

**IN THE  
SUPREME COURT OF OHIO**

League Of Women Voters Of Ohio, *et al.*, :  
Relators, : Case No. 2021-1193  
v. : Original Action Pursuant to  
Ohio Const., Art. XI  
Ohio Redistricting Commission, *et al.*, : [Apportionment Case Pursuant  
Respondents. : to S. Ct. Prac. R. 1403]

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Bria Bennett, *et al.*, :  
Relators, : Case No. 2021-1198  
v. : Original Action Pursuant to  
Ohio Const., Art. XI  
Ohio Redistricting Commission, *et al.*, : [Apportionment Case Pursuant  
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The Ohio Organizing Collaborative, *et al.*, :  
Relators, : Case No. 2021-1210  
v. : Original Action Pursuant to  
Ohio Const., Art. XI  
Ohio Redistricting Commission, *et al.*, : [Apportionment Case Pursuant  
Respondents. : to S. Ct. Prac. R. 1403]

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**COMBINED RESPONSE OF RESPONDENT GOVERNOR MIKE DEWINE TO (A)  
PETITIONERS' OBJECTION TO THE OHIO REDISTRICTING COMMISSION'S MAY  
6, 2022 RESUBMISSION OF THE INVALIDATED FEBRUARY 24, 2022 PLAN (B)  
PETITIONERS' OBJECTIONS TO THE ALREADY-INVALIDATED FEBRUARY 24,  
2022 PLAN, RE-ADOPTED ON MAY 5, 2022, AND REQUEST FOR IMMEDIATE  
RELIEF; AND (C) PETITIONERS THE OHIO ORGANIZING COLLABORATIVE, ET  
AL. JOINDER IN OBJECTIONS TO THE ALREADY-INVALIDATED FEBRUARY 24,  
2022 PLAN, RE-ADOPTED ON MAY 5, 2022 FILED BY PETITIONERS BRIA  
BENNETT, ET AL. IN CASE NO. 2021-1198**

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## INTRODUCTION

***“Map 3 is the only viable option to effectively administer a primary election on August 2, 2022.”***

[Ohio’s Secretary of State Statement<sup>1</sup>]

Facts and practical reality do matter. The Redistricting Commission exercises its legislative discretion within the framework prescribed by the Ohio Constitution, this Court’s opinions interpreting (for the first time just this judicial term) Article XI, and the existing statutory and administrative framework establishing the time and manner for the holding of elections. But in doing so, the Commission does not legislate within a factual vacuum. Rather, the status of these consolidated cases and a related federal case, requires the Commission’s deliberations and vote to focus on the most paramount of considerations: adopting legislative maps that will allow the primary election to be completed in a manner consistent with Federal law and judicial dictates, as well as Ohio statutes and rules.

Petitioners’ objections are completely detached from both the facts and reality. Their submissions repeat the same hypercritical refrain, ignoring that the Commission’s principal constitutional charge is to craft redistricting plans for incorporation and use in Ohio’s statutory framework so that elections may, in fact, proceed. The evidence offered by the Secretary of State to the Commission, which is ***factually uncontroverted*** in Petitioners’ rapidly-filed submissions, is that ***“Map 3 is the only viable option to effectively administer a primary election on August 2, 2022.”***

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<sup>1</sup> See Ohio Redistricting Commission, Statement to the Commission of Secretary LaRose, May 5, 2022, <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-5-2022-316/statement-to-commission-by-secretary-larose-2022-5-05.pdf> (emphasis added) (“LaRose Statement”).

As outlined by the Secretary of State's submission, the lawful execution of an Ohio election is date, time and sequencing sensitive, thus compelling the adoption of Map 3:

