IN THE
SUPREME COURT OF OHIO

LEAGUE OF WOMEN VOTERS OF OHIO, *et al.*, Relators, v. OHIO REDISTRICTING COMMISSION, *et al.*, Respondents.	Case No. 2021-1193 Original Action Pursuant to Ohio Const., Art. XI Apportionment Case
BRIA BENNETT, *et al.*, Relators, v. OHIO REDISTRICTING COMMISSION, *et al.*, Respondents.	Case No. 2021-1198 Original Action Pursuant to Ohio Const., Art. XI Apportionment Case
THE OHIO ORGANIZING COLLABORATIVE, *et al.*, Relators, v. OHIO REDISTRICTING COMMISSION, *et al.*, Respondents.	Case No. 2021-1210 Original Action Pursuant to Ohio Const., Art. XI Apportionment Case

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INTRODUCTION

Petitioners' objections should be overruled. The General Assembly district plan adopted by the Ohio Redistricting Commission ("Commission") on January 22, 2022 ("Revised Plan"), in response to this Court's January 12, 2022 Opinion ("Opinion"), fully complies with Section 6 of Article XI of the Ohio Constitution. That plan contains just 77 Republican-leaning districts out of 132 total districts—8 less Republican-leaning districts than the Court overturned. This results in a plan with 58.3% Republican-leaning districts compared with a strict proportionality 54% result. The Revised Plan "closely corresponds" to the statewide preferences of Ohio voters as those preferences have been defined by this Court.

And it does so while also substantially complying with the mandatory anti-gerrymandering requirements of Sections 2, 3, 4, 5, and 7 of Article XI. Alternative plans submitted by Petitioners and the Democratic members of the Commission contain substantive violations of these provisions that would require significant changes to many districts in those plans to be corrected. The Democratic plan was presented as a plan that would meet a strict-proportionality standard. But the only thing the Democratic plan demonstrates is that the only strictly proportional plan presented by anyone to the Commission violates the mandatory anti-gerrymandering provisions of the Ohio Constitution and the compactness requirements of Section 6.

The Revised Plan was approved with unprecedented cooperation among the Commission members. The process leading to the adoption of the Revised Plan was open to all Commission members and the Revised Plan reflects much of the input by many of the Commission members. The improved collaborative process led to a successful attempt to comply with Section 6 and a plan that closely corresponds to the statewide preferences required by Section 6.

STATEMENT OF FACTS

On January 12, 2022, the Court issued its opinion in this matter (*League of Women Voters of Ohio v. Ohio Redistricting Commission*, Slip Opinion No 2022-Ohio-65 ("Opinion")), finding the Commission's originally adopted plan (the "Original Plan") violated Article XI, Section 6, and ordering the Commission to adopt a new plan within 10 days. The tenth day after the Court's Opinion was Saturday, January 22. If the Ohio Supreme Court Rules of Practice applied, that would have meant that the Commission had until Monday, January 24, to adopt a new plan. S.Ct.Prac.R. 3.03. But it appears that the Rules of Practice do not apply to this deadline. The Rules of Practice apply only "to all documents filed with the Supreme Court." S.Ct.Prac.R. 1.04. Because Court ordered the Commission to adopt a new plan rather than submit any filing with the Court, it seems likely that the Rules of Practice do not control in calculating the deadline. Thus, out of respect for the Court's order and to ensure full and timely compliance, the Commission worked to adopt a new compliant plan by January 22, 2022.

After the Opinion, the Commission reconvened, and staff for all Commission members met repeatedly to discuss ideas and proposals for the new plan. (Appx. Exhibit 10, January 28, 2022 Affidavit of Ray DiRossi ("DiRossi") at ¶6). Throughout the week leading to the adoption of the Revised Plan, staff for all the Commission exchanged proposals for specific geographic areas of Ohio where current Republican-leaning districts could be redrawn to be Democratic-leaning.[1] On January 19, 2022, Republican map drawers Blake Springhetti and Ray DiRossi

[1] As stated by Senate President Huffman during the hearing on January 22, the mechanism for funding the Commission was not specifically addressed in the Constitutional amendment, and therefore remained with the longstanding Legislative Task Force on Redistricting. Because of the compressed time frame and because the Commission itself lacks the authority to appropriate itself funds, the members of the Commission elected to proceed using the funds already appropriated and materials already purchased by the Legislative Caucuses to accomplish this redraw in a collaborative manner. (Appx.029-030).

