

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 MARCH 28, 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)
Harleen K. Gambhir **
Raisa M. Cramer**
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
hgambhir@elias.law
rcramer@elias.law

Donald J. McTigue* (0022849)
*Counsel of Record
Derek S. Clinger (0092075)
MCTIGUE COLOMBO & CLINGER LLC
545 East Town Street

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
Jonathan D. Blanton (0070035)
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
Jonathan.Blanton@OhioAGO.gov
Julie.Pfeiffer@OhioAGO.gov
Michael.Walton@OhioAGO.gov

Counsel for Respondents Ohio Governor Mike

Columbus, OH 43215
T: (614) 263-7000
F: (614) 368-6961
dmctigue@electionlawgroup.com
dclinger@electionlawgroup.com

Counsel for Petitioners

***Pro hac vice motions pending*

*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*

TABLE OF CONTENTS

I. Introduction..... 1

II. Factual Background 2

 A. Despite the clear mandates of the Constitution and this Court, the Commission adopted unconstitutional General Assembly plans in September 2021, January 2022, February 2022, and now March 2022..... 2

 B. The Fourth Plan duplicates the unconstitutional Third Plan, with the exception of a few superficial changes. 6

 C. The Independent Map Drawers’ Plan outperforms the Fourth Plan on constitutional requirements and traditional redistricting criteria. 10

 D. A three-judge federal court considers intervening in Ohio’s General Assembly redistricting process..... 11

III. Argument 13

 A. Respondents violated the requirements of Article XI, Section 1 and the orders of this Court..... 13

 B. The Fourth Plan violates Article XI, Section 6. 15

 1. The Fourth Plan violates Section 6(A) because it was drawn primarily to favor the Republican Party..... 16

 a. The process used to adopt the Fourth Plan provides unmistakable evidence of partisan bias..... 17

 b. The Fourth Plan is nearly identical to the Third Plan, which violated Section 6(A) by systematically creating competitive districts that are only nominally Democratic-leaning, while not subjecting Republican-leaning districts to the same treatment..... 18

 c. The Fourth Plan subverts traditional redistricting criteria in order to maximize Republican Party performance. 24

 2. The Fourth Plan violates Section 6(B)’s proportionality requirement..... 26

IV. Remedies..... 28

 A. This Court should adopt a compliant plan for the 2022 General Assembly election... 29

 B. This Court should alternatively adopt an expedited schedule and mandatory procedures to ensure the constitutional compliance of any Fifth Plan. 31

 C. This Court should issue other remedies it deems appropriate to ensure that Respondents comply with this Court’s orders..... 33

V. Conclusion 34

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adams v. DeWine</i> , Slip Opinion No. 2022-Ohio-89, 2022 WL 129092 (Ohio Jan. 14, 2022)	19
<i>City of Cleveland v. Bright</i> , 2020-Ohio-5180, 162 N.E.3d 153 (8th Dist. 2020)	33
<i>Cramer v. Petrie</i> , 70 Ohio St.3d 131, 637 N.E.2d 882 (1994)	33
<i>Hale v. State</i> , 55 Ohio St. 210, 45 N.E. 199 (1896)	32
<i>State ex rel. Johnston v. Taulbee</i> , 66 Ohio St.2d 417, 423 N.E.2d 80 (1981)	30
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm.</i> , Slip Opinion No. 2022-Ohio-342	<i>passim</i>
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm.</i> , Slip Opinion No. 2022-Ohio-65	<i>passim</i>
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm.</i> , Slip Opinion No. 2022-Ohio-789	<i>passim</i>
<i>Mellow v. Mitchell</i> , 607 A.2d 204 (Pa. 1992)	25
<i>S. Euclid v. Jemison</i> , 28 Ohio St.3d 157, 503 N.E.2d 136 (1986)	30
<i>Scott v. Germano</i> , 381 U.S. 407 (1965)	30
<i>Wattson v. Simon</i> , No. A21-0243, 2022 WL 456357 (Minn. Feb. 15, 2022)	30
Statutes	
R.C. 1.11	30
R.C. 2323.51	34
R.C. 2705	33
R.C. 3501.01	12

Other Authorities

Ohio Constitution, Article IV, Section 130

Ohio Constitution, Article IV, Section 2(B)(1)(f)32

Ohio Constitution, Article XI, Section 1 *passim*

Ohio Constitution, Article XI, Section 6 *passim*

I. Introduction

In their Renewed Motion for an Order Directing Respondents to Show Cause, the Bennett Petitioners explained that the Fourth Plan adopted by the Commission on Monday is just the unconstitutional Third Plan with a few cosmetic adjustments, once again created by Republican caucus staffers under the Republican Legislative Commissioners' direction and control. The Fourth Plan was unveiled at the eleventh hour, the Republican Legislative Commissioners refused to recess to allow the Democratic Commissioners to review the Plan or offer any amendments, and every single Republican Commissioner then refused to consider or finalize the plan that independent map drawers hired by the Commission had been working on all week. This egregious disregard for the Court's orders and the Ohio Constitution warrants the Court resetting the show cause hearing it previously deferred. *See* Pet'rs' Renewed Mot. for an Order Directing Resp'ts to Show Cause, *Bennett v. Ohio Redistricting Comm.*, Case No. 2021-1198 (Mar. 29, 2022) ("Renewed Show Cause Motion").

Petitioners separately file these objections pursuant to the Court's March 16 Order and explain in detail why the Fourth Plan violates Sections 1, 6(A), and 6(B) of Article XI of the Ohio Constitution. The Bennett Petitioners request that this Court invalidate the Fourth Plan and take further action to ensure that Ohio itself—rather than a federal court—adopts a constitutional plan for the 2022 election, in advance of the April 20 deadline by which the three-judge federal court in *Gonidakis v. LaRose*, No. 2:22-cv-00773-ALM-EPD (S.D. Ohio), has suggested it will otherwise intervene in Ohio's General Assembly redistricting process. To that end, the Court should either adopt a constitutional plan for the 2022 election—while retaining jurisdiction to consider a new Commission-adopted plan to be utilized in future elections—or order an expedited schedule and mandatory procedures to ensure that it has an opportunity to review and rule on any

Fifth Commission-drawn Plan before April 20. This Court should also issue any other remedies it deems appropriate and necessary to ensure that Ohioans are able to vote in constitutional General Assembly districts this year.

II. Factual Background

A. **Despite the clear mandates of the Constitution and this Court, the Commission adopted unconstitutional General Assembly plans in September 2021, January 2022, February 2022, and now March 2022.**

The facts of this case are summarized in the Court’s 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*”); *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-789 (“*LWV III*”). This Court has on three previous occasions considered the constitutionality of General Assembly Plans approved by the Ohio Redistricting Commission. The Court has found that all three of those plans violated Article XI’s partisan fairness and proportionality requirements.

In all three 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* at ¶ 31 (citing *LWV I* at ¶ 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.* at ¶ 48. In *LWV III*, the Court gave an even sterner warning. It wrote that “we expect the commission to abide by its Article XI duty to draft a plan, not to simply adopt one drafted by legislative staff at the direction of members of one political party.” *LWV III* at ¶ 31. It accompanied that warning with ground rules for what was necessary to comply with the Commission’s Article XI duty. Specifically, the Court

ordered “that the *commission* 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),” and that “drafting should occur in public and the commissioners should convene frequent meetings to demonstrate their bipartisan efforts to reach a constitutional plan.” *Id.* at ¶ 44 (emphasis in original). The Court added that the Commission “should retain an independent map drawer—who answers to all commission members, not only to the Republican legislative leaders—to draft a plan through a transparent process.” *Id.* at ¶ 30.

In the end, the Commission’s most recent map drawing process, described at length in Petitioners’ filing on Tuesday of this week, *see* Renewed Show Cause Motion, manifested the most blatant disregard of Article XI requirements and this Court’s orders to date. Ultimately, the Republican Legislative Commissioners intervened at the last moment, scrapped the plan that had been drafted on behalf of the entire Commission, and interjected a “new” plan that was nearly identical to the unconstitutional Third Plan.

Through the first few days after the Court’s order, the Commission set public meetings, hired independent map drawers, recruited mediators, and supervised maps drawn in public by the independent map drawers. (*See generally* BENNETTOBJ_001-023 (3/19/22 Commission Meeting Tr.); BENNETTOBJ_024-038 (3/21/22 Commission Meeting Tr.); BENNETTOBJ_039-053 (3/22/22 Commission Meeting Tr.); BENNETTOBJ_054-087 (3/23/22 Commission Meeting Tr.); BENNETTOBJ_088 (Video of Commission’s 3/24/22 Meeting); BENNETTOBJ_091 (3/25/22 Commission Meeting Tr.).)