- **The Revised Code Sets The Time, Place, And Manner For Public Elections:** “The Ohio General Assembly has the sole authority in the Ohio Revised Code (3501.40) to set the time, place, and manner of a public election conducted in the State of Ohio. The only other government entity that can supersede that authority is a federal court of law.” [LaRose Statement.]
- **A Federal Court, Which Is The Only Other Government Entity That Can Supersede Ohio Law Establishing The Timing Of Any Election, Has Conditionally Identified August 2 As a Primary Date And Approved The Use Of Map 3:** “A three-judge panel assigned to consider the Ohio General Assembly redistricting case *Gonidakis, et al. v. LaRose*, Case No. 2:22-CV-773 (S.D. Ohio), has ordered that if the State does not adopt a lawful district plan and set a primary election date before May 28, ‘... we will order the primary be moved to August 2 and Map 3 be used for only the 2022 election cycle. After that, Ohio will have to pass a new map that complies with federal and state law.’” [Id.]
- **The General Assembly Will Not Pass Emergency Legislation Changing The Primary Election Date:** “As of this date, the Ohio General Assembly has not set a primary election date for the above-mentioned contests. Any action doing so would require an emergency clause to make the election date and its associated deadlines effective immediately. The Speaker of the Ohio House and the President of the Ohio Senate have indicated publicly that they lack the required two-thirds vote in both chambers to enact emergency legislation for this purpose; therefore, the only remaining option to conduct a primary election to which Ohio voters are entitled is the prescribed action by the federal district court.” [Id.]
- **The Ohio Association of Elections Officials Agree That August 2 Is The Only Date For A Primary Election:** “[The Secretary of State] and the bipartisan Ohio Association of Elections Officials have repeatedly stated that because August 2, 2022 is already reserved for ‘special elections’ in Ohio law, it is the only date on which a statewide primary election can be conducted in advance of the scheduled General Election (November 8, 2022).” [Id.]

- **August 2 Is The Last Date To Conduct A Primary Without Impacting The Administration Of The General Election:** “August 2, 2022 is also the latest date by which Ohio can conduct a primary election without overlapping or altering the scheduled timeline to successfully administer a General Election. This is also recognized by the three-judge panel in *Gonidakis, et al. v. LaRose* and uncontested by any of the parties involved in that litigation.” [*Id.*]
- **Ninety Days Is Required To Conduct An Election:** “Under Ohio law, elections are conducted over at least a 90-day period. Eighty-nine days now stand between this date and August 2, 2022, putting Ohio within the traditional statutory window for administering its next election.” The LaRose Statement also notes the statutory requirements that must be satisfied to provide Uniformed and Overseas Citizens Absentee Voting Act ballots. [*Id.*]
- **The Board of Elections Have Programmed Voter Registration Based Upon Map 3:** “Boards of elections need at least two weeks to reprogram voter registration and tabulation systems to accommodate a new map, which as of this date takes [Ohio] to at least May 19. At that point, the boards would already be in violation of state law unless the General Assembly changes the statutory deadlines. Additionally, [the Secretary of State] would not instruct the boards to deprogram Map 3 before May 28, risking that the new map could be invalidated with no immediate options to administer a primary election. This administrative delay also reduces or nearly eliminates the required process election officials must complete to conduct testing on all voting equipment, proof ballots, test ballots, recruit poll workers, and order absentee and Election Day ballots. . . . All but two of Ohio's 88 county boards of elections have fully programmed the third General Assembly district plan adopted by the Ohio Redistricting Commission.” [*Id.*]
- **Map 3's Practical Advantages:** “A majority of the federal panel considering *Gonidakis, et al. v. LaRose* recognized that Map 3 has ‘administrative advantages’ of implementation that no other map produced by the Commission to date presents, including a largely completed candidate certification process that also would not require the revisiting of filing deadlines and residency provisions.” [*Id.*]

Petitioners do not contest these facts. Instead, they first declare that the Court may simply judicially rewrite Ohio statutes and administrative rules, and apparently federal law, to completely restructure Ohio’s intricate election process—even though

this Court has already squarely rejected such arguments. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV IV)*, \_\_\_ Ohio St.3d \_\_\_, 2022-Ohio-1235, and even though this Court has repeatedly held that a court may not enjoin enforcement or otherwise override a constitutional statute, *Bd. Of Trs. of the Tobacco Use Prevention & Control Found. v. Boyce*, 127 Ohio St. 3d 511, 2010-Ohio-6207, 941 N.E.2d 745, ¶ 10. Next, Petitioners urge the Court to impose relief expressly prohibited by the plain language of Article XI, notwithstanding this Court's prior holdings specifically rejecting Petitioners' demands.

