IN THE SUPREME COURT OF OHIO

Bria Bennett, *et al.*, **Petitioners,** **v.** **Ohio Redistricting Commission, *et al.*,** **Respondents.**	**Case No. 2021-1198** Original Action Filed Pursuant to Ohio Constitution, Article XI, Section 9(A) *[Apportionment Case Pursuant to S. Ct. Prac. R. 14.03]*

PETITIONERS' OBJECTIONS TO GENERAL ASSEMBLY DISTRICT PLAN ADOPTED ON FEBRUARY 24, 2022

Abha Khanna (PHV 2189-2021)
Ben Stafford (PHV 25433-2021)
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
T: (206) 656-0176
F: (206) 656-0180
akhanna@elias.law
bstafford@elias.law

Jyoti Jasrasaria (PHV 25401-2021)
Spencer W. Klein (PHV 25432-2021)
ELIAS LAW GROUP LLP
10 G St NE, Suite 600
Washington, DC 20002
T: (202) 968-4490
F: (202) 968-4498
jjasrasaria@elias.law
sklein@elias.law

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

Erik J. Clark (0078732)
Ashley Merino (0096853)
ORGAN LAW LLP
1330 Dublin Road
Columbus, OH 43215
T: (614) 481-0900
F: (614) 481-0904
ejclark@organlegal.com
amerino@organlegal.com

Counsel for Respondent Ohio Redistricting Commission

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

dclinger@electionlawgroup.com

Counsel for Petitioners

Counsel for Respondents Ohio Governor Mike DeWine, Ohio Secretary of State Frank LaRose, and Ohio Auditor Keith Faber

W. Stuart Dornette (0002955)
Beth A. Bryan (0082076)
Philip D. Williamson (0097174)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut St., Suite 1800
Cincinnati, OH 45202-3957
T: (513) 381-2838
dornette@taftlaw.com
bryan@taftlaw.com
pwilliamson@taftlaw.com

Phillip J. Strach
Thomas A. Farr
John E. Branch, III
Alyssa M. Riggins
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Ave., Suite 200
Raleigh, NC 27612
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
T: (919) 329-3812

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

C. Benjamin Cooper (0093103)
Charles H. Cooper, Jr. (0037295)
Chelsea C. Weaver (0096850)
Cooper & Elliott, LLC
305 West Nationwide Boulevard
Columbus, Ohio 43215
T: (614) 481-6000
benc@cooperelliott.com
chipc@cooperelliott.com
chelseaw@cooperelliott.com

Counsel for Respondents Senator Vernon Sykes and House Minority Leader Allison Russo

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I. Introduction

It is difficult to believe that it is necessary for the Bennett Petitioners to again object to a plan drawn by the Ohio Redistricting Commission (the "Commission"). But, again, the Commission has ignored the anti-gerrymandering requirements of the Ohio Constitution and this Court's very specific guidance as to how the Commission should draw a constitutional plan.

With this newest map—referred to here as the "February 24 Plan"—the Commission's obstinance continues. Rather than address the issues identified by this Court, the Commission presents more of the same. *Again*, it offers a Plan drawn in secret by partisan map-drawers, unveiled at the last moment, passed without public comment, and painstakingly crafted to suggest a thin veneer of compliance with the Court's orders while still stacking the deck in favor of the majority party. If anything, the February 24 Plan reeks of partisan bias even more pungently than the first remedial plan this court considered and rejected (the "January 22 Plan"). For example, in the Commission's new plan, 42% of nominally Democratic-leaning House seats and 47% of nominally Democratic-leaning Senate seats are toss-ups, whereas *no* Republican-leaning seats are toss-ups.

Equally remarkable is the path the Commission took to get here. Ten days ago, after largely ignoring this Court's order that it draw a new General Assembly plan to comply with the requirements of the Ohio Constitution, the Commission declared it was at an "impasse." The Commission did not move the Court for an extension of time to try to draw a constitutionally compliant plan. It did not say it was still diligently working on new maps and just ran out of time. No, according to Senate President Matt Huffman, the Commission was at an "impasse" because the Commission was outright "unable to ascertain and determine a plan that complies with the Court's order and the Ohio Constitution." Notice of Impasse at 1, *Bennett v. Ohio Redistricting*

Comm., No. 2021-1198 (Feb. 18, 2022). That same day, a group of Republican-aligned voters filed an "impasse" lawsuit asking a federal court to order the implementation of the Commission's unconstitutional January 22 Plan.

Once this Court issued a show cause order, however, it turned out that the Commission was not at "impasse" at all. *See* Resp't The Ohio Redistricting Comm.'s Resp. to Order to Show Cause at 1, *Bennett*, No. 2021-1198 (Feb. 23, 2022). Only days after the Commission was "unable" to comply, it declared it "may be able to adopt a new map within days." *Id.* The next day, the Commission produced its newest Plan. A remarkable turnaround.

But unfortunately, the February 24 Plan before the Court does not reflect a good faith effort to comply with the Constitution or this Court's orders. Rather, it is a cynical attempt to avoid being held in contempt. At the same time, the Commission's seeming indifference to the prospect of judicial review continues to manifest. Secretary of State Frank LaRose (reportedly, at the direction of Speaker Robert Cupp and President Huffman) has already directed election officials to print ballots reflecting the new districts drawn in the February 24 Plan—before the Court even reviews them. (BENNETT_139 (2/26/22, 6:06 PM Tweet by Representative Seitz)). House Floor Leader Bill Seitz was blunter still, announcing on Twitter over the weekend:

> "We have an election to run. This court charade has gone on long enough. Red wave coming and GOP supermajority will be retained."

(*Id.*)

This Court has the power and the obligation to uphold the law and call the February 24 Plan what it is—a charade intended to feign compliance with the Court's orders while, in fact, systematically and primarily favoring the majority party. Accordingly, after describing the facts relevant to their objections, and the substantive reasons the new General Assembly plan fails to pass constitutional muster, the Bennett Petitioners set forth various proposed remedies to bring

finality in the form of a constitutionally compliant General Assembly plan.

II. Factual Background

A. The Commission adopted unconstitutional General Assembly plans in September 2021 and January 2022, despite the clear mandates of the Constitution and this Court.

The facts of this case are summarized in the Court's two recent opinions in this matter. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-65 ("*LWV I*"); *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-342 ("*LWV II*"). The Commission has twice adopted General Assembly district plans following the 2020 Census, and twice the Court has found that those maps violate Article XI's partisan fairness and proportionality requirements.

On September 16, 2021, the Commission approved its first plan (the "September 16 Plan"), which Petitioners promptly challenged as a blatant partisan gerrymander in an original action in this Court. On January 12, 2022, this Court invalidated the September 16 Plan as unconstitutional under Sections 6(A) and 6(B) of Article XI of the Ohio Constitution. *See LWV I*, ¶ 138. The Court's opinion in *LWV I* provided clear direction on the requirements of Article XI and what the Commission must do to comply with those constitutional requirements. The Court remanded to the Commission to remedy the plan's constitutional deficiencies, giving the Commission ten days to produce a new plan. *Id.* ¶ 139.

The Court's clear directions as to how to produce a constitutional plan went unheeded. Instead, the Commission simply took its 2021 process and compressed it into the ten-day timeline set by the Court. On the tenth day, Respondents presented their second General Assembly plan, approved by the Commission on January 22, 2022 (the "January 22 Plan"), to this Court. But the January 22 Plan flagrantly violated this Court's *LWV I* order in both its substance and the process that led to it. Partisan map-drawers reporting to the majority party's leaders once again created a

plan out of public view and with negligible consultation with the minority party's Commissioners. The Commission did not solicit public input. The January 22 Plan looked markedly similar to the unconstitutional September 16 Plan, because it was: although the Court had made clear in its opinion that the violations of Article XI tainted the original plan in its entirety, mapmakers simply begrudgingly made minor adjustments to the old plan. The January 22 Plan created nominally "Democratic-leaning" districts, but did so only in the form of highly competitive toss-up districts, many with Republican incumbents, while ensuring that almost every single Republican-leaning district remained safe.

The Court was not fooled. On February 7, the Court held that the January 22 Plan violated Sections 6(A) and 6(B) of Article XI. *LWV II*, ¶ 1. Once again, this Court gave clear guidance to the Commission as to how to draw a constitutionally compliant plan. The Court emphasized that the Commission could not claim to achieve partisan fairness and proportionality while at the same time allocating competitive districts to one party in a "monolithically disparate" manner. *See id.* ¶ 40. The Court explained that "competitive districts . . . must either be excluded from the proportionality assessment or be allocated to each party in close proportion to its statewide vote share." *Id.* ¶ 62. The Court then ordered as follows:

> We . . . order the commission to be reconstituted, to convene, and to draft and adopt an entirely new General Assembly-district plan that conforms with the Ohio Constitution, including Article XI, Sections 6(A) and 6(B) as we have explained those provisions above. We further order the commission to adopt the new plan and file it with the secretary of state no later than February 17, 2022, and to file a copy of that plan with this court by 9:00 a.m. on February 18, 2022. We retain jurisdiction for the purpose of reviewing the new plan.

Id. ¶ 67-68.

B. After dragging its feet for ten days, the Commission willfully ignored this Court's *LWV II* Order.

Many litigants disagree with court orders that go against them. Few do what Respondents

did next. In the days that followed the Court's *LWV II* Order, Respondents and their representatives criticized this Court, ignored deadlines, refused to hold meetings until the last possible minute, and in the final hours before the Court's February 17 deadline to adopt a new plan, summarily pronounced that compliance with the Court's order was impossible, declared an impasse, and went home.