But the process soured in the final 72 hours. When the Commission convened on Saturday, March 26, it became clear that the two independent map drawers, Dr. Douglas Johnson and Dr. Michael McDonald, were able to make significant strides toward compliance with the Ohio

Constitution and this Court's orders, specifically with regard to Sections 6(A) and 6(B). (*See* BENNETTOBJ_093-095 (3/26/22 Commission Meeting Tr.)) Dr. McDonald drew a General Assembly Plan in which 54 House districts were Republican-leaning and 45 House districts were Democratic-leaning, with 3 districts with a Republican vote share between 50 percent and 52 percent and 3 districts with a Democratic vote share between 50 percent and 52 percent. (*See* BENNETTOBJ_184-188 (Michael McDonald Plan Statistics).) Dr. Johnson drew a General Assembly Plan in which 55 House districts were Republican-leaning and 44 House districts were Democratic-leaning, with 2 districts with a Republican vote share between 50 percent and 52 percent and 3 districts with a Democratic vote share between 50 percent and 52 percent. (*See* BENNETTOBJ_189-191) (Douglas Johnson Plan Statistics).) In other words, the independent consultants hired to work for the entire Commission had made more progress toward compliance with Article XI and the Court's orders in a few short days than Republican Commissioners and their staff had in months.

On Saturday, Republican Commissioners began to query whether the two maps were unconstitutional. Senate President Matt Huffman questioned whether the plans were adequately compact. (BENNETTOBJ_105 (3/26/22 Commission Meeting Tr.)) As explained below, the independent map drawers' end product is more compact than the Fourth Plan. *See infra* Section III.B.1.c. Additionally, Auditor Keith Faber expressed worry about the map drawers not finishing in time for meaningful public comment. (BENNETTOBJ_109 (3/26/22 Commission Meeting Tr.)) Yet, just as with the Second and Third Plans, the Fourth Plan was adopted with *no* public comment. In any event, according to President Huffman's telling, that Saturday he directed his staff to make small tweaks to the Third Plan—which had been invalidated in *LWV III*—that the Commission could consider it as a backup option. (*See* BENNETTOBJ_192 (Tweet by

Cleveland.com Reporter Andrew Tobias).)

To what should not come as a surprise, on the evening of March 28—the deadline set by this Court—after President Huffman suggested passing a marginally tweaked Third Plan, the Commission almost immediately cut off its consideration of the independent map drawers’ work and instead rammed through the handiwork of Republican caucus staffers less than an hour after it was first publicly proposed. (*See generally* BENNETTOBJ_125-138 (3/28/22 Commission Meeting Tr., Part 2); BENNETTOBJ_139-141 (Commission Meeting Tr., Part 3); BENNETTOBJ_142- 155 (3/28/22 Commission Meeting Tr., Part 4).)

Even the Fourth Plan’s proponents, the Republican Legislative Commissioners, scarcely bothered to pretend the Fourth Plan was constitutional. President Huffman insisted that the Commission had to adopt the Plan even if, in substance, it violated the Court’s express order that the Commission adopt a new plan from scratch, so that the Commission could, at least, meet the March 28 deadline. (*See* BENNETTOBJ_136-138 (3/28/22 Commission Meeting Tr., Part 2).) House Speaker Bob Cupp could only offer weakly that the Fourth Plan was “the best that can be done in the time that [is] available,” (BENNETTOBJ_149 (3/28/22 Commission Meeting Tr., Part 4).) Four Republican Commissioners proceeded to vote for the Fourth Plan despite the protests of the Democratic Commissioners who argued that the Independent Map Drawers’ Plan was nearly finished and that the Commission could pass the latter before midnight to comply with the Court’s order. (*See id.* at BENNETTOBJ_144-145, 154-155.) Auditor Faber voted no, as did Leader Allison Russo and Senator Vernon Sykes. (*Id.* at BENNETTOBJ_154-155.)

Several Commissioners acknowledged, both in the Commission meeting and to reporters, that the Fourth Plan likely violated this Court’s orders. President Huffman told a reporter that he understood the Court to require an entirely new plan but insisted that using the invalidated plan

was a “parachute.” (BENNETTOBJ_174 (Susan Tebben, “Ohio Republicans abandon independent mapmakers to pass slightly modified GOP maps,” News from the States (Mar. 29, 2022)).) Talking to the press, Auditor Faber said: “I think that there’s a decent chance that this map won’t meet the court’s test.” (*Id.* at BENNETTOBJ_173.) During the hearing, Speaker Cupp refused to say whether he thought the plan complied with the Court’s order, simply stating that it brought the Commission “closer.” (BENNETTOBJ_149 (3/28/22 Commission Meeting Tr., Part 4).)

When independent map drawer Dr. Johnson¹ completed a General Assembly plan shortly before 11 p.m. and Senator Sykes introduced it to the Commission, the Republican Commissioners refused to vote to adopt it because they claimed they did not have time to confirm its constitutional compliance and had several qualms with the plan’s compactness. (BENNETTOBJ_154, 159-161 (3/28/22 Commission Meeting Tr., Part 5.)) This was curious in light of the fact that (a) the Commissioners had just voted to adopt a plan that several Commissioners admitted they had not seen until moments before it was put to a vote and (b) the Independent Map Drawers’ Plan was *more compact than the Fourth Plan*. (BENNETTOBJ_151-155 (3/28/22 Commission Meeting Tr., Part 4); *see* Affidavit of Dr. Jonathan Rodden (Mar. 30, 2022) (“Rodden Aff.”) ¶ 33, tbl. 1 & 2.)

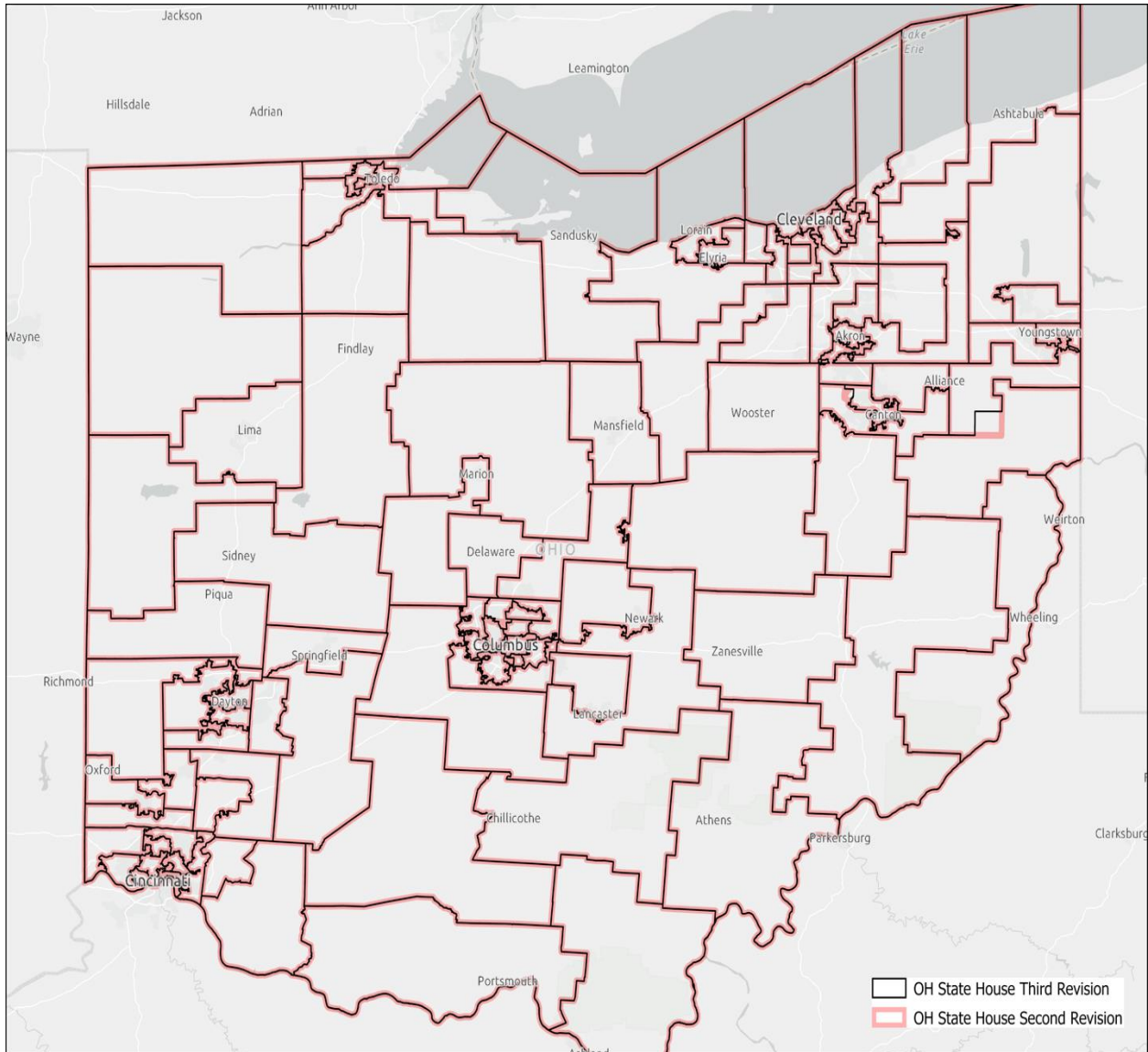
B. The Fourth Plan duplicates the unconstitutional Third Plan, with the exception of a few superficial changes.