Simply put, Petitioners' rhetoric and unconstitutional demands do little to resolve the pressing issue now confronting both the Commission and the Court. The Commission believes Map 3 is constitutional; the Court has held otherwise. Where does that leave us given the Secretary of State's determination? We submit the only course is the adoption of an imperfect resolution, just as the federal court did. This Court will ultimately have the final say on the constitutionality of all legislative maps, but an interim solution is necessary so that the 2022 election may be completed. The resubmitted Map 3, effective only for the 2022 election, is the only map that allows that to be accomplished within Ohio's statutory and administrative framework. The Court is urged to adopt this, albeit imperfect, interim resolution.<sup>2</sup>

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<sup>2</sup> Much of the relief sought (out-of-rule) by Petitioners has been subject to prior submissions explaining the impropriety of Petitioners' demands. The analysis set forth in the following memoranda are incorporated herein: Response of Respondent Governor Mike DeWine to Court's Show Cause Order, filed on February 23, 2022, in Case Nos. 2021-1193; 2021-1198; and 2021-1210; Response of Respondent Governor Mike DeWine to Petitioners' Objection to the Ohio Redistricting Commission's February 24, 2022 Revised Plan, filed on March 3, 2022, in Case Nos. 2021-1193; 2021-1198; and 2021-1210; Combined Response of Respondent Governor Mike DeWine to (A) Petitioners' Renewed Motion for an Order Directing Respondents to Show Cause and Motion to Schedule Contempt Hearing; and (B) Petitioners' Objections to General Assembly District Plan Adopted on March 28, 2022, filed on April 4, 2022 in Case Nos. 2021-1193; 2021-1198; and 2021-1210; and Response of Respondent Governor Mike DeWine to Petitioners' Motion for an Order Directing Respondents to Show Cause for Why They Should

## LAW AND ANALYSIS

### A. The Court Should Overrule Petitioners' Objections To The Use of Map 3 For The 2022 Elections.

#### 1. Petitioners' Failure Of Proof As To Interim Relief.

It is undisputed that the Commission previously adopted "Map 3" on February 24, 2022, and it is now resubmitted. As a resubmission, Map 3's Section 8(C) statement is already of record, and need not be reissued, as erroneously suggested by Petitioners. But the record is very much different today than when the Court first considered Map 3. The passage of time, coupled with real-world practicalities, requires consideration of Map 3 as of today's date and for the interim relief for which it is offered. In this regard, Petitioners once again bear "the burden of proving" all "factual issues beyond a reasonable doubt." See *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV I)*, \_\_ Ohio St.3d \_\_, 2022-Ohio-65 2022 WL 110261, ¶ 80.

Petitioners fail this test. In their rush to file objections on a late Friday afternoon in the hope of gaining some advantage given the abbreviated briefing schedule, Petitioners flatly failed to offer evidence in support of their current objections. To be sure, some of the Petitioners incorporate by reference their prior oppositions to Map 3. But time and circumstances have materially changed. The prior, now stale, submissions fail to address the evidentiary basis underlying the Commission's current vote.

Thus, the factual submission made by the Secretary of State stands un rebutted. Each and every fact must be presumed true, including that "Map 3 is the only viable

**option to effectively administer a primary election on August 2, 2022.** [LaRose Statement.]

**2. The Commission Limited The Life Cycle Of Map 3.**

Petitioners fault the Commission for adopting Map 3 solely for use in the 2022 elections, as opposed to either the four or ten-year periods set forth in Article XI, Section 8. The purpose in doing so is two-fold and each instance evidences a concerted effort by the Commission to comply with the directions of two separate courts exercising jurisdiction, at least in some respects, over the same subject. First, the Commission adopted this term consistent with the limitation imposed in *Gonidakis, et al. v. LaRose*, Case No. 2:22-CV-773 (S.D. Ohio), where the federal court held Map 3 may be used for only the 2022 election cycle. Second, this Court will continue to exercise jurisdiction relating to the preparation of redistricting plans for use beyond the 2022 election cycle. The temporal limitation is an acknowledgement that yet another set of legislative plans must be prepared and ultimately pass this Court's scrutiny. However, in the interim, the elections must proceed as the undisputed facts and Ohio law make clear.

**3. Use Of Map 3 Is The Only Approach That Permits The Completion of the 2022 Elections Without Violence To The Ohio Constitution and Ohio Election Laws. It is Misleading To Cast Blame On The Commission For The Current Time Urgency.**

Petitioners also attempt to falsely blame the Commission for the time dilemma. However, many factors contributed to this. For example, the September 1, 2021 deadline for adopting a final district plan was missed, largely because of a delay in receiving census data. *LWV I*, 2022-Ohio-65 at ¶ 12. Similarly, the Commission

adopted its original plan on September 16, and by the end of September, Petitioners had filed three election actions for expedited relief. *Id.* at ¶ 28. This Court’s first substantive decision was not issued until January 12, 2022.