sent Democratic staff member Randall Routt and Democratic map drawer Chris Glassburn proposals for Hamilton and Franklin County. (Appx. 183-185). These proposals would change two Republican-leaning House Districts to Democratic-leaning and one Republican-leaning Senate District to Democratic-leaning. Both Mr. Springhetti and Mr. DiRossi asked for feedback on these proposals. (Appx. 183-185). Mr. DiRossi also asked for their guidance on other geographic regions the Democratic Commission members would like to adjust on the map. (Appx. 183-185). Mr. Routt responded and indicated they would send files with their proposals for Hamilton and Franklin counties by 2:00 pm that same day. (Appx. 186). At approximately 2:00 pm, Mr. Glassburn emailed Mr. DiRossi one proposed Wood County House District and one proposed Delaware County House District. However, neither district changed the partisan lean of the districts. The districts started out Republican-leaning and remained so after Mr. Glassburn's redraw. (Appx. 186-187). At 6:30 pm, staff for all the Commission members had a lengthy meeting to discuss the proposals that had been exchanged up to that point. (DiRossi ¶ 10).

On January 20, at 12:25 pm, Mr. DiRossi sent to all staff a proposal for new districts in Lorain County. (Appx. 190). He noted that these new districts would change one Republican-leaning House District to a Democratic-leaning district and change one Republican-leaning Senate District to Democratic-leaning. (Appx. 190). Mr. DiRossi also noted that to achieve the new partisan lean of these districts, there were "ripple effects" to other neighboring districts to control for population, and that those changes were included in the proposal. (Appx. 190). Mr. DiRossi asked for feedback on this proposal. (Appx. 190). At 1:25 pm, Mr. Glassburn sent a response to the proposal from Mr. DiRossi and Mr. Springhetti regarding Franklin and Hamilton Counties. (Appx. 192-193).

The Commission convened a meeting on January 20 to address the progress that had been made to date. Members of the Commission noted that staff members for all seven Commission members had been working on proposals together on January 18 and 19. (*See* Appx. 233l; Appx. 015). Senator Sykes testified that he believed that this was the "first time . . . in the history of the state that Republican and Democratic staff have been working together on a map." (Appx. 005, 009, 015). Senator Sykes expressed a desire to take a regional approach to drafting the new districts. (Appx. 007). This approach was due, in part, to the geographic nature of Ohio, which Mr. Glassburn explained resulted in "limited number of places in which Democratic seats may occur." (Appx 011).

The Commission then reviewed the two versions of geographic-based maps exchanged thus far in Hamilton/Warren Counties and Franklin/Union Counties. Testimony at the hearings revealed that the plans for both areas were very similar. (Appx. 017). Both plans presented to the Commission for Hamilton and Warren house districts resulted in five Democratic-leaning House Districts and two Republican-leaning House Districts, a loss of one Republican-leaning seat in that region as compared to the Original Plan. (Appx. 031-032). Both plans presented also had 11 Democratic-leaning House Districts in Franklin/Union counties and one Republican-leaning House District. (Appx. 031-032). This was in addition to all four Senate Districts being Democratic-leaning districts. (Appx. 031-032). As a result, the consensus was that the new Franklin/Union districts would, at minimum, result in a loss of 2 Republican-leaning seats as compared to the Original Plan. (Appx. 031-032).

Where the plans differed was in the Senate Districts for Hamilton County and the House Districts in the more rural southern portion of Franklin County. (Appx. 018-019). Regarding Franklin County, there was discussion and debate by Commission members about defining

communities of interest in the various plans. (Appx 018-022). Auditor Faber took particular interest in the Democratic Caucus proposed plan, questioning whether the German Village pairing with rural portions of Franklin County represented the best pairing along interest lines. (Appx. 018-019).

Staff for all the Commission members met again to discuss proposals that had been exchanged and ideas for other proposals. (DiRossi ¶ 15). In several of the Commission meetings, it was noted that this was an arduous task for staff, that staff were working long hours every day, and expending significant amounts of time and energy to develop proposals and counterproposals, analyze proposals, and meet with each other.