Petitioners do not describe the Fourth Plan at length here, because there is no need to. The Court can learn all it needs to know about the Fourth Plan by simply comparing it with the Third Plan. The images below, provided in an accompanying affidavit submitted by Dr. Jonathan Rodden, represent the only changes that the Fourth Plan makes to the Third Plan. The Third Plan’s

¹ Dr. McDonald departed Columbus at approximately 5 p.m. on March 28 due to a prior academic engagement. (BENNETTOBJ_128, 135 (3/28/22 Commission Meeting Tr., Part 2).)

House map is rendered in red borders and the Fourth Plan’s House map in black borders; as can be easily seen on the map, the lines largely overlap. Aside from the changes shown, the two plans are identical.²

Figure 1: Boundaries of Third and Fourth Plans³



² Dr. Rodden explains that the changes to northern Franklin County in Fourth Plan’s House map also affect the Senate map. (See Affidavit of Dr. Jonathan Rodden at ¶ 20 (Mar. 30, 2022) (“Rodden Aff.”).) The changes in the Canton area did not affect the Senate map. *Id.* at ¶ 21.

³ Dr. Rodden refers to the Third Plan as the “Second Revised Plan” and to the Fourth Plan as the “Third Revised Plan,” but the title of the figure is revised here for consistency.

Figure 2: Northern Franklin County

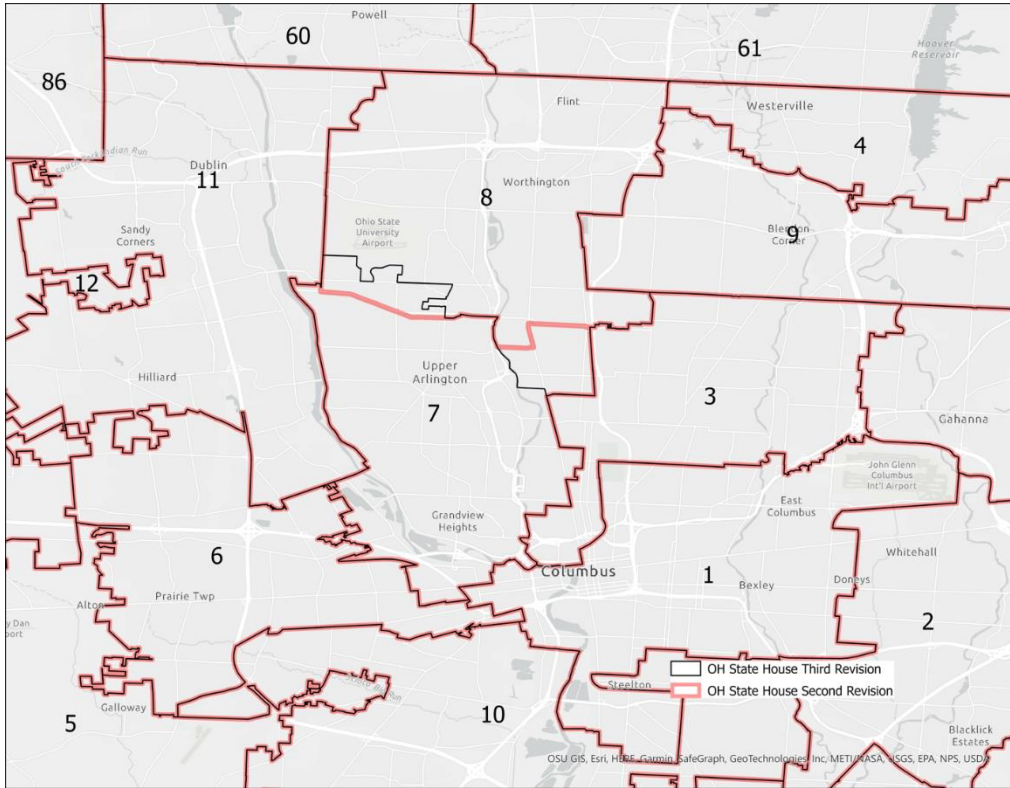
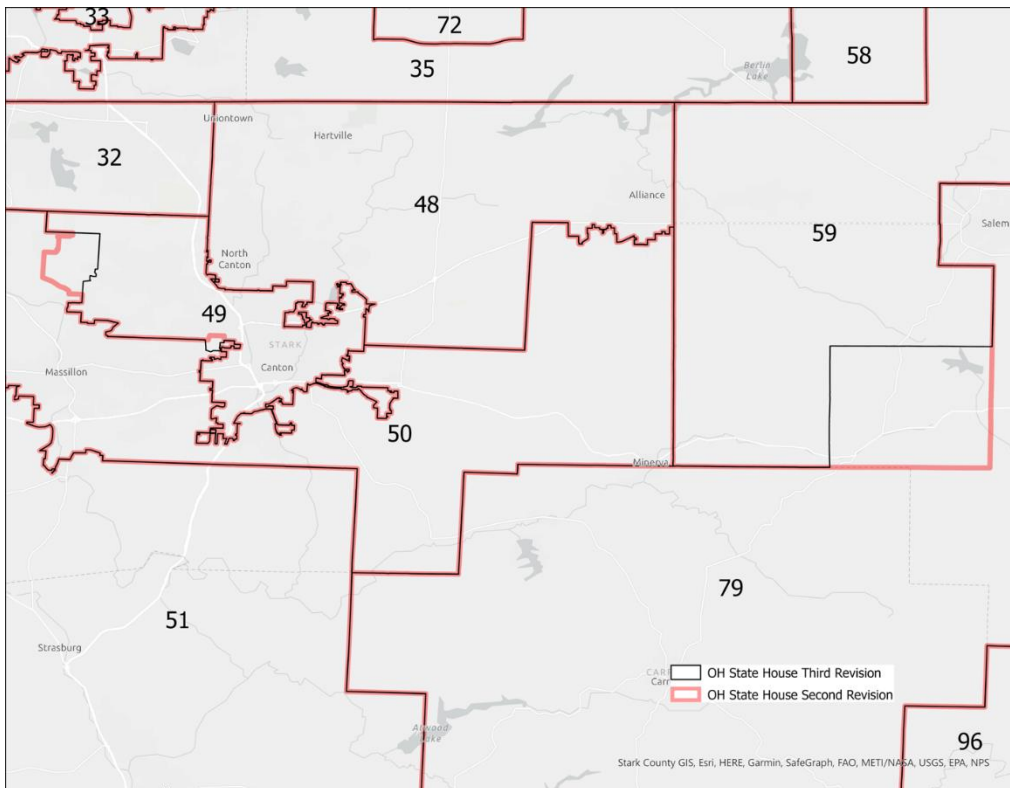


Figure 3: Canton Area



If it is difficult for the Court to spy the difference between the Third and Fourth Plan in the images above, Petitioners commiserate: the few changes are nominal. In fact, only 31,244 Ohioans out of nearly 11.8 million have been placed in a different district. (*Id.* at ¶ 4.) As between the Third and Fourth Plan, 99.74 percent of the state’s population remains in the same district. (*Id.* at ¶ 19.)