What followed then was the Commission’s consideration and submission of three additional maps on an expedited basis, with each submission followed by objections and decisions that, in the views of many, imposed upon the Commission a standard for compliance that continued to evolve throughout these proceedings. *See, e.g., League of Women Voters of Ohio v. Ohio Redistricting Comm’n (LWV II)*, — Ohio St.3d —, 2022-Ohio-342, 2022 WL 354619, ¶ 114-17 (Kennedy and DeWine, J.J., dissenting) (moving “the goalposts”).

“On the first three go-rounds,” for instance, “this court gave the commission ten, ten, and twelve days, respectively, to adopt a new plan.” *LWV IV*, 2022-Ohio-1235 at ¶ 156 (DeWine, J., dissenting).. Each time, however, the Court found new faults in the map drafting process; a map would fail, for example, if a litigant’s expert concluded that it did not withstand a “partisan-symmetry analysis” *LWV I*, 2022-Ohio-65 at ¶ 121-131; it would also fail if a “single party . . . control[led] the redistricting process” *LWVII*, 2022-Ohio-342 at ¶ 31; the Commission could draw the Court’s criticism if, after the Court struck down a non-compliant plan, it waited “days” to reconvene and try again, *id.* at ¶ 44; the Commission could not merely “adopt[]” a plan, it had to “draft[]” one (and without the input of aides from either party’s legislative caucus) *see League of Women Voters of Ohio v. Ohio Redistricting Comm’n (LWV III)*, \_\_ Ohio St.3d \_\_, 2022-Ohio-789, 2022 WL 803033, ¶ 25; further, the Commission ought to “retain an independent map drawer” to do that drafting, and make the process “transparent” to the public *id.* at

¶ 30, though these directives were later described as more akin to recommendations than mandates. *LWV IV*, 2022-Ohio-1235 at ¶ 4. And, notwithstanding these moving targets, every time the Commission drafted a map it was admonished to begin with an “entirely new plan”<sup>3</sup> that the Commission builds from “scratch.” *LWV II*, 2022-Ohio-342 at ¶ 80.

Attributing to further delays are Plaintiffs’ dogmatic efforts to unconstitutionally create, through blatant gerrymandering, Democratic strongholds. To them, the ends justify all means. They go so far in their most recent objections that the Commission should be held in contempt until a plan is adopted that is unchallenged by Petitioners or found to be valid by this Court. [The Ohio Organizing Collaborative Objections (hereinafter, “Objections”), at 5-6] To be clear, no set of legislative maps will be left unchallenged by Petitioners unless the will of Ohio voters is completely flaunted and Article XI turned on its head.

Of course, even when the Commission engaged independent map makers who purposefully made every effort to draw “safe Democratic districts,” the results were unconstitutional. The map makers quickly acknowledged that Ohio’s geography and extensive districting requirements created significant obstacles, particularly as to the Court’s mandate for “symmetry.” “Ohio has . . . some of the most complicated geographic challenges, certainly the most strict geographic rules and also the most complicated Senate rules for how this process is handled,” as independent map drawer Dr. Johnson recognized. [See Gov. DeWine’s 4/4 Resp. to Mtn. for Show-Cause Order; at 13, Ex. I-4, APP-000241.] See also *LWV I*, 2022-Ohio-65 at ¶ 128 (“There is no

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<sup>3</sup> *LWV I*, 2022-Ohio-65 at ¶ 196; *LWV II*, 2022-Ohio-342 at ¶ 35-36; *LWV III*, 2022-Ohio-342 at ¶ 44; *LWV IV*, 2022-Ohio-789 at ¶ 78.

dispute among the experts that Ohio's political geography poses challenges in the drawing of overall Article XI-compliant districts.”). The obstacles proved so challenging that, while the map makers drew a house map in a “quest to get as close to symmetry” as the Court mandated, they “bl[e]w[] through compactness,” and “almost universally” had to draw “democratic leaning” or “safely Democratic seat[s].” [*Id.* at 11-12, Ex. I-4, APP-000142, 249-250.]. The result was an unconstitutional house map that:

- Deemphasized and eliminated competitive districts—even though that was the promise that induced voters to pass Issue 1 and enact Article XI.
- Violated the compactness requirements of Section 6(C), including by adopting a “hub and spoke” model and splitting of cities.
- Disenfranchised suburban Republican voters in violation of Section 6(A) by utilizing a gerrymandering tool to draw districts to appear as “hub and spokes.”
- Was “drawn primarily to favor” Democrats in violation of Section 6(A).