Indeed, the ink on the Court's February 7 order in *LWV II* was not even dry before the Republican caucus began criticizing the Court itself. In a tweet sent the evening of Monday, February 7, Senate GOP spokesperson John Fortney claimed that because of "court ordered gerrymandering," "Ohio's voters, candidates and election system now face a constitutional crisis and election system chaos." (BENNETT_001 (2/7/22, 6:08 PM Tweet by John Fortney)). At the same time, Republican Commissioners provided no word as to when the body would reconvene to begin redrawing General Assembly maps in compliance with the Court's order.

Meanwhile, the Democratic Commissioners expressed their readiness to meet. On Wednesday, February 9, Commission Co-Chair Senator Vernon Sykes sent his fellow Co-Chair Speaker Cupp a letter urging the Commission to reconvene immediately to consider new General Assembly maps. (BENNETT_092-093 (Attachment to 2/9/22, 4:06 PM Tweet by Josh Rultenberg (Letter from Senator Sykes))). In the letter, Senator Sykes expressed "disappointment that based on the availability of the majority commissioners, the Commission cannot meet immediately." *Id.* He also reminded Speaker Cupp that on February 7 this Court, in *LWV II*, noted that the Commission "did not efficiently use [its] time" in responding to the Court's initial order. *Id.* Senator Sykes also cautioned Speaker Cupp that further delay will "not afford ample opportunity for the Commission to have open discussions and to hear testimony from the public on the map." *Id.* Finally, Senator Sykes directed Speaker Cupp to the General Assembly proposal that he and

House Minority Leader Allison Russo had submitted to this Court on January 28. *Id.*

Senator Sykes's pleas to convene a meeting went unheeded. Just prior to Senator Sykes's letter, Speaker Cupp announced that though certain members of the Commission were communicating in private, he did not expect to call a Commission meeting until the following week. (BENNETT_090 (2/9/22, 3:39 PM Tweet by Josh Rultenberg)).

Two days later, on Friday, February 11, Senator Sykes and Leader Russo held a press conference concerning their General Assembly proposal, which was substantially similar to the proposal they had submitted to this Court two weeks prior. (*See* BENNETT_103 (2/1/22, 2:24 PM Tweet by Josh Rultenberg)); *see also* First Affidavit of Derek S. Clinger ¶ 3-4 (Feb. 18, 2022). The two Democratic Commissioners urged the Commission to meet and encouraged the public to provide any feedback on the proposal. (*See* BENNETT_103 (2/1/22, 2:24 PM Tweet by Josh Rultenberg)); (BENNETT_092-093 (Attachment to 2/9/22, 4:06 PM Tweet by Josh Rultenberg (Letter from Senator Sykes))). In response, Senate GOP spokesperson John Fortney wrote "I'm sure at this point, democrats [sic] believe they could draw house and senate maps in crayon and watercolor and the same four members of the court would approve their unconstitutional maps." (BENNETT_101 (2/11/22, 11:52 AM Tweet by Josh Rultenberg)). The Commission itself took no action, though only one week remained until the deadline. (*See* BENNETT_102 (2/11/22, 4:39 PM Tweet by Josh Rultenberg)).

The following Monday, February 14, House and Senate Democrats confirmed they had still heard nothing from Republicans about scheduling a Commission meeting. (BENNETT_105 (2/14/22, 10:17 AM Tweet by Josh Rultenberg)). Finally, Governor Mike DeWine and Secretary LaRose announced that they were prepared to meet. (BENNETT_107 (Attachment to 2/14/22, 3:24 PM Tweet by Josh Rultenberg (Statement from Governor DeWine's spokesperson));

(BENNETT_108 (Attachment to 2/14/22, 3:46 PM Tweet by Josh Rultenberg (Statement from Secretary LaRose's spokesperson)). But this was cold comfort because as the rules stood then the Commission could only convene at the call of both Co-Chairs, Senator Sykes *and* Speaker Cupp. *See* Ohio Redistricting Comm., Rules at R. 05 (Amended Feb. 17, 2022). And Speaker Cupp had not agreed to meet. (*See* BENNETT_110 (2/14/22, 3:38 PM Tweet by Josh Rultenberg)).

The following day, on Tuesday, February 15, the Bennett and League of Women Voters Petitioners jointly submitted to the Commission a plan drawn by Dr. Jonathan Rodden. *See* First Affidavit of Derek S. Clinger ¶ 7-8 (Feb. 18, 2022). The plan ("Rodden III"), was substantially identical to the plan previously introduced to this Court, with a few minor changes to correct zero-population splits and instances where district lines were drawn to follow township boundaries instead of municipal boundaries.[1] *See* Second Affidavit of Derek S. Clinger (Feb. 18, 2022), BENNETT_0003 (February 15 Letter to Ohio Redistricting Commission from Ben Stafford and Freda Levenson). In a letter accompanying the plan, Petitioners' counsel welcomed the Commission's feedback and invited the Commission to use the plan as a starting point for an adopted plan. *Id.*

Finally, during the evening of February 15, the Commission issued a meeting notice for

[1] As described in the Bennett Petitioners' previous round of objections, Bennett Petitioners do not understand Section 3 to be implicated by splits in which only one side of the subdivision split is populated. *See* Bennett Pet'rs' Objections at 20 n.6, *Bennett,* No. 2021-1198 (Jan. 25, 2022). Dr. Rodden adjusted these "splits" to remove any doubt as to the plan's compliance. Also, as explained in Dr. Rodden's most recent report, the Commission's plan now under consideration (the February 24 Plan) contains zero-population splits that (if counted as genuine splits) would violate Article XI, Section 3(D)(3), as did the Commission's January 22 Plan. Affidavit of Dr. Jonathan Rodden ¶ 51 n.7 (Feb. 28, 2022). According to the previous testimony of the Republican Legislative Commissioners' map-drawer, Raymond DiRossi, these splits should render the February 24 Plan unconstitutional. *See* Affidavit of Ray DiRossi ¶ 27, Appx.247 (Jan. 28, 2022). But because the Bennett Petitioners do *not* believe that zero-population splits are constitutionally meaningful, they do not seek rejection of the February 24 Plan on this basis.

Thursday, February 17, the Court's deadline. (BENNETT_002 (Notice and Agenda of Ohio Redistricting Commission's 2/17/22 Meeting)).

On Wednesday, February 16, the day before the Court's deadline—with no indication that the Commission as a whole would draw a plan, and without any introduced Republican plan—the Democratic Commissioners moved forward with finalizing their General Assembly proposal. In the early afternoon, Senator Sykes and Leader Russo released a slightly revised version of the plan they had presented the week prior, with minor technical changes. (BENNETT_122 (2/16/22, 1:28 PM Tweet by Josh Rultenberg)). In a letter to Republicans on the Commission, the Democratic Commissioners requested any feedback by 9:00 a.m. the next morning. *Id.*

Meanwhile, the Republican plan remained shrouded in mystery. During an interview on February 16, President Huffman said that Republicans were drawing maps, but that he was unsure if they would be introduced at the meeting the next day. (BENNET_123 (2/16/22, 2:50 PM Tweet by Josh Rultenberg)). In a separate conversation, when a reporter reminded Speaker Cupp that the Court-appointed deadline for new maps was the next day, he responded, "You're really set on these deadlines aren't you?" When the reporter responded, "It's not me; it's the Ohio Supreme Court," Speaker Cupp shot back, with a laugh, "They are, too." (BENNETT_124 (2/16/22, 5:22 PM Tweet by Josh Rultenberg)). As later events showed, the Court was "set" on its February 17 deadline—the Commission was not.

At long last, the Commission held a meeting on Thursday, February 17. (*See* BENNETT_003-027 (Transcript of Ohio Redistricting Commission's 2/17/22 Meeting, Part 1)). At this meeting the Republican Commissioners refused to introduce any plan. After ten days of sitting on their hands, the Republican Commissioners showed up to the Commission meeting empty-handed.

Aside from that key difference, Respondents' approach to the February 17 meeting was largely the same as their approach to the January 22 meeting. Public testimony was not permitted. Republican Commissioners attacked the Democratic proposal with the help of visual aids. (*See id.* at BENNETT_003-025). About an hour into the meeting, journalist Josh Rultenberg reported that "a ton of posters . . . of maps" could be seen leaning against the wall in the meeting room. (BENNETT_128 (2/17/22, 2:25 PM Tweet by Josh Rultenberg)). As observers would soon discover, not one of these posters showed a Republican proposal. Instead, Republican staffers had evidently spent the days leading up to the meeting creating posters of the Democratic proposal to assist the Republican Commissioners in criticizing the plan.

And so, as it did on January 22, a familiar dance unfolded. Democrats introduced a plan. Republicans objected to it using prepared demonstratives to press their attack, while refusing to work to address any of their supposed objections. The Commission voted the proposal down along party lines. (*See* BENNETT_025-026 (Transcript of Ohio Redistricting Commission's 2/17/22 Meeting, Part 1)). Leader Russo asked the Commissioners to put their objections into writing, but this proposal was similarly voted down 5-2, with the two Democrats voting in favor. (*Id.* at BENNETT_026-027). The Commission did not consider or even discuss the Rodden III Plan, or any other plan that had been submitted through the Commission's public portal.

The Republican Legislative Commissioners did not present or discuss a plan of their own. There is no evidence they showed a draft of any such plan to the statewide officials on the Commission, let alone the Democrats. No Commissioner suggested that any such plan was on the cusp of being finalized or that, if only they had a few more days, they would introduce or pass such a plan. No Commissioner made a motion to ask the Court for an extension.

Instead, Speaker Cupp declared that there was no constitutional plan that the Commission

could pass and declared the Commission at "impasse." (BENNETT_035 (Transcript of Ohio Redistricting Commission's 2/17/22 Meeting, Part 2). The meeting adjourned without the Commission adopting a plan. (*See id.* at BENNETT_035-036). The Court's February 17 deadline came and went and the Commission did not pass a plan. The Commission willfully disregarded an order of this Court.