In terms of the Fourth Plan’s compliance with the partisan fairness and proportionality requirements of Sections 6(A) and (B), its only relevant changes impact just 3 districts across the entire General Assembly: 2 in the House and 1 in the Senate. (*Id.* at ¶ 20-21.) In all 3 districts, the Republican map drawers nudged the projected Democratic vote share to just above 52 percent. (*Id.*) Setting aside the inherent superficiality of such a maneuver, it does little to improve the Fourth Plan’s proportionality. As described by Dr. Rodden, the Fourth Plan remains starkly asymmetrical and out of line with Ohioans’ voter preferences. While the Fourth Plan (like the Third Plan) achieves nominal proportionality by placing 46 percent of seats above 50 percent Democratic vote share and 54 percent of seats below that figure, (*id.* at ¶ 25 tbls. 1 & 2,) its allocation of competitive districts⁴ remains wildly disparate. Like its predecessor, the Fourth Plan contains a remarkable number of districts with a Democratic vote share between 50 and 52 percent: 17 such districts in the House and 6 in the Senate. (*Id.*) At the same time, the Fourth Plan creates zero Republican-leaning competitive districts in the House or Senate. (*Id.*)

The Fourth Plan’s disparate allocation of competitive districts and lack of proportionality is clear when one excludes competitive districts from the seat count. Under that analysis, the Fourth Plan creates just 28 Democratic seats and 54 Republican seats in the House (corresponding to a split of 34.1 percent Democratic and 65.9 percent Republican) and 9 Democratic and 18

⁴ This Court’s order in *LWV III* concluded that “sub-52-percent districts allocated to” a party under the Third Plan were “‘competitive’ districts.” *LWV III* at ¶ 42. Petitioners refer to such districts by the same terminology here.

Republican seats in the Senate (corresponding to a split of 33.3 percent Democratic and 66.7 percent Republican). (*Id.* at ¶ 29.)

C. The Independent Map Drawers’ Plan outperforms the Fourth Plan on constitutional requirements and traditional redistricting criteria.

The Independent Map Drawers’ Plan, on the other hand, outperforms the Fourth Plan, not only on partisan proportionality, but other Article XI requirements and traditional redistricting criteria as well.⁵ This is undoubtedly why the Commission refused to allow it to be finalized: to deploy President Huffman’s “parachute” rather than letting the plane land at its destination of a fair, constitutionally compliant map.

The Independent Map Drawers’ plan is markedly more proportional than the Fourth Plan. It contains a ratio of Democratic-leaning to Republican-leaning seats that tracks Ohio’s statewide partisan composition of 54 percent Republican and 46 percent Democratic. (*Id.* at ¶ 25 tbls. 1 & 2.) Unlike the Fourth Plan, the Independent Map Drawers’ Plan does not feature a gross disparity in the allocation of competitive seats. The Fourth Plan’s House map features 17 Democratic-leaning districts with a Democratic vote share between 50 percent and 52 percent and 0 Republican-leaning districts with a Republican vote share in that range. (*Id.*) The Independent Map Drawers’ Plan allocates competitive seats with perfect symmetry: 3 Democratic-leaning districts with a Democratic vote share between 50 percent and 52 percent and 3 Republican-leaning districts with a Republican vote share in that same range. (*Id.*)

Similarly, the Fourth Plan’s Senate map creates 6 Democratic-leaning seats with a Democratic vote share between 50 percent and 52 percent, and 0 Republican-leaning seats with a Republican vote share in that range, while the Independent Map Drawers’ Plan creates 2

⁵ The Independent Map Drawers’ Plan is available on the Ohio Redistricting Commission’s website. *See* Maps, Ohio Redistricting Comm., <https://www.redistricting.ohio.gov/maps> (last accessed April 1, 2022) (labeled as “Johnson McDonald Independent Plan 328 Final”).

Democratic-leaning seats with a Democratic vote share in that range and 0 Republican-leaning seats with a Republican vote share in that range. (*Id.*)

When seats with a vote share between 50 percent and 52 percent in favor of either party are excluded from the seat count, the Independent Map Drawers' Plan is significantly more proportional than the Fourth Plan. Under that formula, the Independent Map Drawers' Plan creates 42 Democratic and 51 Republican seats in the House, corresponding to 45.2 percent Democratic and 54.8 percent Republican, and 13 Democratic and 18 Republican seats in the Senate, corresponding to 41.9 percent Democratic and 58.1 percent Republican. (*Id.* at ¶ 30.)

The independent map drawers achieved these outcomes while also drawing a plan that compares favorably with the Fourth Plan on almost every constitutional metric. As to compactness, the Independent Map Drawers' Plan is more compact than the Fourth Plan on all three plan-wide measurements of compactness analyzed by Dr. Rodden (Reock, Polsby-Popper, and Area/Convex Hull) in both the House and Senate. (*Id.* at ¶ 33.)

The Independent Map Drawers' Plan also splits fewer counties and voting tabulation districts ("VTDs") in the House. (*Id.* at ¶ 34.) In the Senate, while the Independent Map Drawers' Plan splits more counties than the Fourth Plan, it splits fewer VTDs. (*Id.*)

The Independent Map Drawers' Plan, like the Rodden III Plan, demonstrates that it is possible to draw a General Assembly plan consistent with traditional redistricting criteria and other Article XI requirements, while at the same time achieving partisan proportionality and fairness. The Commission had such a plan before it but nevertheless refused to finalize and adopt it.

D. A three-judge federal court considers intervening in Ohio's General Assembly redistricting process.

On February 18, 2022, a group of Republican voters filed a lawsuit in the U.S. District Court for the Southern District of Ohio, alleging that delays in the General Assembly redistricting

process violated their federal rights. *See Gonidakis v. LaRose*, No. 2:22-cv-00773-ALM-EPD (S.D. Ohio filed Feb. 18, 2022). The federal court initially stayed proceedings pending this Court’s review of the Third Plan, but on March 18, a three-judge court was convened, and on March 30, the federal court held a hearing on the voters’ motion for a preliminary injunction. (*See* (BENNETTOBJ_196 (Order for Three-Judge Panel); BENNETTOBJ_ 197-199 (PI Hearing Courtroom Minutes); BENNETTOBJ_ 200-201 (Judge Marbley Opinion and Order).)

At that hearing, Secretary of State Frank LaRose’s counsel, after consulting with the Secretary by phone, reported that the Secretary’s preferred outcome was for the federal court to order the General Assembly primary to proceed on May 24 under the Third Plan that this Court has already held unconstitutional. The federal court rejected that request, but it also indicated that it believes a final General Assembly plan must be in place by no later than April 20 to avoid violating Ohioans’ federal voting rights. The federal court’s indication was based on testimony from Ohio’s Director of Elections, an employee of the Secretary’s office, that April 20 is the date necessary to allow for a primary election on August 2, which the same witness represented to be the last date on which Ohio could hold a primary election sufficiently in advance of this year’s November general election. August 2 is also the statutorily set date for special elections. *See* R.C. 3501.01. The federal court ordered expedited post-hearing briefing to address—among other topics—what General Assembly plan it should adopt if necessary. And the court’s questions made clear that if it does impose a plan, the options it is considering include the Third Plan, the Fourth Plan, and the existing plan from 2011, along with other plans presented to the Court.⁶

On the evening of March 31, Secretary LaRose released a letter confirming that the General

⁶ No transcript of the federal hearing is yet available; this description of events is based on the recollection of counsel present at the hearing.

Assembly primary would “most likely” occur on August 2, (BENNETTOBJ_193-195 (Tweet by Spectrum News Reporter Josh Rultenberg),) such that the federal court would likely order implementation of a plan no later than April 20.

III. Argument

The Fourth Plan violates the procedural requirements provided in Article XI, Section 1 and this Court’s prior orders. The Fourth Plan is also substantively deficient: It violates the partisan fairness requirement of Section 6(A) and the proportionality requirement of Section 6(B). Considering the requirements of the Ohio Constitution as very clearly enunciated by this Court in its *three* prior opinions, the only possible conclusion is that the Fourth Plan, too, is patently unconstitutional.

The Commissioners were aware of these constitutional violations at the time that they adopted the Fourth Plan. A majority of them nevertheless chose to flout the Constitution and this Court’s orders. Respondents likely hope that, with enough delay, they can secure federal court intervention that would subject Ohio’s voters to a map that violates the requirements of the Ohio Constitution. This Court should reject their gambit and give force to the will of Ohio voters, the Ohio Constitution, and the rule of law.

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

Article XI, Section 1 and the previous orders of this Court provide clear procedural requirements for the Commission’s adoption of General Assembly maps. Respondents have repeatedly and willfully refused to comply with those requirements.