Given the foregoing, no one can reasonably place the time delay at the feet of the Commission.

**B. The Court Has And Should Once Again Reject Petitioners’ Laundry List Of Unconstitutional Demands.**

Although styled as “objections,” Petitioners’ submissions are non-complaint motions for the imposition of unconstitutional relief—relief this Court has already rejected.

**1. This Court’s Jurisdiction And Powers Are Expressly Limited Under Article XI.**

As Petitioners are aware, this Court “can exercise only such powers as the constitution itself confers, or authorizes the legislature to grant.” *Kent v. Mahaffy*, 2 Ohio St. 498, 498–99 (1853). It “**can derive no power elsewhere.**” *Id.* (emphasis

added). “[N]either statute nor rule of court can expand [its] jurisdiction” beyond the constitutional grant in Article XI. *ProgressOhio.org v. Kasich*, 129 Ohio St. 3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 4.

Petitioners are likewise fully aware of the Court’s commitment to this principle. It has refused to “declare . . . presumptively constitutional” plans not approved by the Commission; to “itself adopt a [redistricting] plan”; or to hold in contempt Commission members without authority to do so under Article XI, merely for making the legislative judgments that Ohio’s voters have entrusted to them. *LWV IV*, 2022-Ohio-789 at ¶ 72, 65, 32 n.6.

But Petitioners have little consideration for either the plain language of Article XI or this Court’s prior rulings. They again insist that, not only should the Court act as the legislature, and adopt a plan not approved by the Commission, as Article XI, Section 9(D)(1) & (2) prohibits, but that it should also assume the duties of the executive branch by dictating Ohio’s election schedule, and change not just one deadline, but any “election-related deadlines as necessary,” including the August 2 primary date. [Objections, at 10.] The Constitution not only makes no allowance for such relief, it forbids it.

**2. The Law is Clear, As This Court Has Found, That The Remand Of A Matter To The Commission Is The Only Action That May Be Imposed If A Map Is Found To Be Unconstitutional.**

Instead, if a proposed General Assembly-district plan violates Sections 2, 3, 4, 5, or 7 of Article XI, the Court may invalidate the plan and “order the commission to adopt a new general assembly district plan in accordance with this article.” Ohio Const. Art. XI, Section 9(D)(3). If a proposed plan approved under Section 8(C) violates Article XI,

the Court may “order the commission to adopt a new general assembly district plan in accordance with this article.” *Id.* And if a proposed plan violates Section 6 of Article XI, the Court may “order the commission to be reconstituted” to “adopt a General Assembly-district plan in conformity with the Ohio Constitution.” *LWV I*, 2022-Ohio-65 at ¶¶ 91-101, 138.

Those are the constitution’s only remedies for a non-compliant plan. And this is the sole relief this Court has issued. Repeatedly. *LWV I*, 2022-Ohio-65 at ¶¶ 91-101, 138; *LWV II*, 2022-Ohio-342 at ¶¶ 67-68; *LWV III*, 2022-Ohio-789 at ¶¶ 44; *LWV IV*, 2022-Ohio-789 at ¶¶ 63.

Petitioners concede that they proffered only “weak” arguments in support of their previous claim that the Court should defy the terms of Article XI and adopt its own plan, even if for no other reason than preventing a federal court from doing it first – an argument the Court rejected. *LWV IV*, 2022-Ohio-789 at ¶¶ 65. Now, they say, circumstances have changed permitting this relief – even though the only change is that the federal court has “take[n] action under federal law,” just as this Court knew it might. *Id.*

Nothing about the federal court’s order changes the plain language of Article XI. And nothing about it changes the fact that the voters have vested authority for apportionment in the Commission, rather than the Court. See *State ex rel. Gallagher v. Campbell*, 48 Ohio St. 435, 436–37, 442, 27 N.E. 884 (1891) (the fact that officials were chosen to serve on apportionment board “shows of itself that . . . in applying the rules prescribed, a discretion would have to be exercised, and these officers were selected to exercise it”). Given that the Court “cannot disregard Section 9(D) simply to

avoid the possibility that a federal court may take action under federal law,” the fact of that this previously contemplated action has occurred does not serve as license to disregard it either. *LWV IV*, 2022-Ohio-789 at ¶ 65.