The next morning, the Commission filed a self-styled "notice of impasse" with this Court, stating that the Commission was "unable to ascertain and determine a plan that complies with the Court's order and the Ohio Constitution." Notice of Impasse at 1, *Bennett*, No. 2021-1198 (Feb. 18, 2022). That very same morning, a group of Republican activists filed a lawsuit in federal district court asking the court to usurp this Court's jurisdiction and adopt the Commission's unconstitutional January 22 Plan. *See* Second Affidavit of Derek S. Clinger (Feb. 18, 2022), BENNETT_009-041 (Complaint in *Gonidakis, et al. v. Ohio Redistricting Comm'n, et al.*, Case No. 2:22-cv-773 (S.D. Ohio Feb. 18, 2022)). Along with the complaint, plaintiffs in that case filed a motion for preliminary injunction also requesting that the court order the implementation of the invalidated January 22 Plan. *Id.*, BENNETT_042-057 (Motion for Preliminary Injunction in *Gonidakis, et al. v. Ohio Redistricting Comm'n, et al.*, Case No. 2:22-cv-773 (S.D. Ohio Feb. 18, 2022)). The Bennett Petitioners have moved to intervene in the lawsuit and, if their motion is granted, will move to stay the proceedings pending the resolution of this litigation by this Court.

On Friday, February 18, the Court issued an order requiring Respondents to show cause as to why they should not be held in contempt. *See* Order, *Bennett,* No. 2021-1198 (Feb. 18, 2022). Four days later, *after* the show cause order, the intractable "impasse" melted away. On February 22, during a Commission meeting convened to discuss its plan for adopting a congressional map, Auditor Keith Faber suggested that the Commission meet to discuss General Assembly maps that

were in progress or, at the very least, the Rodden III Plan. (BENNETT_041 (Transcript of Ohio Redistricting Commission's 2/22/22 Meeting)). Speaker Cupp declared the Commission would meet the next day "for a dual purpose to begin hearing [sic] on the congressional map, the two hearings that are required, as well as to report on any progress that may be made on a General Assembly district map." (*Id.* at BENNETT_042). Until that time, the Commission members had not given any indication that they still intended to pass a General Assembly plan.

The next day, February 23, the Commission, President Huffman and Speaker Cupp, Secretary LaRose and Auditor Faber, Governor DeWine, and the Democratic Commissioners all filed briefs responding to the Court's order inquiring why Respondents should not be held in contempt. In their brief, President Huffman and Speaker Cupp stated that they did not vote for the Democratic Commissioners' plan because it unduly favored Democrats in violation of the state constitution and because they supposedly thought the plan was a racial gerrymander. *See* Response to the February 18, 2022 show cause order of Ohio Senate President Matt Huffman and Ohio House Speaker Robert R. Cupp at 1, *Bennett*, No. 2021-1198 (Feb. 23, 2022). They wrote that "members of the Commission have continued to work on a plan" and "[t]he Speaker and President anticipate that the Commission will be in a position to vote on a new plan this week." *Id.* It is unclear which Commissioners were privy to this "work." Senator Sykes and Minority Leader Russo submitted affidavits describing their efforts to work with the other Commission members and their belief that the Republican Commission members refused to work with them to draw and adopt maps despite their repeated overtures. *See* Response to the February 18, 2022 show cause order of Senator Vernon Sykes and House Minority Leader Allisson Russo at 2-4, *Bennett*, No. 2021-1198 (Feb. 23, 2022). Furthermore, they stated that the majority members failed to identify specific alleged constitutional deficiencies so that they were able to remedy them to satisfy the

other members. *See* Affidavit of Resp't Vernon Sykes ¶ 53-58 (Feb. 23, 2022); Affidavit of Resp't Allison Russo ¶ 38-43 (Feb. 23, 2022).

C. The Commission adopted the February 24 Plan, despite warnings that the Plan created weak Democratic seats in a "monolithically disparate" manner.

In both of its opinions in this case, the Court has noted that if the Commission conducts a partisan map-drawing process and then adopts a plan drawn by partisan map-drawers rather than the Commission as a whole, that choice strongly evinces that the plan is drawn to unduly favor a political party. *LWV II*, ¶ 31 (citing *LWV I*, ¶ 118). The Court has repeatedly reminded the Commissioners that Article XI of the Ohio Constitution mandates that they "must be, in good faith, commission members first, setting aside their usual partisan modes." *Id.* ¶ 48. But the Republican Commissioners simply cannot help themselves.

On Wednesday, February 23, the Commission convened to discuss congressional plans. (BENNETT_045 (1/23 Commission Meeting Agenda)). It heard from witnesses who spoke on behalf of their own proposed maps.[2] (*See* BENNETT_046-68 (Transcript of Ohio Redistricting Commission's 2/23/22 Meeting)). After the testimony concluded, Senator Sykes inquired whether the Commission would consider state legislative maps. (*Id.* at BENNETT_068). Speaker Cupp responded that work was continuing on a plan and that it would be made available as soon as possible. (*Id.*). Senator Sykes then asked if the plan would be made available the next day, to which Speaker Cupp said that he did not know. (*Id.*). Leader Russo then added that Speaker Cupp and President Huffman had filed briefs claiming a plan was in progress and noted that the Democratic Commissioners wanted to be included in that process. She stated, "I would ask that the majority

[2] As of the time this brief is filed, the Commission has heard testimony on congressional maps submitted by members of the public, but has released no draft maps of its own for public comment or input. It has been more than eight weeks since the Court's January 14 order in the congressional redistricting case. The Commission appears set on once again drawing maps in secret, and unveiling and voting them through without public review or feedback.

caucuses please make their staff available to us and for our staff to be able to meet to discuss what these maps may look like." (*Id.*). The request went unanswered and the Commission went into recess. (*Id.*).

On Thursday, February 24, the Commission reconvened one final time. While the Commission had initially planned to gavel back in at 11:30 a.m., it did not convene until 3:00 p.m. (*See* BENNETT_076 (Transcript of the Ohio Redistricting Commission's 2/24/22 Meeting)). President Huffman then offered that he and his staff had been working on a General Assembly plan for "several days." (*Id.*) He explained that "all of the Republican commissioners have had an opportunity to review." (*Id.*). He then requested that the Commission recess for three hours per Senator Sykes's request, so that the Democratic Commissioners could review the plan with their staffs for the first time. (*Id.*). Senator Sykes asked if the plan had been made available to the public. (*Id.*). President Huffman responded that he did not believe the plan had yet been made available, but it would be up on the Commission's website in the next half hour. (*Id.*). When Senator Sykes asked whether all the Republican commissioners had been involved in the drafting, President Huffman scoffed that he did not keep "a daily logger diary of what each of all the other six members of the commission did," but that all of the Republican commissioners "had a chance to see it, make comments, suggestions, whatever it may be." (*Id.*).

When the Commission gaveled back at 6:00 p.m., it took *less than twenty minutes* to discuss and pass the plan that the public and Democratic Commissioners had received just hours before. Senator Sykes asked whether the Republican Commissioners intended to move forward on the vote that night. He queried, "[W]hat is your rationale, since we have reached out to you to be involved or to offer input, but we haven't been given any information, just the map, once you finish and complete it, how is that complying with the directive of the court?" (*Id.* at

BENNETT_078-79).[3] President Huffman responded that he believed time was of the essence and that he preferred to vote on the plan that night. (*Id.* at BENNETT_078).

Touting the plan, President Huffman explained that it resulted in 18 Republican-leaning Senate seats and 54 Republican-leaning House seats. (*Id.* at BENNETT_077). Even with the short time they had to analyze the plan, the Democratic Commissioners expressed at the meeting that it was apparent to them that the plan put the minority party in an even worse position than the previous plan. In particular, Minority Leader Russo pointed out that the new House map drew 19 of the Democratic-leaning House districts to have a Democratic vote share of just barely above 50% (between 50% and 52%), while the January 22 Plan had placed 14 Democratic-leaning districts in that range. (*Id.* at BENNETT_080). In contrast, *none* of the Republican-leaning seats in the new House map fell within a 50% to 52% vote share range. Turning to the Senate plan, Leader Russo similarly noted that the proposed plan drew seven of the total Democratic-leaning districts to have Democratic vote shares below 52%, while the January 22 Plan had five such Democratic-leaning districts. (*Id.*). Thus, while the new proposal purported to achieve partisan proportionality, it in fact exacerbated the January 22 Plan's failure to allocate competitive seats "to each party in close proportion to its statewide vote share." *LWV II*, ¶ 62.

Speaker Cupp responded that he read the Court's February 7 Order to apply only to the creation of toss-up districts with vote shares between 50% and 51%, such that reducing the number of Democratic-leaning districts in that specific range was sufficient to achieve compliance. (*Id.* at BENNETT_079). Leader Russo then pointed Speaker Cupp to paragraph 40 of the Court's

[3] At times the Commission's official transcript attributes quotes to the incorrect speaker, as occurred for this quotation. The official recording of the hearing can be found on the Ohio Channel website. Ohio Redistricting Commission - 2-24-2022, Ohio Channel, *available at* https://www.ohiochannel.org/video/ohio-redistricting-commission-2-24-2022.

decision, which stated that "in a plan in which every toss-up district is a 'Democratic district,' the commission has not applied the term 'favor' as used in Section 6(B) equally to the two parties." (*Id.* at BENNETT_080 (*quoting* LWV II, ¶ 40)). Leader Russo noted that *zero* Republican-leaning House districts in the new proposal gave Republicans a vote share below 52%. (*Id.*). That is, the Republican legislative leaders' map-drawers had toiled behind the scenes to create maps in which nearly *all* Republican-leaning seats *strongly* tilted Republican, whereas 42% and 47% of Democratic-leaning seats in the House and Senate, respectively, are toss-ups.