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* at ¶ 119; *LWV II* at ¶ 34. “In all

three of [this Court’s prior] opinions,” the Court has “identified a flawed process in which the General Assembly–district plan adopted by the commission has been the product of just one political party.” *LWV III* at ¶ 31. Accordingly, the Court ordered on March 16 that “*the commission* draft and adopt an entirely new General Assembly–district plan that conforms with the Ohio Constitution.” *LWV III* at ¶ 44 (emphasis in original). The Court specified that the “commission should retain an independent map drawer—who answers to all commission members, not only to the Republican legislative leaders—to draft a plan through a transparent process.” *Id.* at ¶ 30. The Court further ordered that “drafting should occur in public and the commissioners should convene frequent meetings to demonstrate their bipartisan efforts to reach a constitutional plan within the time set by this court.” *Id.* at ¶ 44.

The Commission took steps in accordance with these directives for much of the remedial process. *See supra* Section II.A. Just as it appeared that the Commission would adopt compliant maps, however, the Republican Legislative Commissioners brought out the same playbook they have now used three times over: In the eleventh hour, they introduced a plan “drawn by employees of the Republican caucuses.” *LWV III* at ¶ 28. Once again, the process for creating that plan “was controlled entirely by Senate President Huffman and House Speaker Cupp,” with the plan “drafted by legislative staff at the direction of members of one political party.” *Id.* at ¶ 30-31.

The Commission also violated this Court’s clear order that the Commission “draft and adopt an *entirely new* General Assembly–district plan.” *LWV III* at ¶ 44 (emphasis added). By the Republican Legislative Commissioners’ own admission, the Fourth Plan is nearly identical to the unconstitutional Third Plan. As this Court held in *LWV II*,

We find unavailing the claim that the map makers started with the original plan because time was short and they were familiar with it. We clearly invalidated the entire original plan . . . The commission’s choice to nevertheless start with that plan and change it as little as

possible is tantamount to an intent to preserve as much partisan favoritism as could be salvaged from the invalidated plan.

LWV II at ¶ 38. Here, Speaker Cupp openly acknowledged that the Fourth Plan was based upon the Third Plan. (BENNETTOBJ_146 (3/28/22 Commission Meeting Tr. Part 4).) Indeed, he acknowledged that the Plan made changes to only 6 House Districts and 2 Senate Districts in the Third Plan. (*Id.* at 145.) Even more egregiously, President Huffman stated that his intent was that the caucuses’ map drawers make “only minor changes” to the Third Plan, and he said as a result the Fourth Plan was 97 percent similar to the Third Plan. (BENNETTOBJ_158 (3/28/22 Commission Meeting Tr., Part 4).)⁷ Remarkably, President Huffman’s 97 percent figure is an understatement. In fact, Dr. Rodden observes that the Fourth Plan places 99.74 percent of Ohio residents remain in the same district as in the Third Plan. (Rodden Aff. at ¶ 19.) This is akin to a used car salesman slapping a fresh coat of paint on a lemon and trying to sell it as a near-new car.

Respondents have willfully failed to comply with this Court’s orders. Their refusal to do so also demonstrates that the Fourth Plan was drawn primarily to favor the Republican Party and disfavor the Democratic Party, in violation of Article XI, Section 6(A) as discussed below.

B. The Fourth 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.

⁷ At times the Commission’s official transcript attributes quotes to the incorrect speaker, as occurred for this quotation. The official video recording of the hearing can be found on the Ohio Channel website. *See* Ohio Redistricting Commission, available at <https://www.ohiochannel.org/video/ohio-redistricting-commission>.

(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* at ¶ 87-88. The Fourth Plan is substantively identical to the Third Plan, and so violates Section 6 for the same reasons as the Third Plan.

1. The Fourth 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* at ¶ 116. “[D]irect or circumstantial evidence may establish that a districting plan was drawn primarily to favor one political party over another.” *Id.* at ¶ 117 (citations omitted).

The Court found the Third Plan violates Section 6(A). The question is whether a plan that is 99.74 percent identical to the Third Plan somehow cures the undue partisan bias that infected the Third Plan. Obviously, the answer is no. That is why the Court found it necessary for an entirely new plan to be prepared.

The evidence bears this out. Multiple sources of evidence demonstrate that Respondents intentionally favored the Republican Party at the expense of the Democratic Party in adopting the Fourth Plan. First, a majority of Commissioners adopted the Fourth Plan through a rushed and one-sided process that drips with partisan bias, while ignoring the General Assembly plan drawn by the independent map drawers hired by the Commission. Second, the Fourth Plan barely addresses the partisan asymmetry of the Third Plan, making miniscule changes while, by President Huffman’s own characterization, leaving at least 97 percent of the previous map in place. (BENNETTOBJ_158 (3/28/22 Commission Meeting Tr., Part 4); Rodden Aff. at ¶ 19 (explaining

that the Fourth Plan in fact left 99.74 percent of the Third Plan in place.) Third, the Fourth Plan subordinates traditional redistricting criteria, such as ensuring compactness and maintaining political subdivisions, in order to maximize the Republican Party's performance.

a. The process used to adopt the Fourth Plan provides unmistakable evidence of partisan bias.

The Commission's actions during the remedial period support a finding that the Fourth Plan violates Section 6(A). This Court has held that a "map-drawing process may support an inference of predominant partisan intent." *LWV I* at ¶ 118. In explaining why the Commission's first General Assembly 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.* at ¶ 119. Respondents took the same approach for the Second Plan and the Third Plan, both of which the Court held to have violated Section 6(A). *See LWV II* at ¶ 34; *LWV III* at ¶ 30-32.

Incredibly, despite this Court's clear orders, the Fourth Plan was once again drawn by the staff of the Republican Legislative Commissioners, rather than by staff employed by the Commission itself. (BENNETTOBJ_163 (3/28/22 Commission Meeting Tr., Part 4).) The Fourth Plan was introduced and passed in the span of less than an hour. (*See id.* at BENNETTOBJ_142-155.) Despite the Democratic Commissioners' repeated requests, the Republican Legislative Commissioners refused to allow a recess so that the Commissioners could examine the Plan or propose amendments. (*Id.* at BENNETTOBJ_151, 154.) The Democratic Commissioners were provided only a PDF printout of the Plan and a chart of the Plan's population deviations, leaving

them unable to ascertain the Plan’s compliance with constitutional requirements regarding political subdivision splits, compactness, or partisan proportionality. (*Id.* at BENNETTOBJ_146.)

To state the obvious, Respondents were aware of the partisan effects of the Fourth Plan prior to approving it. Indeed, just before the Commission voted, Leader Russo asked Speaker Cupp about the apparent lack of partisan proportionality and asymmetry in the Fourth Plan. (*Id.* at BENNETTOBJ_148.) Speaker Cupp had no response other than that the Plan was “the best that can be done in the time that [is] available,” (*id.* at BENNETTOBJ_149,) thereby ignoring the proportional, symmetrical map that had been drafted by the independent map drawers.

As the Court noted in *LWV II*, Respondents’ “awareness of the partisan effects supports an ‘inference of predominant partisan intent’ similar to the one the Court found with respect to the” Commission’s first General Assembly Plan. *LWV II* at ¶ 37 (citing *LWV I* at ¶ 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 Fourth Plan. *See id.* at ¶ 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.”).

b. The Fourth Plan is nearly identical to the Third Plan, which violated Section 6(A) by systematically creating competitive districts that are only nominally Democratic-leaning, while not subjecting Republican-leaning districts to the same treatment.

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 Commission’s Second 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 at ¶ 40; *see also Adams v. DeWine*, Slip Opinion No. 2022-Ohio-89 at ¶ 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.”).

In direct defiance of the Court’s clear direction, the Commission’s Third Plan used this exact tactic to disfavor the Democratic Party *to an even greater degree* than the Second Plan. *See Bennett Pet’rs Objections, Bennett v. Ohio Redistricting Comm.*, Case No. 2021-1198 (Feb. 28, 2022). The Fourth Plan preserves the Third Plan’s partisan bias. As Dr. Rodden explains in his report,⁸ the Fourth Plan does not contain a *single* Republican-leaning House or Senate seat that falls within the 50 percent to 52 percent vote share range. (Rodden Aff. at ¶ 24 tbls. 1 & 2.) 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.* at ¶ 4-5.) The treatment of Democratic-leaning seats is markedly different. The Fourth Plan creates only 28 House seats in which the Democratic vote share exceeds 52 percent. (*Id.* at ¶ 25 tbl. 1.) Every other nominally “Democratic-leaning” district—17 in total,

⁸ For ease of comparison, Dr. Rodden and the Bennett Petitioners employ the dataset and method for calculating seat share utilized by the Commission. (Rodden Aff. ¶ 24.)

or about 38 percent of the total Democratic-leaning seats—falls within the 50 percent to 52 percent range. (*Id.*) Likewise, the Fourth Plan contains 6 Senate seats that fall within the competitive range, accounting for 40 percent of the total Democratic-leaning seats. *Id.* This asymmetry largely tracks with the invalidated Third Plan, which included 19 House seats and 7 Senate seats in which the Democratic vote share fell between 50 percent and 52 percent. *See LWV III* at ¶ 32. (*See also* BENNETTOBJ_183 (Comparative Plan Statistics Table), reproduced in part below.)