The same goes for Petitioners’ request that the Court unilaterally change the primary date, which as they seem to forget, this Court has also already rejected. “[A]uthority for setting the date for a primary election belongs to the General Assembly, not to the Ohio Supreme Court,” *LWV IV*, 2022-Ohio-1235 at ¶ 69 (citing R.C. 3501.40 and 3501.01(E)(1)), and no “unique circumstances” have changed that.

**3. The Law Is Clear, As The Court Has Found, That It Cannot Compel The Adoption Of Particular Set of Maps.**

“No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.” Ohio Const. Art. XI, Sec. 9(D)(1). Never, “***in any circumstance***” can this or any other court order implementation of a plan “that has not been approved by the commission,” acting in its discretion, “in the manner prescribed by” Article XI. *Id.* at Sec. 9(D)(2) (emphasis added). Accordingly, only a month ago, this Court declined to order either type of relief. *LWV IV*, 2022-Ohio-1235 at ¶ 63-65, 72.

Still, Petitioners maintain that “[g]iven these unique circumstances,” the Court should hold, “as a matter of constitutional interpretation,” that it can do what the Constitution explicitly says it cannot – adopt and implement a plan the Commission has not approved; require the Commission to draw a particular map as it sees fit, and compel the Commission’s members to act according to Petitioners’ whims, on Petitioners’ preferred timeline, drafting house and senate maps over a 3-day period

under threat of contempt. [Objections, at 5-7.] The law does not permit this. And Petitioners know it.<sup>4</sup>

Equally wrong is Petitioners' foundational premise – that the Court can unilaterally expand its authority in view of the “unique circumstances.” Yet current circumstances are in no way unique, not in the country,<sup>5</sup> and not in Ohio's history.

Indeed, as early as 1891, a litigant claimed an apportionment board including the Governor, State Auditor, and Secretary of State “disregarded” the constitution's “senatorial apportionment provisions,” and sought a writ of mandamus compelling the board “to make a new one.” *Gallagher*, at 48 Ohio St. 435-36, 442 (declining to issue the writ.) In 1942, Ohio's Attorney General brought a mandamus action against the Governor and others seeking an order compelling them “to apportion correctly the senatorial districts in accordance” with the constitution. *State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 517, 41 N.E.2d 377 (1942). In 1967, the Court again dealt with allegations “the Governor, Secretary of State and State Auditor, acting as the Apportionment Board, adopted an apportionment plan for the state [that] . . . was unconstitutional,” in a case that also involved the federal courts. *State ex rel. King v. Rhodes*, Ohio St. 2d 95, 95, 228 N.E.2d 653 (1967). In 1992, the Governor and other state officials brought an action for declaratory judgment against the State Auditor and Attorney General (among others) in another apportionment case, claiming that a

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<sup>4</sup> Though it should, at this point, go without saying, constitutional provisions alone define the Court's power. *Kent*, 2 Ohio St. at 498–99. And the Court cannot simply “interpret” its way into increasing that power. See *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St. 3d 39, 41, 577 N.E.2d 1077 (1991) (“It is well settled, of course, that neither statute nor rule of court can expand our jurisdiction beyond the constitutional grant.”).

<sup>5</sup> “As of May 3, 2022, a total of 68 cases have been filed challenging congressional and legislative maps in 24 states.” See Brennan Center for Justice, <https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0> (last accessed May 8, 2022).

particular senate district in a legislative plan did not satisfy constitutional population requirements. *Voinovich v. Ferguson*, 63 Ohio St.3d 198, 586 N.E.2d 1020 (1992). And in this case, the Court has issued a new opinion every month since the start of 2022.

The Court should not, in other words, be swayed by Petitioners' suggestion that a ruling granting their wide-ranging relief could, or would, somehow remain limited to these particular facts and this particular dispute. Judicial intervention into cases of alleged gerrymandering are, as the above line of cases shows, hardly a "one-time" occurrence. See *Rucho v. Common Cause*, \_\_\_ U.S. \_\_\_, 139 S.Ct. 2484, 2507, 204 L.Ed.2d 931 (2019) ("The expansion of judicial authority [into partisan gerrymandering] would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives."). Inability to know whether the Court will disregard the express limits on its authority in the case of some undefined "unique circumstances" will only further erode public confidence in the process. "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id.* at 2498 (citation omitted).