When asked whether the Republican Commissioners honestly believed the plan would satisfy the Court's order and remedy any issues of contempt of court, Speaker Cupp responded that he would not comment on pending litigation and advised the rest of the Commission not to so either. (*Id.* at BENNETT_081).

Ending discussion, Speaker Cupp asked for a motion to vote. (*Id.*). The plan passed 4-3, with Auditor Faber voting against the plan with the Democratic members. (*Id.*). Auditor Faber later stated that he voted against the plan because he believed it was not constitutional, as it unnecessarily split political subdivisions and was not compact. (BENNETT_138 (2/5/22, 11:25 AM Tweet by Auditor Faber)).

Secretary LaRose then moved to have the Commission adopt a statement that would authorize him to issue guidance to the boards of elections by which House and Senate candidates who previously filed to run for state office can still have 30 days to change residencies to the districts in which they wished to run consistent with Article XI, Section 9(C). (BENNETT_082 (Transcript of Ohio Redistricting Commission's 2/24/22 Meeting)). The motion passed 5-2, with Democratic Commissioners in the minority. (*Id.* at BENNETT_084-85).

Following that vote, Leader Russo asked whether the Commission intended to adopt a

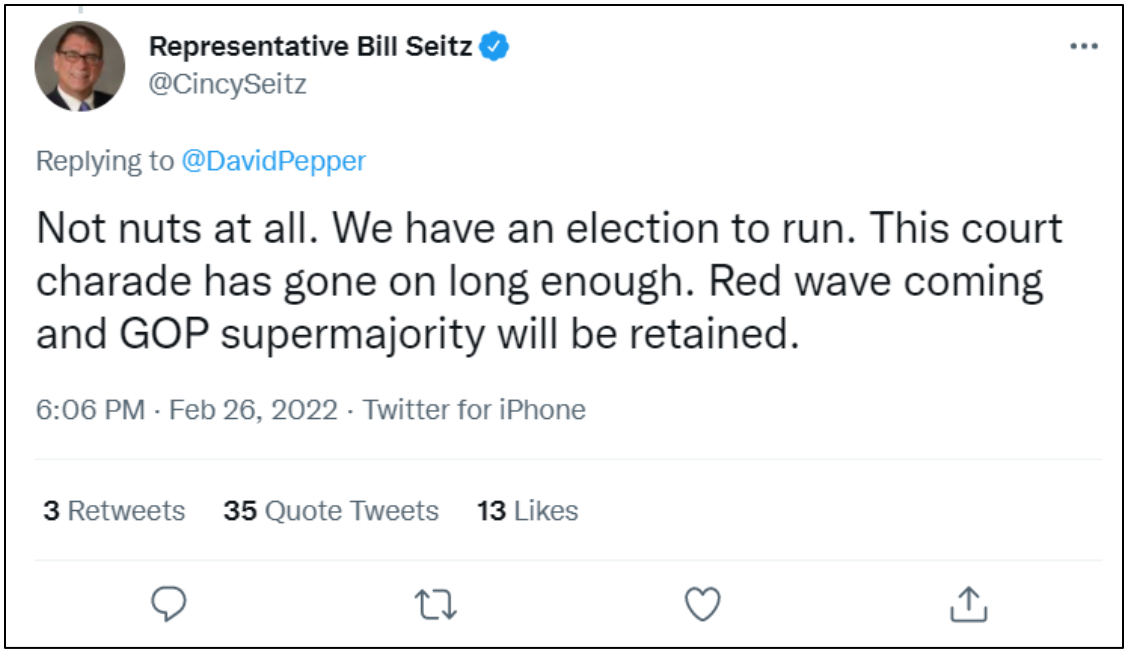
Section 8(C)(2) statement explaining how the Commission complied with Article XI, Section 6 of the Constitution. (*Id.* at BENNETT_085). Speaker Cupp consulted with staff and then told the Commission they would need an hour to draft and distribute the statement. (*Id.* at BENNETT_085-86). When the Commission reconvened an hour later, the statement was adopted on a 5-2 party-line vote. (*Id.* at BENNETT_088).

Leader Russo read a dissenting statement on behalf of the Democratic Commissioners. In that statement, Leader Russo lamented the process, noting that (once again) the Republican Commissioners did not allow for Democratic participation and (again) the public had no meaningful opportunity to participate in the process. (*Id. at* BENNETT_086-87). "It is disappointing that instead of simply working together, the majority commissioners are flagrantly ignoring Ohio voters and the Supreme Court of Ohio in an attempt to tighten their unyielding grasp on their supermajority power," she read. (*Id. at* BENNETT_087).

Two days after the Commission approved the February 24 Plan, Secretary LaRose, reportedly at the direction of Speaker Cupp and President Huffman, instructed counties to include General Assembly candidates on the May 3 ballot. (BENNETT_139 (2/26/22, 6:60 PM Tweet by Representative Seitz).[4] That is, the Republican Commissioners are not deigning to wait for the Court's review—they are proceeding full steam ahead to implement their latest General Assembly plan.

Responding to criticism that the Secretary of State ought not implement a plan the Court expressly has retained jurisdiction to review, *see LWV II*, ¶ 68, and has not yet reviewed, the General Assembly's House Majority Floor Leader Bill Seitz tweeted the following:

[4] *See also* Josh Rultenberg (@JoshRultNews), Twitter (Feb. 26, 2022, 5:04 PM) https://twitter.com/JoshRultNews/status/1497694034994806795?s=20&t=cGBqO0jH-XrP2AaiUlCtZg.



BENNETT_139 (2/26/22, 6:06 PM Tweet by Representative Seitz).

III. Argument

At this point, the Commission has offered two previous unconstitutional maps, an impasse that wasn't, and an array of excuses. The February 24 Plan is of the same ilk: again, it violates both the partisan fairness requirement of Section 6(A) and the proportionality requirement of Section 6(B). Respondents also violated the procedural requirements laid out in Section 1 and this Court's prior order in adopting the February 24 Plan.

As the majority party's public activity surrounding the Plan makes clear: this is no accident. The Commission is unwilling to abide by the Constitution's requirements or this Court's orders. Perhaps it is hoping that with enough political pressure, this Court will give up the trenches and allow the Commission to trample right over the rule of law. This Court should instead hold the line and refuse to abdicate its duty. Under the requirements of the Ohio Constitution as very clearly enunciated by this Court first in *LWV I* and then *LWV II*, the only possible conclusion is that the February 24 Plan, too, is patently unconstitutional.

A. The February 24 Plan violates Article XI, Section 6.

Article XI mandates that the 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 preferences of the voters of Ohio.
>
> (C) General assembly districts shall be compact.

Ohio Constitution, Article XI, Section 6. The Commission may not "violate the district standards described in Section 2, 3, 4, 5, or 7" in an effort to comply with Section 6. *Id.* If, however, it is possible to draw a plan that meets these standards while complying with the other substantive provisions of Article XI, the Commission *must* do so. *See LWV I*, ¶ 87-88.

1. The February 24 Plan violates Section 6(A) because it was drawn primarily to favor the Republican Party.

Article XI, Section 6(A) "requires this court to discern the map drawers' intent." *LWV I*, ¶ 116. "Direct or circumstantial evidence may establish that a districting plan was drawn primarily to favor one political party over another." *Id.* ¶ 117 (citations omitted).

Multiple sources of evidence demonstrate that Respondents intentionally favored the Republican Party at the expense of the Democratic Party in adopting the February 24 Plan. First, the February 24 Plan doubles down on the partisan asymmetry of the January 22 Plan, creating *even more* toss-up districts that are nominally Democratic-leaning, while ensuring safe seats for Republicans throughout the state. Second, the February 24 Plan subordinates traditional redistricting criteria, such as ensuring compactness and maintaining political subdivisions, in order to maximize the Republican Party's performance. Third, Respondents adopted the February 24 Plan through a rushed and one-sided process that reeks of partisan bias, while ignoring a General

Assembly plan that the Bennett Petitioners proposed, which is fully compliant with Article XI and this Court's orders.

a. The February 24 Plan systematically creates toss-up districts that are only nominally Democratic-leaning, while not subjecting Republican-leaning districts to the same treatment.

Respondents have demonstrated a dogged determination to adopt a General Assembly plan that primarily and unduly favors the Republican Party. With each order imposed by this Court, Respondents find yet another way to claim they have complied with Article XI while actually violating it, much like a teenager who persists in claiming he has cleaned his room but has simply stuffed his clothes under the bed in the hopes that no one will notice.

The Court has made clear that Section 6(A) is violated where a General Assembly plan demonstrates "monolithically disparate" partisan favoritism. In its opinion invalidating the January 22 Plan, the Court explained:

> Article XI, Section 6(B) provides that the commission shall attempt to draft a plan in which "[t]he statewide proportion of districts whose voters * * * favor each political party shall correspond closely to the statewide preferences of the voters of Ohio." . . . While the Constitution does not require exact parity in terms of the vote share of each district, the commission's adoption of a plan in which the quality of partisan favoritism is monolithically disparate is further evidence of a Section 6(A) violation. In other words, in a plan in which every toss-up district is a "Democratic district," the commission has not applied the term "favor" as used in Section 6(B) equally to the two parties. The commission's adoption of a plan that absurdly labels what are by any definition "competitive" or "toss-up" districts as "Democratic-leaning"—at least when the plan contains no proportional share of similar "Republican-leaning" districts—is demonstrative of an intent to favor the Republican Party.