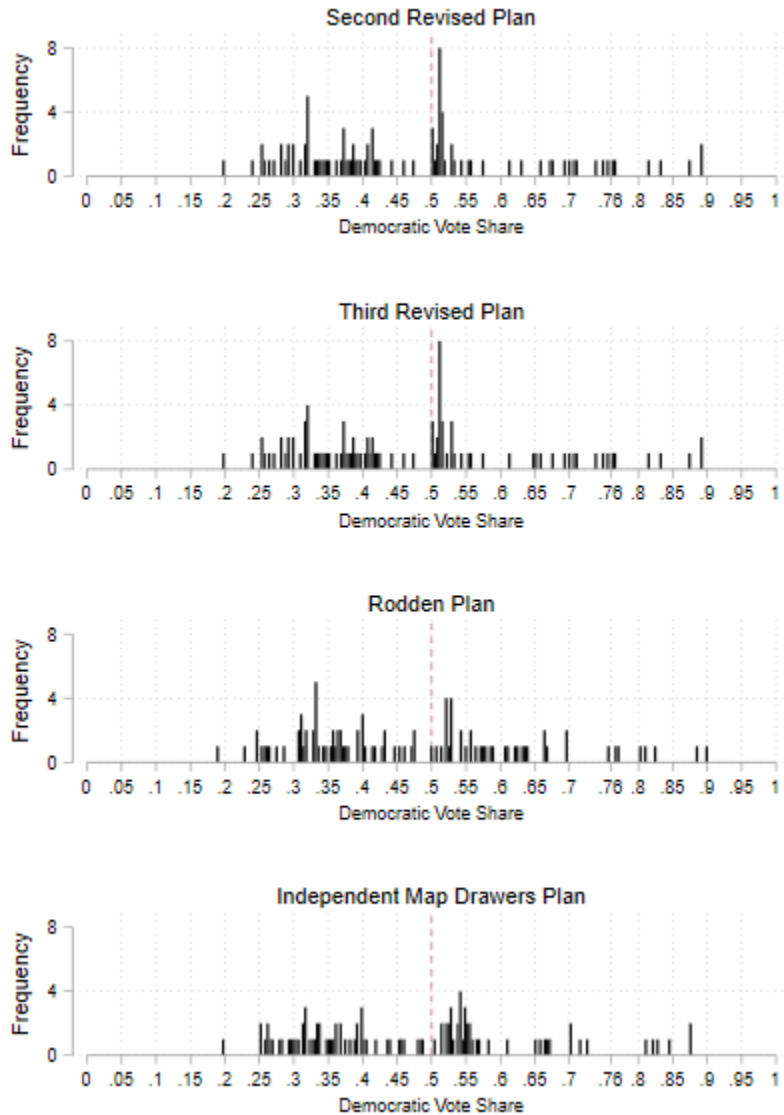
Comparative Plan Statistics, Ohio House of Representatives Maps

	Third Plan (Feb. 24)	Fourth Plan (Mar. 28)	Rodden Plan	Independent Map Drawers Plan
# of seats with two-party Democratic vote share >.52	26	28	40	42
Expressed as percentage of seats	26.3%	28.28%	40.4%	42.4%
# of seats with two-party Democratic vote share <.48	54	54	56	51
Expressed as percentage of seats	54.55%	54.55%	56.6%	51.5%
# of seats with two-party Democratic vote share between .48 and .5	0	0	1	3
Expressed as percentage of seats	0.0%	0.0%	1.0%	3.0%
# of seats with two-party Democratic vote share between .5 and .52	19	17	2	3
Expressed as percentage of seats	19.19%	17.17%	2.0%	3.0%

The Fourth 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 Fourth Plan (called “Third Revised Plan” below), compared with the same distribution in the Third Plan (called “Second Revised Plan” below), the Rodden III Plan, and the Independent Map Drawers’

Plan, as set forth in Dr. Rodden’s affidavit:

Figure 4: Histograms of Democratic Vote Share, House Plans

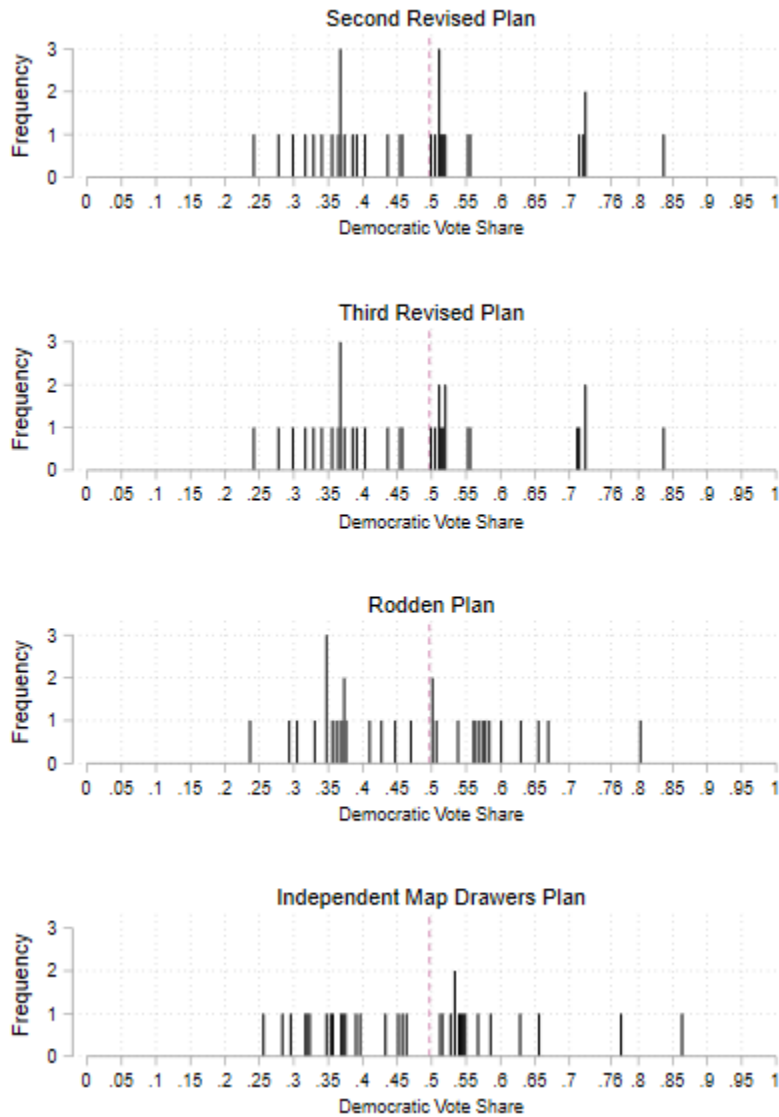


(Rodden Aff. at ¶ 25 fig. 4.) Dr. Rodden writes that the Fourth Plan “continues the [Third Plan’s] strategy of bunching Democratic seats very close to the 50 percent line,” which “reflects a conscious attempt to achieve the appearance of partisan proportionality, while ensuring disproportionate Republican majorities.” (*Id.* at ¶ 27.)

Similarly, the Fourth Plan creates 7 Senate seats in which the Democratic vote share falls

between 50 percent and 52 percent. (*Id.* at ¶ 31 tbl. 2.) Like the Third Plan, the Fourth Plan contains no Republican-leaning Senate seats that fall in the range of 48 percent to 50 percent Democratic vote share. (*Id.*) A histogram for the Senate is reproduced below:

Figure 5: Histograms of Democratic Vote Share, Senate Plans



(*Id.* at ¶ 31 fig. 2.) The large number of districts at or close to 51 percent 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.* at ¶ 8.)