This Court cannot, "in any circumstance" order the relief Petitioners demand here. Ohio Const. Art. XI, Sec. 9(D)(1). And because "unique circumstances" are still within the umbrella of "any circumstance," it should reject Petitioners' Motion.

**4. The Law is Clear, As The Court Has Found, That It Cannot Dictate The Manner In Which The Commission Conducts Its Legislative Function.**

Apportionment is a legislative task. *LWV I*, 2022-Ohio-65 at ¶ 76. Ohio voters vested the Commission with sole authority for that task, never “in any circumstance” to be transferred to the courts. Ohio Const. Article XI, Sec. 9(D)(1). “The separation-of-powers doctrine therefore precludes the judiciary from asserting control over ‘the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control,’” *City of Toledo v. State*, 154 Ohio St. 3d 41, 2018-Ohio-2358, 10 N.E.3d 1257, ¶ 27, including the apportionment process under Article XI. Thus, as the Court clarified only weeks ago, aside from directing the Commission back to the drawing board when it approves a non-compliant plan, the Court can make only “should” recommendations about how the Commission should accomplish that task, not “shall” orders. *LWV IV*, 2022-Ohio-789 at ¶ 4.

Accordingly, regardless of whether Map 3 is again deemed unconstitutional, Petitioners’ request for contempt among other facially unconstitutional orders for relief, should be rejected. See *Gallagher*, 48 Ohio St. at 442 (“[t]he [apportionment] matter rests in the sound discretion of the board, and cannot be controlled by the courts in any form of proceeding”); *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 633, 716 N.E.2d 704 (1999) (courts will not dictate “the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control”).

5. **The Law Is Clear, As The Court Has Found, That It Cannot Compel The Commission To Perform Its Legislative Function By Order or Threats of Contempt.**

“Absolute legislative immunity,” as a facet of the separation of powers doctrine, “attaches to all actions [Commission members] take[] ‘in the sphere of legitimate legislative activity’ as part of the map drafting process. *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998). Unable to dispute this point directly, Petitioners, without mentioning immunity specifically, attempt to draw a comparison to *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 467, 715 N.E.2d 1062 (1999). The Court there struck down “legislation previously declared violative of the Constitution” that the General Assembly had nonetheless reenacted, a remedy no one disputes that the Court can exercise here consistent with Article XI. *Id.* at 467. What it **did not** do, however, was hold any legislator in contempt for voting to enact that unconstitutional legislation. Nor could it. Even when “voting for [a] resolution that they knew . . . was illegal,” Ohio legislators are entitled to immunity. *Hicksville v. Blakeslee*, 103 Ohio St. 508, 519, 134 N.E. 445 (1921). Petitioners point to no case law that rebuts *Hicksville*’s force here.

In addition to the Court’s order rejecting such requests only a month ago, *City of Toledo* definitively forecloses Petitioners’ request for contempt. This Court in *Toledo* held that a trial court abused its discretion when it enjoined the state from enacting new statutes as punishment for contempt of court. *Toledo*, 2018-Ohio-2358 at ¶ 24-29. *Toledo* recounts and applies the key propositions of law emphasizing the separation of powers between the judiciary and the legislative branch—legal principles well established under Ohio jurisprudence and repeated throughout literally decades of this

Court's decisions. See also *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481, 17 S.Ct. 16141 L.Ed. 518 (1896) (the courts “will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption.). Of import here, the *Toledo* Court noted that “[a] court can no more prohibit the General Assembly from enacting a law than it can compel the legislature to enact, amend, or repeal a statute.” 2018-Ohio-2358 at ¶ 27. See also *State ex rel. Slemmer v. Brown*, 34 Ohio App.2d 27, 28, 295 N.E.2d 434 (10th Dist.1973) (“The judiciary has no right or power to command the General Assembly to adopt joint resolutions”). Under this Court’s holding in *Toledo* the Commission cannot be compelled to act or punished for failing to do so.