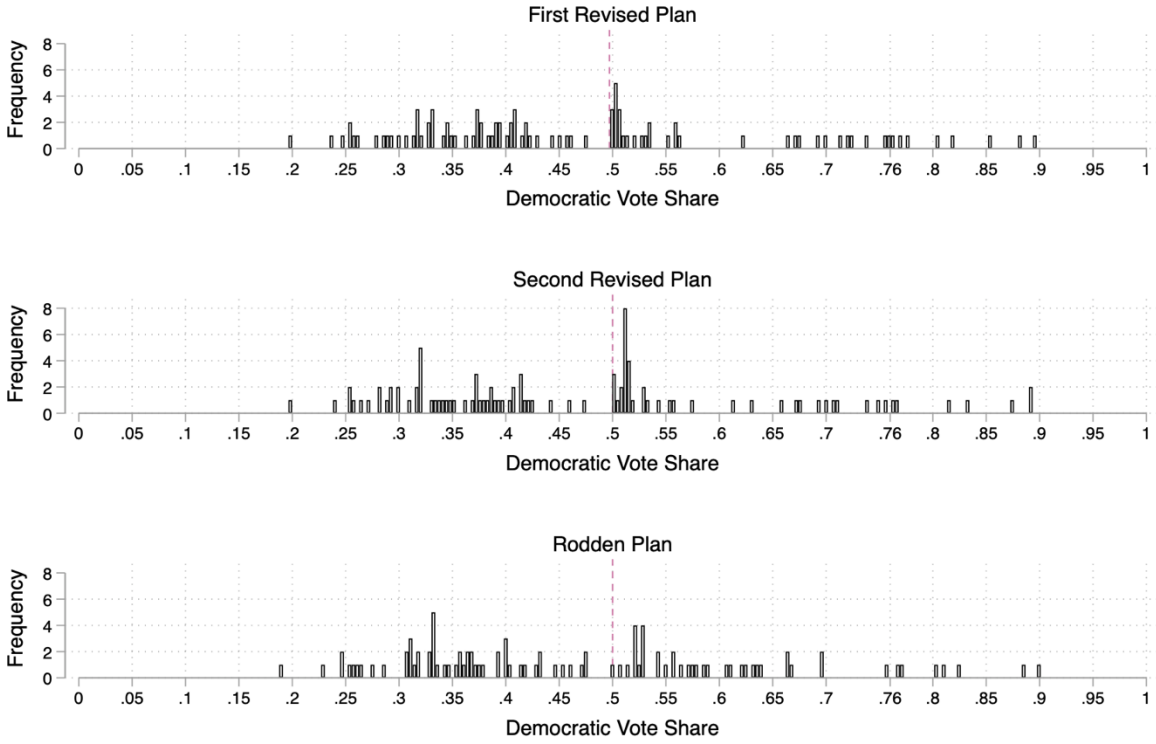
LWV II, ¶ 40; *see also Adams v. DeWine*, Slip Opinion No. 2022-Ohio-89, ¶ 71 ("[T]he General Assembly's decision to shift what could have been – under a neutral application of Article XIX – Democratic-leaning areas into competitive districts, i.e., districts that give the Republican Party's candidates a better chance of winning than they would otherwise have had in a more compactly drawn district, resulted in a plan that unduly favors the Republican Party and unduly disfavors the

Democratic Party.").

Remarkably, and in direct defiance of the Court's clear direction, the February 24 Plan uses this exact tactic to disfavor the Democratic Party *to an even greater degree* than the January 22 Plan. As Dr. Rodden explains in his report,[5] the February 24 Plan does not contain a *single* Republican-leaning House or Senate seat that falls within the 50% to 52% vote share range. Affidavit of Dr. Jonathan Rodden ¶ 24 tbl. 1 & 31 tbl. 2 (Feb. 28, 2022) ("Rodden Aff."). Every Republican-leaning seat in the plan is drawn in such a way that the Republicans in those districts are highly likely to win. *Id.* ¶ 3. The treatment of Democratic-leaning seats is markedly different. The February 24 Plan creates only 26 House seats in which the Democratic vote share exceeds 52%. *Id.* ¶ 24 tbl. 1. Every other nominally "Democratic-leaning" district—19 in total, or about 42% of the total Democratic-leaning seats—falls within the 50% to 52% range. *Id.* In contrast, the invalidated January 22 Plan included 14 House seats in which the Democratic vote share fell between 50% and 52%. *See LWV II*, ¶ 20.

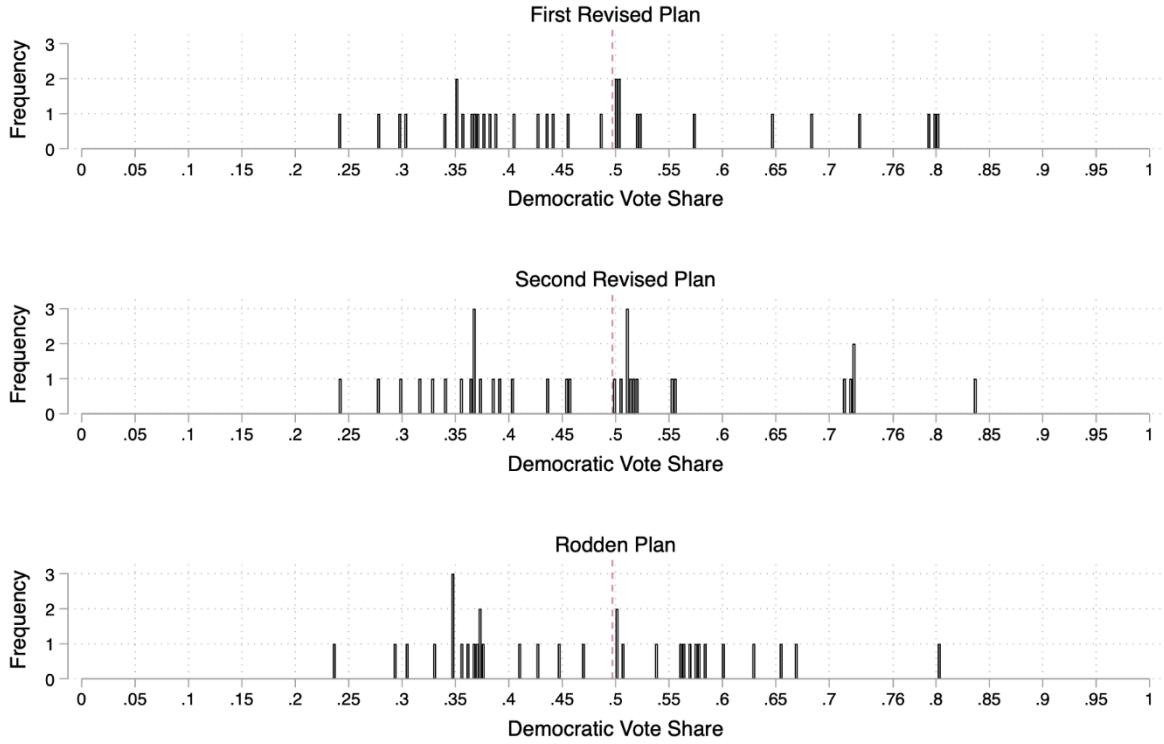
The February 24 Plan's systematic creation of weak Democratic-leaning House seats is illustrated by the following histogram of the Democratic vote share in House districts in the February 24 Plan (called "Second Revised Plan" below), compared with the same distribution in the January 22 plan (called "First Revised Plan" below), and Rodden III, as set forth in Dr. Rodden's affidavit:

[5] For ease of comparison, Dr. Rodden and the Bennett Petitioners employ the dataset and method for calculating seat share utilized by the Commission. However, Petitioners agree with the Court's conclusion, articulated in its February 7 Order, that Dr. Kosuke Imai's method for calculating seat share "is preferable and more accurate than the commission's." *LWV II*, ¶ 60.



Rodden Aff. ¶ 28 fig. 1. "In my experience with redistricting plans" Dr. Rodden writes, "I do not believe I have seen a distribution of partisanship quite like that displayed in [the February 24 Plan's House map]. It clearly reflects an effort to create a large number of districts with a vote share in a very narrow range just above 50 percent." *Id.* ¶ 27.

Similarly, the February 24 Plan creates seven Senate seats in which the Democratic vote share falls between 50% and 52%. *Id.* ¶ 31 tbl. 2. Unlike the January 22 Plan, which contained one Republican-leaning Senate seat that fell in the range of 48% to 50% Democratic vote share, the February 24 plan contains *none*; all of the Republican seats are safe this time. *Id.* A histogram for the Senate is reproduced below:



Rodden Aff. ¶ 31 fig. 2. The large number of districts at or close to 51% Democratic vote share led Dr. Rodden to conclude that "it appears that the map drawers were instructed to draw as many of the Democratic-leaning districts as possible to be as close as possible to 51 percent." *Id.* ¶ 8.

The February 24 Plan's systematic creation of strong Republican seats alongside weak Democratic seats favors the Republican Party by ensuring Republicans win a disproportionate number of seats in virtually all electoral environments. As Dr. Rodden explains, "a massive uniform swing across all districts of 5 percentage points in favor of the Republican Party" would likely result in "an additional 23 [House] seats" beyond partisan proportionality for Republicans, providing the caucus with 78 percent of the seats in the House. *Id.* ¶ 25. If Democrats receive the same swing in their direction, they can only hope to gain two additional seats beyond proportionality in the House, and this is only "if we make the very unrealistic assumption that Democratic candidates win *every single one* of the 19 districts with a Democratic vote share

between 50 and 52 percent." *Id.* (emphasis in original). In other words, the February 24 Plan makes 54% of the seats a "*floor*" for Republicans, while 46% of the seats is a "*ceiling*" for Democrats. *LWV II*, ¶ 40 (emphasis in original).

And the Democratic capture of all or most of the competitive districts in the February 24 Plan is even less likely in light of the allocation of incumbency advantage. According to Dr. Rodden, the majority of the Democratic-leaning competitive districts have Republican incumbents, who, by virtue of their incumbency, "often outperform their statewide co-partisans in their districts—sometimes by several percentage points." Rodden Aff. ¶ 11, 23. Thus, Dr. Rodden adds, "if we take incumbency into consideration, Republican candidates likely have the edge in many of these nominally Democratic districts." *Id.* ¶ 23. Respondents have, once again, systematically rigged the General Assembly plan by creating an unnaturally large number of nominally Democratic-leaning toss-up districts.

