text to his Chief of Staff and further bemoaned that he "should vote no." (DEPO_00145-00158, LaRose Dep. Ex. 2). Secretary LaRose then backed down after his Chief of Staff convinced him that voting his conscience was "probably not worth it" because that vote would "be used in the court against the GOP." (*Id.*) He then voted in favor of the Plan, but in doing so, stated, "I'm casting my yes vote with great unease," and expressed his view that certain other Commissioners had not "worked in good faith, in a bipartisan way, to try to get a compromise." (STIP_0398)

Governor DeWine also expressed clear reservations, stating that the Commission “could have produced a more clearly constitutional bill” but “[t]hat’s not the bill that we have in front of us.” (*Id.*) Governor DeWine stated that in voting for the bill, he was “not judging the bill one way or another. That’s up . . . to a court to do.” (*Id.*) The Governor further testified in his deposition that he did not agree with the statement’s use of the 81% metric to gauge statewide voter preferences, stating that it “would not have been a rationale for [him].” (DEPO_00240, 00242, DeWine Dep. 81:1-11, 83:4-10).

Commissioner Faber was less critical, but still stopped short of a full-throated endorsement, stating, “[T]his map isn’t that bad. It’s not that good either.” Taken together, the Commissioners’ statements further indicate that the enacted Plan was not the product of a legitimate redistricting process, nor did it satisfy the requirement of Section 6(B) that a plan “closely” correspond to the voters’ partisan preferences.

E. The Enacted Plan violates Section 6(A) because it was drawn to favor the Republican Party.

Article XI, Section 6(A), requires the Commission to attempt to draw a map that does not advantage or disadvantage any political party. The 2021 Plan’s lack of proportionality is not the result of mere happenstance, but rather a direct consequence of Republicans’ concern for their own Party at the expense of a fair district plan.

First, the Republican Legislative Commissioners instructed the mapmakers to comply with the line-drawing requirements of the state Constitution, such as those set forth in Sections 3 and 4 of Article XI, but emphasized to the mapmakers that they need not worry about complying with Section 6. (DEPO_01658-01659, Cupp Dep. 98:16-23, 99:6-12; DEPO_01733-01734, Huffman Dep. 31:19-32:5; DEPO_00610-00611, DiRossi Dep. 158:6-159:25; DEPO_01285-01286, Springhetti Dep. 34:10-35:21). Thus, by Commissioner Huffman’s own description, the enacted

Plan was drawn using a process that utterly disregarded the constitutional obligations imposed on the Commissioners by Section 6.

Second, despite what Republican officials may have said publicly at the time, DiRossi and Springhetti confirmed in their depositions that they were considering partisan data while drafting their maps. When using the Maptitude software to draw legislative districts, the mapmakers could (and did) view partisan data while constructing the maps, including data showing each party's likely vote share in a given district as it was configured. (DEPO_00464, 00469-00470, 00484, DiRossi Dep. 12:6-9, 17:13-18:10, 32:2-6; DEPO_01295-01296, Springhetti Dep. 44:24-45:11). Co-Chair Cupp also testified that the map drawers discussed the partisan indices for various draft districts. (DEPO_01604-01605, Cupp Dep. 44:14-45:6). Given that the mapmakers did not consider partisan fairness in preparing the Republican maps, their reliance on partisan indices can only mean that the mapmakers sought to maximize the Republicans' electoral chances.

Third, Republicans' minimal efforts toward compromise demonstrate that they never intended to prepare a fair map. By all accounts, Republicans' compromise offers focused exclusively on seat counts. And the only change between the map Republicans proposed on September 9 to their final House map on September 16 was that five previously majority-Republican seats were now toss-up seats that were expected to favor Democrats (yet this so-called advantage amounts to fewer than two percentage points in each such district). (Rodden Expert Aff. at ¶ 21).

Though each anecdote, standing alone, might be insufficient to prove the Republicans' intentions in drawing the map, collectively, the evidence shows beyond a reasonable doubt that the Republican Commissioners drew the map primarily to favor the Republican Party, and that the enacted Plan therefore violates Section 6(A).

F. The constitutional violations of the enacted Plan require this Court to invalidate the Plan and Order the Commission to adopt a new plan that complies with Article XI in its entirety.

Section 9 of Article XI authorizes this Court to invalidate the enacted Plan and order the Commission to adopt a new plan. Specifically, this authority stems from the Court's exclusive grant of original jurisdiction. This Court is a court of "competent jurisdiction," as set forth in Article XI, Section 9(B), authorized to determine whether the enacted Plan violates the Constitution. As discussed above, the enacted Plan violates Sections 6(A) and (B) of Article XI because it fails to create districts that meet Section 6 standards. Moreover, the record evidence shows that the Republican Commissioners did not even consider the Section 6 standards. Therefore, the enacted Plan violates Section 6, and this Court has the authority to invalidate the enacted Plan and require the Commission to not only adopt a new plan that complies with the Ohio Constitution, but to adopt a plan that comes as close to the 54%-46% split of Ohio voter preferences.

IV. CONCLUSION

This Court has the opportunity to address a terrible injustice. In 2015, a 71% majority of Ohio voters determined that gerrymandering would be a thing of the past for apportioning seats in the General Assembly.

Instead of heeding the will of Ohio voters, the Republican members of the Commission simply disregarded the provisions that required fairness and proportionality. In a secret sanctum, hidden even from the Statewide Commissioners, the Republican Legislative Commissioners prepared maps so lopsided that Republicans are essentially guaranteed veto-proof majorities in the General Assembly no matter how many votes Democrats earn.

This Court should enforce the will of the voters and find that the Commission has failed to comply with Article XI.

Respectfully submitted,

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