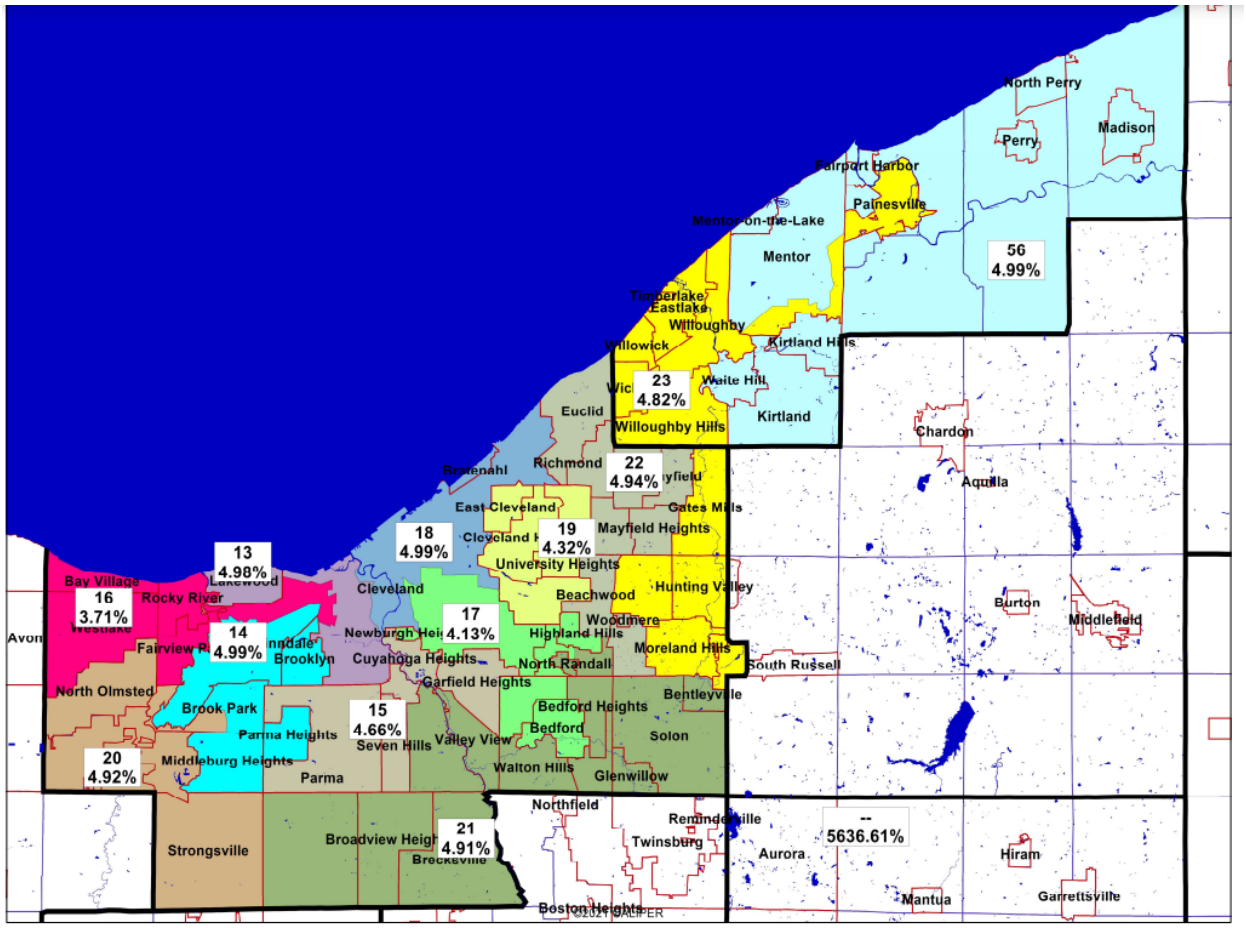
On January 21 at 4:04 pm, Mr. DiRossi sent proposals to all staff for Cuyahoga and Summit Counties that would add two more Democratic leaning house districts and one more Democratic leaning senate district. (Appx. 195). Mr. DiRossi continued to ask for feedback on this proposal and other proposals made the previous days. (*Id.*). During the Commission meeting on January 20, Mr. Glassburn testified that he had prepared a statewide map that achieved a strictly proportional plan. However, as of late evening of January 21, Mr. Glassburn had not sent any such map to the Commission staff. (Appx. 198).

On January 22, the final day for the Commission to adopt a new plan, Mr. DiRossi sent staff for all commission members statewide maps that included all the geographic changes discussed over the past few days: Hamilton County, Franklin County, Lorain County, Cuyahoga County, Summit County, as well as a change to "west/central" Ohio that Auditor Faber previously worked on with staff for Democratic Commission members. (Appx. 199). This statewide proposal was sent at 8:39 am and it also "incorporated some of the changes from the Democratic Caucuses' counter proposal in Franklin County". (Appx. 199).