The February 24 Plan's imbalanced treatment of Democratic-leaning and Republican-leaning districts is not necessitated by the requirements of Article XI or the political geography of Ohio. Indeed, the Commission had before it a General Assembly plan that fully complied with Article XI and did not favor one party over another. While the February 24 Plan creates 19 nominally Democratic-leaning House districts with Democratic vote shares between 50% and 52% (and *no* Republican-leaning House districts in the same category), the Rodden III Plan creates just two (plus one Republican-leaning House district in the same category). *See* Rodden Aff. ¶ 24 tbl. 1. The February 24 Plan's disparate allocation of toss-up districts once again evinces an intent to favor Republican candidates.[6]

[6] Petitioners note that the efficiency gap of the February 24 Plan is lower than that of the January 22 Plan, likely because the February 24 Plan draws over a third of the Democratic-leaning districts

b. The February 24 Plan upends traditional redistricting criteria in order to maximize Republican Party performance.

The February 24 Plan—on its face—continues to reflect Respondents' efforts to favor the Republican Party. Respondents disregarded traditional redistricting criteria in order to create weak Democratic-leaning districts and safe Republican-leaning districts, further evincing partisan intent. The February 24 Plan is less compact than even the January 22 Plan on at least some measures for both the House and Senate maps. *Id.* ¶ 24 tbl. 1, 31 tbl. 2. And, as Auditor Faber noted in dissenting from the plan, the February 24 Plan also unnecessarily splits political subdivisions. (BENNETT_138 (2/5/22, 11:25 AM Tweet by Auditor Faber)).

The February 24 Plan is less compact than the Rodden III Plan on every measure of plan-wide compactness that Dr. Rodden considered, and less compact than the January 22 plan on several as well. In the House, the Rodden III Plan is more compact than the February 24 Plan under the Reock, Polsby-Popper, and Area-Convex Hull compactness methodologies. Rodden Aff. ¶ 24 tbl. 1. The January 22's House Plan also bests the February 24's House Plan on Reock. *Id.* Likewise, in the Senate, Rodden III performs better on compactness than the February 24 Plan under all three measures, while the January 22 Plan also outperforms the February 24 Plan on all three measures. *Id.* ¶ 31 tbl. 2.

The Rodden III Plan also maintains the integrity of political subdivisions more effectively than the February 24 Plan. For example, the Rodden III Plan's House map splits only 32 counties, while the February 24 Plan's House map splits 38 counties. *Id.* ¶ 24 tbl. 1. And in both the House and Senate maps, the February 24 Plan splits at least 35 more Vote Tabulation Districts than the

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to be hyper-competitive. Partisan metrics such as the efficiency gap and partisan symmetry can be useful indicia of a partisan gerrymander, but favorable performance on one metric does not, on its own, constitute definitive proof that a plan is not a gerrymander. *See Harper v. Hall*, 2022-NCSC-17, ¶ 163 (N.C. Feb. 14, 2022) ("[T]here are multiple reliable ways of demonstrating the existence of an unconstiutional partisan gerrymander.").

Rodden III Plan. *Id.* ¶ 31 tbl. 2. Keeping Vote Tabulation Districts (also known as precincts) whole is particularly important for election administration purposes. *Id.* ¶ 50 ("Local election administrators must make sure that voters receive the correct ballot for state and federal legislative races, along with various local races, and split VTDs can create headaches, mistakes, and litigation after close races."); *see also Mellow v. Mitchell*, 607 A.2d 204, 218 (Pa. 1992) (adopting Special Master opinion explaining that "a serious election administration problem rises from requiring the voters in a single precinct to look to two different sets of congressional candidates," and emphasizing that this "problem is not a minor one").

c. The process used to adopt the February 24 Plan also provides strong evidence of partisan bias.

The Commission's actions during the remedial period also support a finding that the February 24 Plan violates Section 6(A). This Court has held that a "map-drawing process may support an inference of predominant partisan intent." *LWV I*, ¶ 118. In explaining why the September 16 Plan violated Section 6(A), the Court noted that "Senate President Huffman and House Speaker Cupp controlled the process of drawing the maps that the commission ultimately adopted. . . . [T]he commission itself did not engage in any map drawing or hire independent staff to do so. Instead, the legislative caucuses of the two major political parties – i.e., the groups with the most self-interest in protecting their own members – drew maps for the commission to consider." *Id.* ¶ 119. Respondents took the same approach for the January 22 Plan, and the Court again found the plan violated Section 6(A). *See LWV II*, ¶ 34.

Incredibly, this time around the Commission's map-drawing process was characterized by *more* secrecy and dominance by the majority party than even the two prior rounds. As explained above, *all* map-drawing was conducted outside of public view. It should also not escape notice that in the initial ten days following this Court's February 7 order (i.e., the time period during

which the Commission was supposed to pass a plan), Republican staffers were (apparently) at work on a plan that was not shared with the public, Democratic Commissioners, or this Court. Even after this Court issued its show-cause order, no Republican proposal was released to the public for another *six days*. The February 24 Plan was thus once again drawn by the staff of the Republican Legislative Commissioners, rather than by staff employed by the Commission itself.

While neither of the prior Commission maps reflected the results of a bipartisan process, the process seen in the final days before the adoption of the February 24 Plan did not even attempt to maintain the charade offered to support the January 22 Plan, which the Commission assured the Court had been "approved with unprecedented cooperation among the Commission members." *See* Response of Resp't The Ohio Redistricting Comm.'s to Petitioners' Objections at 1, *Bennett*, No. 2021-1198 (Jan. 28, 2022). Democratic Commissioners were not given an opportunity to view or analyze the February 24 Plan until roughly three hours prior to its passage. (*See* BENNETT_076-81 (Transcript of the Ohio Redistricting Commission's 2/24/22 Meeting)). The Democratic Commissioners expressed concern regarding their inability to review or collaborate on a plan they had first seen hours before, but the Commission proceeded to a vote nevertheless. (*Id.* at BENNETT_078-81). By contrast, the Republican members of the Commission were allowed to meaningfully participate in the map-drawing process prior to February 24: President Huffman showed them the maps in advance of the meeting. (*See* BENNETT_076 (Transcript of the Ohio Redistricting Commission's 2/24/22 Meeting) (President Huffman explaining that he and his staff had been working on a General Assembly plan for "several days" and that "all of the Republican commissioners have had an opportunity to review")). Remarkably, the Democratic members only found out through President Huffman and Speaker Cupp's filings in this Court on February 22 that a new plan was in progress. (*See* BENNETT_068 (Transcript of Ohio

Redistricting Commission's 2/23/22 Meeting) (Leader Russo stating "[I]f there is work being done on a map, I would ask that the majority caucuses please make their staff available to us and for our staff to be able to meet to discuss what these maps may look like"). Two days later, apparently after the Republican Commissioners had all conferred internally prior to the plan's public release and disclosure to the Democratic Commissioners, that plan was adopted. *See supra* Section II.C.

To state the obvious, Respondents were aware of the partisan effects of the February 24 Plan prior to approving it. Indeed, before the Commission voted, Leader Russo read aloud the portion of this Court's February 7 Order discussing the systematic creation of nominally Democratic-leaning districts that are in fact toss-up districts. (*See id.* at BENNETT_080 (quoting *LWV II*, ¶ 40)). Leader Russo explained that the Republican Legislative Commissioners had "actually created a bigger problem" by increasing the number of such districts as compared to the invalidated January 22 Plan. (*Id.*). When Speaker Cupp asked how many Democratic-leaning districts fell between 50% and 51%, ostensibly to point out that the number had decreased in comparison to the January 22 Plan, Leader Russo explained that the January 22 Plan's Section 6(A) violation was based on the "monolithic[]" asymmetry in the creation of competitive seats, rather than a precise threshold for toss-up districts. (*Id.*).

As the Court noted in its February 7 Order, Respondents' "awareness of the partisan effects supports an 'inference of predominant partisan intent' similar to the one the Court found with respect to the" September 16 Plan. *LWV II*, ¶ 37 (citing *LWV I*, ¶ 118). The one-sided nature of the Commission's process further bolsters the conclusion that the Commission primarily favored the Republican Party in drawing the February 24 Plan. *See id.*, ¶ 48 ("[Commission members] are charged with drawing a plan that inures to the benefit of not just one political party, not just one constituency, but of Ohio as a whole. . . . Section 6(A) directly prohibits actions in conflict with

this principle.").

Respondents violated Article XI, Section 6(A) of the Ohio Constitution in drawing the February 24 Plan.

2. The February 24 Plan violates Section 6(B)'s proportionality requirement.

Article XI, Section 6(B) of the Ohio Constitution provides that the Commission "shall attempt" to draw a district plan that meets the following standard: "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." "[T]here is no dispute that," under Section 6(B), "about 54 percent of Ohio voters preferred Republican candidates and about 46 percent of Ohio voters preferred Democratic candidates" in the relevant past elections." *LWV II*, ¶ 51 (quoting *LWV I*, ¶ 108).