Because “exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability,” the Court must reject Petitioners’ request for contempt. *Bogan*, 523 U.S. at 52

**C. Article XI, Sec. 9(D) Does Not “Conflict” With The Balance Of Article XI Or Other Constitutional Provision, And Even If Did, Ohio’s Rule of Construction Is Clear That A Specific Provision Trumps A General Provision.**

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Petitioners next argue the express limitation on this Court’s authority under Section 9(D) “conflicts” with not just the other provisions of Article XI but the entire Constitution. In support, Petitioners declare a conflict with Section 6 (additional district standards), Section 9(A) (grant, original jurisdiction to consider challenges to the constitutionality of redistricting plans), and even Article I, Section 16, and then cite, albeit the wrong ones, rules of statutory construction for resolving the conflict.

Petitioners' attempt to unconstitutionally expand the Court's power beyond those granted by Ohio voters is easily dismissed. There obviously is nothing inconsistent with Section 9(A) of Article XI granting the Court original and exclusive jurisdiction, but then also limiting the scope of its powers. To begin, this is perfectly consistent with the forgoing authorities stating the Court's jurisdiction and that the scope is power are defined by the Constitution. This is the precise balance of power chosen by Ohioans. The Court is charged with giving full application to related and co-existing provisions of the Constitution, as perhaps even Petitioners would begrudgingly acknowledge.

We add that even if an inconsistency existed within Article XI or with another provision of the Constitution, Petitioners cite the wrong rule of construction. The dispositive rule is that "when there is a conflict between a general provision and a more specific provision in a statute, the specific provision controls." See *MacDonald v. Cleveland Income Tax Bd. of Review*, 151 Ohio St.3d 114, 2017-Ohio-7798, 86 N.E.3d 314, ¶ 27. See also R.C. 1.51. Section 9(D) imposes a specific and enforceable constitutional limitation and it controls to the exclusion of all general provisions.

**D. Petitioners' "Severance" Argument Seeks An Unconstitutional Result.**

Petitioners also purport to invoke Article XI, Section 10, in conjunction with their erroneous conflict argument, noting its language that "[t]he various provisions of [Article XI] are intended to be severable." Petitioners misleadingly omit the balance of this Section. Stated in its entirety, it reads: "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." (Emphasis added.) Petitioners' argument is a frivolous contention.

Section 10 does not authorize the Court to unilaterally “sever away” a constitutional provision expressly limiting its power. Rather, this Section merely memorializes the power this Court already possesses and has exercised, ironically in the redistricting context, to separate the remaining parts of an otherwise constitutional article from the “**unconstitutional** sections.” *King*, 11 Ohio St. 2d at 101 (emphasis added). In *King v. Rhodes*, this Court addressed a legislative apportionment plan adopted under a prior version of Article XI. A federal court found certain portions of Article XI unconstitutional under the U.S. Constitution, and the issue before our Supreme Court was whether the remaining articles could be severed and therefore enforced. This Court answered “yes,” holding it was obligated “to sustain the validity of constitutional provisions if possible, and the remaining parts of Article XI passed the “test of severability” because the “remaining parts of the article, standing alone and without reference to the unconstitutional sections, can be effective and operable.” *Id.*

Here, of course, no one contends that the express limitation imposed on this Court’s authority in Article XI violates the U.S. Constitution. Nor could they do so. The pertinent provisions are not “invalid,” and this Court is expressly obligated to faithfully apply them, in their *entirety*. The necessity for doing so is perhaps never more paramount than where the subject provision limits the Court’s jurisdiction in deference to an independent branch of government, thereby implicating separation of powers considerations.

**E. The Federal Constitution And “Its Remedies” Are Not Within The Court’s Jurisdiction.**

Finally, Amici declare the Court should now apply the federal constitution and its remedies—although it should have been obvious to them that the Court already rejected

this position. *LWV IV*, 2022-Ohio-1235 at ¶ 66. It did so for multiple reasons, one practical and other constitutional. First, Petitioners have not advanced federal constitutional claims in these cases. Amici cannot do so for them. Second, this Court possesses original jurisdiction for actions arising under Article XI. No original jurisdiction exists over federal constitutional claims. Either way, Amici's argument fails here and does for reasons the Court has already ruled.

### **CONCLUSION**

For these reasons, the Court should permit the Commission to proceed with Map 3 as an interim solution, overrule all opposition thereto, and otherwise deny Petitioners' (out-of-rule) other demands.

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