At 9:22 am, a statewide proposal was sent by Randall Routt, but there were issues with the format and export because it came from Dave's Redistricting. (Appx. 200). For the next hour, various staff members, including Mr. Springhetti, Mr. DiRossi, and Ms. Emily Redman (on Auditor Faber's staff) asked for updated versions. (Appx. 200-204). Ms. Redman also asked Mr. Routt about whether there was a corresponding political index from maptitude, noting that the Dave's Redistricting index is not a "perfect" match to the OCURD file. (Appx. 201). An hour later, Mr. Routt sent updated files in the updated format, but stated he was working on "technical fixes" for the statewide senate proposal. (Appx. 205). Less than 12 hours before the deadline set by the Court, Mr. Routt subsequently transmitted a new Senate map. (Appx. 205). As it turns out, even with these "technical fixes," these proposals contained several constitutional flaws.

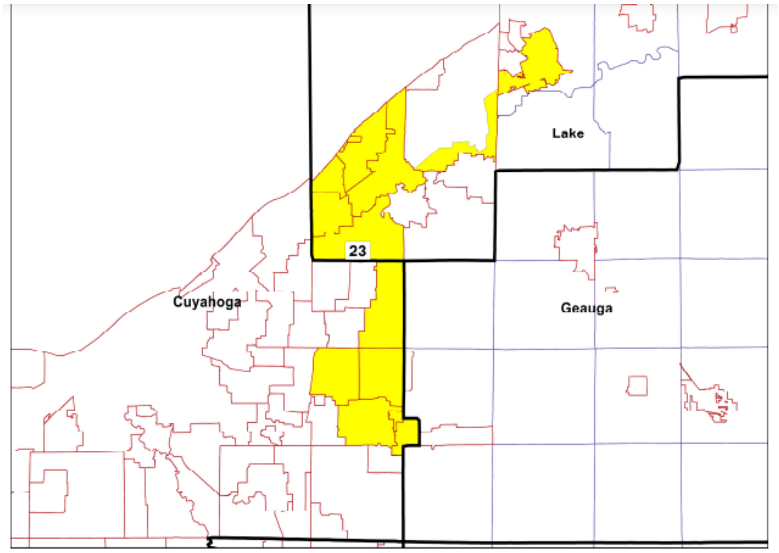
The Commission met for the final time on January 22. During that meeting several members of the Commission questioned Mr. Glassburn regarding constitutional deficiencies with his proposed plans. Specifically, Commissioners pointed out that there were impermissible splits in the Northeastern portion of the state, particularly that both Cleveland and Brook Park were split in House District 14, and Cleveland and Warrensville Heights in House District 17. (Appx. 128-130). These splits are contrary to Article XI, Section 3(D)(3), which prohibits splitting two jurisdictions in one house district. In both instances Senate President Huffman pointed out that if Brook Park or Warrensville Heights were kept whole, the districts would be vastly over populated. (Appx. 128-130). Thus, these errors would require significantly redrawing multiple districts.

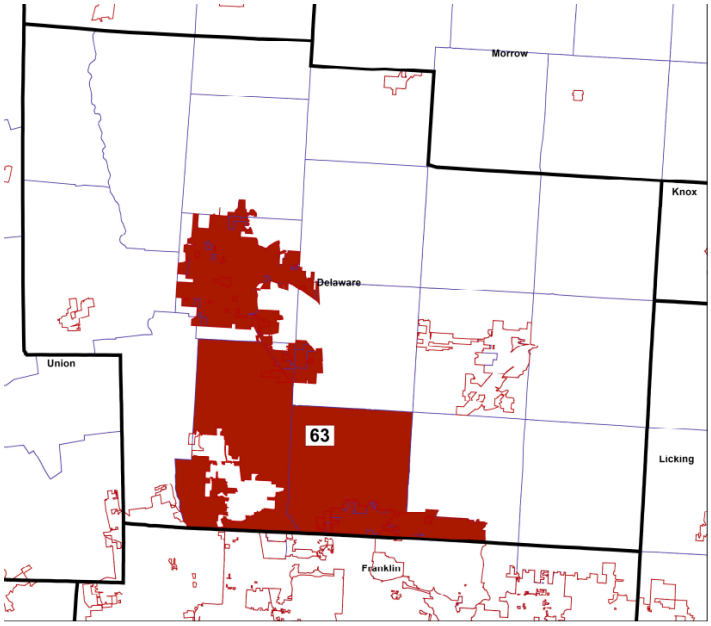
An image of the districts containing these constitutional violations is below. Unsplitting one or more of the cities to cure the constitutional defect would clearly require significant changes to these districts and others surrounding them. (DiRossi ¶ 19-21).



Commission members also opined that they believed Democratic proposed districts were not compact. Auditor Faber compared the Athens area to a "spaghetti district" and opined that the district looked gerrymandered. (Appx. 122). Commission members also pointed out impermissible county splits in House District 10, and in Prairie Township in Franklin County. (Appx. 110). In addition to these districts, other Democratic proposed districts were clearly not

compact and failed the interocular compactness test. Just two examples of the many in the Democratic proposal are below, House District 63 and House District 23.