Respondents have once again stacked the deck in favor of the Republican Party while claiming that the February 24 Plan satisfies Section 6(B). But this Court has *already* warned Respondents against such artifices. In its February 7 Order, the Court explained that "competitive districts . . . must either be excluded from the proportionality assessment or be allocated to each party in close proportion to its statewide vote share." *LWV II*, ¶ 62. The February 24 Plan utterly fails under either standard. It creates 19 Democratic-leaning House districts with vote shares between 50% and 52%, constituting 42% of all Democratic-leaning House districts in the plan. Rodden Aff. ¶ 24 tbl. 1. The February 24 Plan has zero Republican-leaning House districts with vote shares in that range. *Id.* Likewise, the February 24 Plan's Senate map contains seven Democratic seats in the 50 to 52 percent range, and none in the same range for Republicans. *Id.* ¶ 31 tbl. 2. Considering both of the Court's methodologies for calculating proportionality where a map contains competitive districts, the February 24 House Plan contains no more than 35%

Democratic-leaning seats, compared with at least 65% Republican-leaning seats. *Id.* ¶ 29. And the February 24 Senate Plan contains no more than 33% Democratic-leaning seats, compared with at least 67% Republican leaning seats. *Id.* ¶ 33. These projected seat shares are a far cry from the 54-46% split that the Republican Commissioners touted in their 8(C)(2) statement. (*See* BENNETT_129-130 (Ohio Redistricting Commission's Section 8(C)(2) statement for 2/24/22 General Assembly District Plan)). This analysis reveals that, just as in the January 22 Plan, the February 24 Plan's "quality and degree of favoritism in each party's allocated districts is grossly disparate," such that "the proportion of districts whose voters 'favor' each party is not being assessed properly." *LWV II*, ¶ 61.

This outcome is neither inevitable nor required by Ohio's political geography. Again considering both of the Court's methodologies for accounting for competitive districts in determining proportionality, the Rodden III Plan gets closer to proportionality than the February 24 Plan by anywhere from 6% to 9% in both chambers of the General Assembly. *Id.* ¶ 30, 34. Because the Commission had ample time to consider both this Court's clear guidance on what constitutes a proportional plan and the Rodden III Plan, which complies with each provision in Article XI, the February 24 Plan cannot be characterized as the result of an attempt to draw a plan whose projected seat share closely corresponds to voter preferences. Accordingly, the February 24 Plan violates Section 6(B) as well.

B. Respondents violated the requirements of Article XI, Section 1 and the orders of this Court.

Finally, Respondents have repeatedly refused to comply with the procedural requirements of Article XI, Section 1 of the Ohio Constitution and the directives of this Court.

Article XI, Section 1 requires the *Commission*, rather than the legislative caucuses, to draft a General Assembly district plan. *See* Ohio Constitution, Article XI, Section 1(C) ("The

commission shall draft the proposed plan . . . ."); *see also LWV I*, ¶ 119; *LWV II*, ¶ 34. Yet once again, "the commission itself did not engage in any map drawing or hire independent staff to do so." *LWV I*, ¶ 119.

Section 1(C) also requires that, "[b]efore adopting, but after introducing, a proposed plan, the commission shall conduct a minimum of three public hearings across the state to present the proposed plan and shall seek public input regarding the proposed plan." Yet, even after the Commission blew off the Court's February 17 deadline and aggrandized to itself additional time to draw a plan, it *still* could not be bothered to even feign compliance with Section 1(C). The Commission adopted the February 24 Plan just hours after releasing it publicly and did not hear or consider any public feedback "[b]efore adopting, but after introducing, [the] proposed plan." *See* Article XI, Section 1(C); *see also* Article XI, Section 8(A)(1)-(2) (requiring, if the Commission "fails to adopt a final general assembly plan not later than the first day of September of a year ending in the numeral one," that the Commission "hold a public hearing concerning [a] proposed plan, at which the public may offer testimony. . . ."). Indeed, the Democratic Commissioners expressed that they were taken by surprise when the Republican members gave them only a few hours to review and vote on the February 24 Plan even though they had repeatedly asked to be involved in the process and expressed concern about the lack of time to consider and discuss the plan. *See supra* Section II.B-C.

Respondents have also willfully failed to comply with this Court's orders. On February 7, the Court ordered the Commission "to adopt [a] new plan and file it with the secretary of state no later than February 17, 2022, and to file a copy of that plan with this court by 9:00 a.m. on February 18, 2022." *LWV II*, ¶ 68. The Court further provided that "[n]o requests or stipulations for extension of time shall be filed." *Id.* ¶ 70. Respondents, of course, failed to comply with this order.

As discussed in the next section, Respondents' repeated refusal to comply with the Constitution and this Court's orders necessitates greater judicial intervention, all squarely within this Court's authority, than Petitioners have sought thus far.

IV. Remedies

This Court has twice provided clear instruction to the Commission on Article XI's meaning and application. Nevertheless, Respondents have once again returned to this Court without following its express orders—indeed, in blatant defiance of them, and after making ever less veiled threats about their willingness to continue defying them. *See* Response to the February 18, 2022 show cause order of Ohio Senate President Matt Huffman and Ohio House Speaker Robert R. Cupp at 6-8, *Bennett*, No. 2021-1198 (Feb. 23, 2022). Accordingly, this Court should strike down the February 24 Plan and enjoin its implementation, including Secretary LaRose's apparent instructions that election officials prepare for the May 3 primary utilizing the February 24 Plan.[7] But the Bennett Petitioners respectfully submit that such a remedy alone is no longer enough: this Court should take all direct action within its power to ensure that Ohioans can exercise their fundamental voting rights under a constitutional General Assembly district plan, and to ensure that Respondents are held to account for their intransigence.

[7] Likewise, the Bennett Petitioners respectfully submit that this Court should not hesitate to use its authority to suspend or modify election-related deadlines until Ohioans are able to vote under constitutional maps. *See, e.g.*, *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022) (modifying congressional and statewide election calendar due to impasse and noting suspension of state legislative election deadlines until resolution of litigation).

A. This Court should use all the tools at its disposal to ensure that Ohioans are represented under constitutional General Assembly districts.

1. This Court has at least one constitutional plan before it—the Rodden III Plan—and should declare that plan as such.

This Court should declare the constitutionality of the Rodden III Plan—which has been rigorously explained in expert affidavits submitted by the map-drawer Dr. Rodden, about which Respondents did not raise a single concern in the more than ten days the Rodden III Plan was before them, and which this Court has already cited favorably in its previous opinions, *see LWV I*, ¶ 112-113, 126, 130; *LWV II* ¶ 23 n.6, 32, 47. As this Court is aware, Dr. Rodden is a professor of political science at Stanford University, who has published extensively on political representation, geographic location of demographic and partisan groups, and the drawing of electoral districts, and who has been accepted and testified as an expert witness in many election law and redistricting cases. Notably, just last week, the Pennsylvania Supreme Court ordered the implementation of a congressional map drawn by Dr. Rodden after the political branches reached an impasse. *Carter*, 2022 WL 549106.

As explained above, the Rodden III Plan complies with all the technical requirements of Article XI, achieves greater proportionality than any plan adopted by the Commission to date, and was not drawn primarily to favor or disfavor any political party, as demonstrated by the fact that it surpasses the Commission's two most recent plans on traditional redistricting criteria such as compactness and political subdivision splits. In aid of its inherent powers to enforce its judgments, *Infinite Sec. Sols., L.L.C. v. Karam Properties, II, Ltd.*, 143 Ohio St. 3d 346, 352, 2015-Ohio-1101, 37 N.E.3d 1211, 1219, ¶ 27, and to facilitate "orderly and efficient exercise of [its] jurisdiction," *Hale v. State*, 55 Ohio St. 210, 45 N.E. 199 (1896), this Court should thus declare that the Rodden III Plan passes constitutional muster under Article XI. This step will provide important guidance and clarity to Respondents, who have, until very recently, professed that it is impossible to comply

with the Constitution. This Court's express statement that the Rodden III Plan complies fully with the Ohio Constitution would settle any remaining shred of doubt as to whether its implementation by the Commission would finally resolve the matter of General Assembly redistricting.[8] In other words, to the extent that the Commission—whose membership is primarily comprised of attorneys and which is ably represented by counsel—has not yet adopted a constitutional General Assembly district plan because it does not know what *is* constitutional, this Court should declare that the Rodden III Plan is constitutional to facilitate the Commission's compliance with the Court's prior orders. And, in the event that the Commission continues its defiance of this Court's orders, this Court's declaration of the Rodden III Plan's constitutionality will still have value. After all, given the Commission's conduct to date, it is possible, albeit greatly undesirable, that a federal court may need to step in to draw the General Assembly district plan. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) (allowing federal courts to interject in state legislative redistricting when there is "evidence that the[] state branches will fail timely to perform that duty"). In such circumstances, this Court's declaration of the Rodden III Plan's constitutionality will, if nothing else, be critical to ensuring that any plan ultimately adopted in a federal forum is, indeed, drawn in compliance with the Ohio Constitution as construed by this Court. *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21 (explaining that this Court is "the ultimate arbiter of the meaning of the Ohio Constitution").[9]

[8] In this context, the Court can note the constitutionality of the Rodden III Plan without ordering that the Commission adopt it.

[9] As noted, plaintiffs in ongoing federal litigation are instead asking the District Court for the Southern District of Ohio to implement the unconstitutional January 22 Plan.

2. This Court has several additional options within its authority to ensure that a constitutional plan is ultimately adopted.

a. This Court does have the authority to implement or adopt a compliant plan.

Given the Commission's refusal to adopt a constitutional plan drawn in compliance with the Court's orders, the Commission has thrust Ohio into a constitutional crisis where it lacks constitutionally compliant maps for the approaching May primary that the General Assembly refuses to move. In these extraordinary circumstances, the Bennett Petitioners respectfully submit that this Court has the power to adopt the Rodden III Plan or any other specific General Assembly district plan that is compliant with Article XI of the Ohio Constitution and all other applicable provisions of Ohio and federal law. Countless courts have done the same in circumstances when the body responsible for redistricting has either passed unconstitutional maps, as the Commission has done here, or reached an impasse, as the Commission purported to do just ten days ago—even without express authority to do so under those courts' own state constitutions. *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by [the U.S. Supreme] Court but appropriate action by the States in such cases has been specifically encouraged."); *see, e.g.*, *Wattson v. Simon*, No. A21-0243, 2022 WL 456357 (Minn. Feb. 15, 2022) (adopting new state senate and house districts after impasse between political branches responsible for redistricting); *Carter*, 2022 WL 549106 (adopting new congressional districts after impasse between political branches responsible for redistricting).