As with the Third Plan, the Fourth 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.* at ¶ 31.) If Democrats receive the same swing in their direction and win 51 percent of the vote, they can only hope to gain 47 percent of the seats, and this is only “if we make the very unrealistic assumption that Democratic candidates win *every single one* of the 17 districts with a Democratic vote share between 50 and 52 percent.” (*Id.* (emphasis in original).) In other words, the Fourth Plan makes 54 percent of the seats a “*floor*” for Republicans, while 46 percent of the seats is a “*ceiling*” for Democrats. *LWV II* at ¶ 40 (emphasis in original). Respondents have, once again, systematically rigged the General Assembly plan by creating an unnaturally large number of nominally Democratic-leaning competitive districts.

The Fourth 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. The plan drawn by the independent map drawers hired by the Commission yet again demonstrates that point. While the Fourth Plan creates 17 nominally Democratic-leaning House districts with Democratic vote shares between 50 percent and 52 percent (and *no* Republican-leaning House districts in the same category), the Independent Map Drawers’ Plan created just 3 (plus 3 Republican-leaning House districts in the same category), and the Rodden III Plan creates just 2 (plus 1 Republican-leaning House district in the same category). (*See* Rodden Aff. at ¶ 25 tbl. 1.) The Fourth Plan’s disparate allocation of competitive districts once again evinces an intent to favor Republican candidates. The Republican Commissioners simply refuse to pass a plan in which even

a single Republican running in a “Republican” district faces real competition.

c. The Fourth Plan subverts traditional redistricting criteria in order to maximize Republican Party performance.

The Fourth 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 Fourth Plan is less compact than each of the plans adopted by the Commission thus far (although it scores the same as the Third Plan on almost all measures, an unsurprising result given the two plans are nearly identical). (*Id.* at ¶ 25 tbls. 1 & 2.)

The Fourth Plan is less compact than both the Independent Map Drawers’ Plan and the Rodden III Plan on every measure of plan-wide compactness that Dr. Rodden considered, namely the Reock, Polsby-Popper, and Area-Convex Hull compactness methodologies. (*Id.*) This is true for both the House and the Senate maps. (*Id.*)

Comparative Plan Statistics, Ohio House of Representatives Maps

	Third Plan (Feb. 24)	Fourth Plan (Mar. 28)	Rodden Plan	Independent Map Drawers Plan
Average compactness scores (Higher scores = more compact)				
Reock	0.39	0.39	0.41	0.41
Polsby-Popper	0.31	0.31	0.36	0.33
Area/Convex Hull	0.75	0.74	0.79	0.77
Number of split counties	38	38	32	38
Number of split VTDs	135	135	96	118

Even with the limited time available to Dr. Johnson and Dr. McDonald to finalize their plan, the Independent Map Drawers’ Plan is superior or comparable to the Fourth Plan on several traditional redistricting criteria. (*See* BENNETTOBJ_183 (Comparative Plan Statistics Table),

reproduced in part above.) As stated above, the Independent Map Drawers’ Plan is more compact than the Fourth Plan on multiple measures of compactness. (*Id.*) The Independent Map Drawers’ Plan also splits fewer counties and voting tabulation districts (“VTDs”) in the House. (*Id.* at ¶ 34) In the Senate, while the Independent Map Drawers’ Plan splits more counties than the Fourth Plan, it splits fewer VTDs. *Id.* As Dr. Rodden discussed in the report submitted to this Court in *LWV III*, keeping VTDs (also known as precincts) whole is particularly important for election administration purposes. (Rodden Aff. at ¶ 50 (Feb. 28, 2022) (“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”).

Similarly, the Rodden III Plan outperforms the Fourth Plan on compactness while also maintaining the integrity of political subdivisions more effectively than the Fourth Plan. For example, the Rodden III Plan’s House map splits only 32 counties, while the Fourth Plan’s House map splits 38 counties. (Rodden Aff. at ¶ 25 tbl. 1.) And in both the House and Senate maps, the Fourth Plan splits at least 35 more Vote Tabulation Districts than the Rodden III Plan. (*Id.* at ¶ 25 tbl. 2.)

Republican caucus staffers made minor, cosmetic changes to an unconstitutional General Assembly Plan. The Republican Legislative Commissioners subsequently pushed through a vote without any opportunity for other Commissioners to substantively consider the Plan or offer amendments, while ignoring an alternative plan that was drawn by independent map drawers in

consultation with the entire Commission and that compared to or outperformed the Fourth Plan on traditional redistricting criteria. It could not be clearer that the Fourth Plan violates Article XI, Section 6(A) of the Ohio Constitution.

2. The Fourth 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.” “Under this methodology, there is no dispute that ‘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* at ¶ 51 (quoting *LWV I* at ¶ 108).

The Fourth Plan violates Section 6(B) in the same manner as the Third Plan. The Court explained in *LWV II* that 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* at ¶ 62. The Fourth Plan fails under either standard. It creates 17 Democratic-leaning House districts with vote shares between 50 percent and 52 percent, constituting 42 percent of all Democratic-leaning House districts in the plan. (Rodden Aff. at ¶ 25 tbl. 1.) The Fourth Plan has 0 Republican-leaning House districts with vote shares in that range. (*Id.*) Likewise, the Fourth Plan’s Senate map contains 7 Democratic seats in the 50 to 52 percent range, and none in the same range for Republicans. (*Id.* at ¶ 25 tbl. 2.) Considering the Court’s methodology for calculating proportionality where a map contains competitive districts, wherein competitive districts are excluded from the calculation, the Fourth Plan’s House map contains 34.1 percent Democratic-leaning seats, compared with at least 65.9 percent Republican-leaning seats. (*Id.* at ¶ 29.) And the Fourth Plan’s Senate map contains no more than 33.3 percent Democratic-leaning seats, compared

with at least 66.7 percent Republican leaning seats. (*Id.* ¶ 29.) These projected seat shares are a far cry from the 54-46 percent split that the majority of Commissioners touted in their Section 8(C)(2) statement. (*See* BENNETOBJ_142-143 (Section 8(C)(2) Statement).) This analysis reveals that, just as in the Second Plan and the Third Plan, the Fourth Plan has a “gross and unnecessary disparity in the allocation of close districts [that] offends Article XI, Section 6(B).” *LWV III* at ¶ 43; *see also LWV II* at ¶ 61-62.

Comparative Plan Statistics, Ohio House of Representatives Maps

	Third Plan (Feb. 24)	Fourth Plan (Mar. 28)	Rodden Plan	Independent Map Drawers Plan
# of seats with two-party Democratic vote share >.52	26	28	40	42
Expressed as percentage of seats	26.3%	28.28%	40.4%	42.4%
# of seats with two-party Democratic vote share <.48	54	54	56	51
Expressed as percentage of seats	54.55%	54.55%	56.6%	51.5%
# of seats with two-party Democratic vote share between .48 and .5	0	0	1	3
Expressed as percentage of seats	0.0%	0.0%	1.0%	3.0%
# of seats with two-party Democratic vote share between .5 and .52	19	17	2	3
Expressed as percentage of seats	19.19%	17.17%	2.0%	3.0%

This outcome is neither inevitable nor required by Ohio’s political geography. Again excluding competitive districts from the calculus (as this Court has instructed), the Independent Map Drawers’ Plan achieves almost perfect proportionality, with a split of 45.2 percent Democratic to 54.8 percent Republican in the House and 41.9 percent Democratic to 58.1 percent

Republican in the Senate. (*Id.* at ¶ 30; *see also* BENNETTOBJ_183 (Comparative Plan Statistics Table), reproduced in part above.) Because the Commission had ample time to consider both this Court’s clear guidance on what constitutes a proportional plan and the independent map drawers’ proportional plan, the Fourth Plan cannot be characterized as the result of an attempt to draw a plan whose projected seat share closely corresponds to voter preferences. The majority of Commissioners threw out the Independent Map Drawers’ Plan precisely because it complies with Section 6(B). The Fourth Plan, by contrast, is a *deus ex machina* designed to protect the majority party’s parochial partisan and incumbency protection interests. Accordingly, the Fourth Plan violates Section 6(B) as well.