Under the factual circumstances presented here, Section 9(D)'s prohibition on any court ordering the implementation or adoption of a General Assembly district plan does not stand in the way of that authority. Rather, where the complete intransigence of certain Commissioners has led to nothing short of a constitutional crisis, Section 9(D) cannot preclude this Court's ability to

ensure that new, constitutional legislative districts are provided for Ohio voters. That is, Section 9(D) should not be allowed to prevent an otherwise constitutional General Assembly district plan from taking effect, if the alternative is no plan at all or a federal court stepping in to draw a plan itself. Indeed, if no plan is adopted or approved by this Court, a federal court would be required to draw Ohio's General Assembly districts under the Fourteenth Amendment to the U.S. Constitution and binding U.S. Supreme Court precedent. *See Growe*, 507 U.S. at 34. But a federal takeover would effectively nullify Section 9(A), which grants this Court "exclusive, original jurisdiction in all cases arising under [Article XI]." It would likewise effectively nullify Section 9(D) itself, which provides that "*[n]o court*"—not just no *state* court—should order implementation of a specific plan. Moreover, stripping this Court of authority to order the adoption or implementation of a specific plan itself is at odds with Article IV, Section 1 of the Ohio Constitution, which vests the "judicial power of the state" in Ohio courts, and Article I, Section 16, which provides that "every person . . . shall have remedy by due course of law" for injuries. *See* R.C. 1.11 ("Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice."). Furthermore, as applied in this particular circumstance, Section 9(D) undermines the separation of powers doctrine, which "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158–159, 503 N.E.2d 136 (1986). Citing that doctrine, this Court has held that "[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 421, 423 N.E.2d 80 (1981).

In sum, if the Commission continues to refuse to adopt a compliant redistricting plan, it will be impossible to adhere to both Section 9(D) and various other provisions of the Ohio Constitution that govern the redistricting process and Ohio voters' rights. Section 9(D) should not and cannot be construed to let the Commission continuously circumvent the Court's orders and thus effectively deny the Bennett Petitioners and all Ohio voters a constitutional remedy by running out the clock, or to cede the power over any remedy to the federal judiciary.

Fortunately, this Court need not sit back and allow Section 9(D) to render the entirety of Article XI a nullity. Pursuant to Article XI, Section 10, Section 9(D) is "intended to be severable."[10] Indeed, the Fair Districts Amendments were expressly adopted to prevent a partisan political process such as the one that led to the 2011 plan from occurring again, especially without robust judicial review, which was missing at the time. *See Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 24. It is hard to imagine that Ohioans who voted to overhaul their Constitution in 2015 intended to allow a federal court to take control over redistricting instead of allowing this Court to act as a backstop if the Commission persistently failed to comply with the reforms. It is even harder to imagine that the voters who sought a better redistricting process with a fairer outcome would view Section 9(D) as an invitation for the Commission to act with impunity instead of a measure seeking to motivate good behavior. Accordingly, the Commission cannot rely on Section 9(D) as an end run around the rest of Article XI; Section 9(D) must bend in this moment to give effect to the Article XI redistricting reforms that a supermajority of Ohio voters passed last decade.

[10] "The various provisions of this article are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions." Ohio Constitution, Article XI, Section 10.

b. This Court could appoint a special master to aid the Commission.

In the alternative, if the Court believes it more appropriate to return this matter to the Commission again, the Bennett Petitioners respectfully submit it should do so while providing guidance and assistance to the Commission to aid it in drawing a constitutional plan. To that end, the Court should appoint a Special Master to assist the Commission in adopting a constitutional plan. A Special Master could assist in the Commission in any number of ways. For example, the Special Master could serve as an informed map-drawer to improve the process, perhaps providing a neutral, compliant plan with which the Commission could start. A neutral Special Master could also provide minute-by-minute feedback on a plan drawn collectively by the Commission in public view, instead of evaluating maps after their passage, as has thus far been the role of experts in this process. Finally, the Commission could be required by this Court to sit, in public view, with the Special Master and justify changes from an initial plan drawn by a Special Master.

The Court has authority to make such an appointment pursuant to its "inherent power to enforce [its] final judgments," which is "well-established." *Grande Voiture D'Ohio v. Montgomery Cnty. Voiture No. 34*, 2d Dist. Montgomery No. 29064, 2021-Ohio-2429 (collecting cases). Moreover, courts have "powers as are necessary to the orderly and efficient exercise of jurisdiction," which also "must be regarded as inherent." *Hale*, 55 Ohio St. 210, 45 N.E. 199. "[A]s jurisprudence developed in Ohio, it is clear that the appointment of a special master was inherent in courts of equity and in actions to which the parties were not entitled to a jury," like the action at issue here. *State ex rel. Allstate Ins. Co. v. Gaul*, 131 Ohio App. 3d 419, 431, 722 N.E.2d 616, 625 (1999); *see also Hale* at 215 ("A power which the legislature does not give, it cannot take away. If power, distinguished from jurisdiction, exists independently of legislation, it will continue to exist notwithstanding legislation."); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1093-95 (9th Cir.

2010) (concluding, in prison litigation case, that following the failure of the state to implement the terms of a consent decree, court had equitable power to appoint a receiver to exercise all of the powers of the Secretary of the state prison and rehabilitation system with respect to the delivery of medical care, despite express provision in Prison Litigation Reform Act referencing other remedies for unconstitutional conditions in prisons, but not receivership).

c. This Court should issue other remedies it deems appropriate to ensure that Respondents comply with this Court's orders.

Finally, this Court has remedies at its disposal to ensure that Respondents are held responsible for their behavior, and it should issue any and all such remedies that it deems appropriate. For one—as the events of at least the past three weeks make clear, *see supra* Section II, and as this Court has already taken steps toward doing, *see* Order, *Bennett*, No. 2021-1198 (Feb. 18, 2022)—this Court should find the Commission and, as the Court deems appropriate, individual Respondents, in contempt pursuant to R.C. 2705 and its inherent contempt power unless—and until—Respondents adopt a plan that has either been deemed constitutional by this Court (e.g., the Rodden III Plan) or another constitutional plan. *See Cramer v. Petrie*, 70 Ohio St.3d 131, 133, 637 N.E.2d 882 (1994) ("[C]ourts have inherent authority—authority that has existed since the very beginning of the common law—to compel obedience of their lawfully issued orders."); *City of Cleveland v. Bright*, 2020-Ohio-5180, 162 N.E.3d 153, ¶ 45 (8th Dist.) (noting that Ohio courts "are not bound by the sanction limits set forth in R.C. 2705.05 when imposing a penalty for contempt").

Relatedly, this Court should award Petitioners' attorney's fees under R.C. 2323.51 or based on a determination that Respondents acted in bad faith, with any such fees issued against the Commission and/or individual Respondents as the Court deems appropriate.

V. Conclusion

For the foregoing reasons, Petitioners respectfully request that this Court invalidate the February 24 Commission Plan, enjoin its implementation, declare the Rodden III Plan constitutional, and issue any other remedies it deems appropriate and necessary to ensure that Ohioans are able to vote under constitutional General Assembly districts—up to and including ordering the adoption or implementation of the Rodden III Plan or some other constitutional plan itself.

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Respectfully submitted,

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

Abha Khanna (PHV 2189-2021)
Ben Stafford (PHV 25433-2021)
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
T: (206) 656-0176
F: (206) 656-0180
akhanna@elias.law
bstafford@elias.law

Jyoti Jasrasaria (PHV 25401-2021)
Spencer W. Klein (PHV 25432-2021)
ELIAS LAW GROUP LLP
10 G St NE, Suite 600
Washington, DC 20002
T: (202) 968-4490
F: (202) 968-4498
jjasrasaria@elias.law

sklein@elias.law

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via email this 28th day of February, 2022 to the following:

DAVE YOST
OHIO ATTORNEY GENERAL
Bridget C. Coontz (0072919)
Julie M. Pfeiffer (0069762)
30 E. Broad Street
Columbus, OH 43215
Tel: (614) 466-2872
Fax: (614) 728-7592
bridget.coontz@ohioago.gov
julie.pfeiffer@ohioago.gov

Counsel for Respondents
Governor Mike DeWine,
Secretary of State Frank LaRose, and
Auditor Keith Faber

W. Stuart Dornette (0002955)
Beth A. Bryan (0082076)
Philip D. Williamson (0097174)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut St., Suite 1800
Cincinnati, Ohio 45202-3957
T: (513) 381-2838
dornette@taftlaw.com
bryan@taftlaw.com
pwilliamson@taftlaw.com

Phillip J. Strach (PHV 25444-2021)
Thomas A. Farr (PHV 25461-2021)
John E. Branch, III (PHV 25460-2021)
Alyssa M. Riggins (PHV 25441-2021)
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Ave., Suite 200
Raleigh, North Carolina 27612
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
T: (919) 329-3812

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

Erik J. Clark (Ohio Bar No. 0078732)
Ashley Merino (Ohio Bar No. 0096853)
ORGAN LAW LLP
1330 Dublin Road
Columbus, Ohio 43215
T: (614) 481-0900
F: (614) 481-0904
ejclark@organlegal.com
amerino@organlegal.com

Counsel for Respondent
Ohio Redistricting Commission

C. Benjamin Cooper (0093103)
Charles H. Cooper, Jr. (0037295)
Chelsea C. Weaver (0096850)
Cooper & Elliott, LLC
305 West Nationwide Boulevard
Columbus, Ohio 43215
T: (614) 481-6000
benc@cooperelliott.com
chipc@cooperelliott.com
chelseaw@cooperelliott.com

Counsel for Respondents Senator Vernon Sykes
and House Minority Leader Allison Russo

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