IV. Remedies

Despite its best efforts, time is running out for this Court to give effect to Article XI and the will of Ohio voters. A three-judge federal court is poised to order the implementation of a General Assembly plan by April 20, 2022. *See supra* Part II.D. In other words, if Ohio does not adopt its own plan by that date, the federal court *will*—and it has indicated that it will consider plans that include last decade’s General Assembly plan (drawn before Article XI’s adoption) and the Third Plan (already invalidated by this Court). *See id.* Meanwhile, Respondents have demonstrated, for the fourth time, that they are unwilling to comply with the Ohio Constitution and this Court’s orders. They are all but counting on federal court intervention to secure the use of an unconstitutional General Assembly plan during the 2022 elections. *See id.* As things stand, this Court must unfortunately treat *any* plan produced by the Commission with great skepticism. The past three unconstitutional plans were a prologue to the fourth unconstitutional plan now before the Court. To ensure that Ohio timely, and finally, produces constitutional maps, the Bennett Petitioners respectfully submit that this Court should invalidate the Fourth Plan and then proceed in one of two ways.

A. This Court should adopt a compliant plan for the 2022 General Assembly election.

In this particular and unusual circumstance, Petitioners respectfully submit that this Court should order the implementation of a constitutional General Assembly plan for the 2022 General Assembly election, such as a plan based on the Independent Map Drawers’ Plan or the Rodden III Plan. Of course, Petitioners are aware that the Court has, to date, declined to consider this request for relief, and that Article XI, Section 9(D)(1) instructs that “[n]o court shall order . . . the implementation or enforcement of any general assembly district plan that has not been approved by the commission.” But the facts have changed and now stand far beyond what Article XI contemplates. The Commission has stalled for months and passed four unconstitutional plans, including one plan passed after the Commission declared “impasse” and refused to meet a court-ordered deadline and another plan that is 99.74 percent the same as its invalidated predecessor. The Commission’s repeated refusal to enact a constitutional plan has thrust Ohio into a constitutional crisis.

Absent this Court’s action, *a* court will draw the plan, but it will be a federal court—one forced to intervene to draw a plan to protect Ohioans’ right to vote for state General Assembly representatives. There is no greater insult to Ohio’s constitutional redistricting scheme than a federal takeover of the redistricting process. By contrast, this Court ordering the implementation of a constitutional General Assembly plan for the 2022 General Assembly election, while retaining jurisdiction over the Commission’s continued efforts to enact a valid plan for future election cycles, will do the least violence to Ohio’s constitutional structure and framework for approving General Assembly districts at this late date.⁹

⁹ 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

Indeed, 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. Where a federal court is already planning to act in contravention of Section 9(D) to order a plan for the 2022 election, there is simply no reason that this Court cannot do the same to vindicate Ohioans’ state and federal rights.

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.”). And on the facts of this case, 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).

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).

Fortunately, this Court need not sit back and allow Section 9(D) to render the entirety of Article XI a nullity. It is hard to imagine that Ohioans who voted to overhaul their Constitution in 2015 intended to allow a federal court—that has not, at this point, rejected the possibility of ordering the use of General Assembly plans that this Court has already held unconstitutional, or that prompted the constitutional overhaul in the first place—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. Accordingly, the Commission cannot rely on Section 9(D) to nullify the rest of Article XI; Section 9(D) must bend in this moment so that the Article XI redistricting reforms as a whole, which a supermajority of Ohio voters passed last decade, are not broken entirely by the Commission’s obstinate refusal to follow the law.

B. This Court should alternatively adopt an expedited schedule and mandatory procedures to ensure the constitutional compliance of any Fifth Plan.

If the Court decides not to implement a plan itself, then the task will fall to the Commission. The Commission *should* make quick work of the task. Since March 28, it has had at its disposal a final (or near-final) plan drawn by the independent map drawers it hired.

Regrettably, the Court must account instead for the likely possibility that the Commission will once again flout constitutional requirements and this Court’s orders. Respondents’ conduct to date gives little confidence that they will put away their playbook of delay in favor of a newfound commitment to what Article XI requires. Instead, the Court should be mindful that Respondents may seek to enact an unconstitutional Fifth Plan just before April 20, 2022—the date that the federal court has identified as the last day on which a General Plan could be selected for an August 2 primary election—with the very purpose of evading this Court’s review. Thus, if the Court

chooses to order the Commission to draw a remedial map, it should ensure that it has ample time to review and adjudicate the constitutionality of a Fifth Plan prior to April 20.

To that end, Petitioners respectfully suggest an expedited schedule and robust procedures, pursuant to the Court’s inherent powers. *Hale v. State*, 55 Ohio St. 210, 213, 45 N.E. 199 (1896) (explaining that courts have “powers as are necessary to the orderly and efficient exercise of jurisdiction,” which “must be regarded as inherent”); *see also* Ohio Constitution, Art. IV, Section 2(B)(1)(f); *LWVI* at ¶ 136 (ordering further relief under Article IV, Section 2(B)(1)(f), noting that “because the election cycle should not proceed with a General Assembly–district map that we have declared invalid, it is appropriate to issue further remedial orders in an effort to have the redistricting commission adopt a plan that complies with Article XI in time for the plan to be effective for the 2022 election cycle”).

The Court should adopt the following schedule:

Event	Date
Respondents’ response on Fourth Plan due	April 4, 2022
Court order issued, with opinion to follow	April 7, 2022
Commission must adopt constitutional plan drawn by independent map drawer(s)	April 11, 2022
Petitioners’ objections due	April 13, 2022
Respondents’ responses due	April 15, 2022
Court order, including adoption of General Assembly plan itself, if necessary	April 19, 2022

To facilitate the passage of a remedial map, the Court should require Respondents to include, in their responses due on April 4, any objections they have to the Independent Map Drawers’ Plan. If the Court invalidates the Fourth Plan and remands the matter to the Commission, then given the record of proceedings to date, the Court should clarify that it will presume that any

plan drawn by caucus staff is drawn to unduly favor a political party. The Court could also specify that any Fifth Plan must be at least as symmetrical as the Independent Map Drawers' Plan or the Rodden III Plan. These two alternatives show that any map drawer "attempting" in good faith to comply with Section 6(B) will do at least as well as these plans. And finally, to facilitate the Court's expedited review of a Fifth Plan, it should order Respondents to file a brief accompanying the new plan explaining how it (supposedly) achieves compliance with Sections 6(A) and 6(B), as well as other requirements of the Ohio Constitution and this Court's orders. Finally, regardless of the outcome of these proceedings with regard to the 2022 elections, the Court should retain jurisdiction over this case in order to ensure that a constitutional General Assembly plan is in force during subsequent elections.

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

Regardless of the path it takes for the General Assembly plan to be used in 2022 general election, and in furtherance of incentivizing Respondents to do their constitutionally required job, this Court should use every remedy at its disposal to ensure that Respondents are held responsible for their behavior and their disregard for the rule of law. For one—as the events of at least the past two 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 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. 2020) (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 personally as the Court deems appropriate. Alternatively, the Court could hold that if the Court is compelled to strike down Respondents’ *fifth* General Assembly Plan, *then* the Court will find that they have acted in bad faith warranting a fee award.

Petitioners’ ultimate interest remains the same as when they first filed this case many months ago: fair maps drawn in compliance with Article XI. They outline the additional remedies above not only because Respondents’ conduct warrants them, but because so far—despite the positions of public trust they hold and the fact that three of the four Commissioners who voted in favor of adopting the Fourth Plan are attorneys admitted to the Ohio Bar—Respondents’ oaths of office, Ohio’s constitutional requirements, and this Court’s orders have not been enough to induce them to pass constitutional maps.

V. Conclusion

It is long past the time that enough was enough. For the foregoing reasons, Petitioners respectfully request that this Court invalidate the Fourth Plan and either adopt a constitutional plan for the 2022 election itself—while retaining jurisdiction to consider a new Commission-adopted plan to be utilized in future elections—or order an expedited schedule and mandatory procedures to ensure that it has an opportunity to review and rule on any Fifth Commission-drawn Plan before April 20. This Court should also issue any other remedies it deems appropriate and necessary to ensure that Ohioans are able to vote under a constitutional General Assembly plan this year.

Dated: April 1, 2022

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)

Harleen K. Gambhir**

Raisa M. Cramer**

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

hgambhir@elias.law

rcramer@elias.law

Counsel for Petitioners

***Pro hac vice motions pending*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via email this 1st day of April, 2022 to the following:

DAVE YOST
OHIO ATTORNEY GENERAL
Jonathan D. Blanton (00070035)
Julie M. Pfeiffer (0069762)
Michael A. Walton (0092201)
30 E. Broad Street
Columbus, OH 43215
Tel: (614) 466-2872
Fax: (614) 728-7592
jonathan.blanton@ohioago.gov
julie.pfeiffer@ohioago.gov
michael.walton@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)