Moreover, the Democratic proposal contained numerous violations of Section 5 of Article XI. For example, Senator Antani was elected to Senate District 6 in November 2020. The majority of the district that elected Senator Antani is in Senate District 5, as proposed by the Democratic members (198,348 people). (DiRossi ¶ 24). Therefore, pursuant to Section 5 of Article XI, Senate District 5 as drawn by the Democrats must be assigned Senate District 6

(Senator Antani's current district). (DiRossi ¶ 24). This significant error in the Democratic proposal would result in Senator Antani representing a group of voters that never elected him, and another senator would instead represent the voters who in fact elected Senator Antani. (DiRossi ¶ 24).

Mr. Glassburn, Leader Russo, and Senator Sykes stated that in drawing maps, the goal was to reach strict proportionality, and that this goal contributed to the shapes of some of the districts. (*See, e.g.*, Appx. 86, 87, 105, 109). Mr. Glassburn also testified that he specifically drew districts, particularly in Northeastern Ohio, to benefit Democrats. (Appx. 122-123).

Leader Russo opined whether there would be asymmetry issues with the number of districts that were slightly Democratic-leaning as compared to slightly Republican-leaning. (Appx. 143-144). Auditor Faber rebutted this claim, stating that the Commission previously had heard weeks of testimony about how competitive districts were preferable to non-competitive districts. (Appx. 147). Speaker Cupp also noted that he was unaware of any definition for how "partisan" was "partisan enough" under the Constitution when calculating the lean of each district. (Appx. 145-146).

Auditor Faber also testified that he was concerned about Democratic proposals in Lake County and suburban/rural areas of Hamilton County. (Appx. 120-123). Auditor Faber questioned Mr. Glassburn on his drawing of those areas and asked how drawing to achieve a Democratic majority did not violate the Constitution's prohibition against drawing districts to benefit a particular party. (Appx. 120-123). Auditor Faber also questioned Mr. Glassburn on how Republicans in Lake County and suburban Hamilton County were not the subject of pro-Democratic gerrymanders. (Appx. 120-123). Mr. Glassburn could not provide responses to these specific areas, only testifying about the statewide proportion as a whole. (Appx. 122-123).

Ultimately, no plan was submitted to the Commission that achieved the strict-proportionality ratio without significantly violating numerous other provisions of Article XI of the Ohio Constitution. As a result, the Commission adopted the geographic alternatives proposed in the plan presented by Mr. DiRossi and Mr. Springhetti as incorporated into the statewide map.

When evaluating the Original Plan, this Court gave guidance on calculating the political index pursuant to the requirements of Section 6(B), and indicated that the applicable measure for this decade resulted in a partisan composite of 54% Republican and 46% Democratic. (Opinion ¶ 108). Under the Original Plan, 64.4% of all general assembly districts leaned Republican. (Opinion ¶ 105). During the Commission's discussions in September 2021, Senator Sykes offered a plan that would have established 77 out of 132 districts (58%) as leaning Republican. (DEPO_0890:1-17).[2] Senator Sykes stated that his plan fully represented a good faith "attempt" to comply with Article XI, Section 6, meaning that his proposed plan was not drawn "primarily to favor or disfavor a political party," and that the number of Republican-leaning districts "correspond[ed] closely to the statewide preferences of Ohio voters." (*Id.*).

On Thursday, January 20, Petitioners submitted to the Commission a plan drawn by their expert witness, Dr. Rodden. In submitting the plan, Petitioners acknowledged that the first plan they submitted to this Court from Dr. Rodden (the "Rodden I Plan") contained constitutional violations. (*See* Notice of Correspondence Filed with the Court on 1/20/2022). Even with those constitutional violations, the Rodden I Plan did not achieve strict proportionality, having a total of 75 Republican leaning districts (57 in the house, 18 in the senate). The second Rodden plan

[2] This refers to Senator Sykes' September 13, 2021 Proposed Plan and his September 15, 2021 Proposed Plan that both had 13 Democratic leaning senate Seats and 42 Democratic leaning house Seats for a total of 55 Democratic seats. The Revised Plan offers the exact same number of seats.

submitted by Petitioners (the "Rodden II Plan") again does not achieve strict proportionality, having a total of 75 Republican leaning districts (57 in the house, 18 in the senate). Most notably, the Rodden II Plan contains even more significant constitutional violations than did the Rodden I Plan. For instance, the Rodden II Plan violates Section 3(D)(3) of Article XI in the following areas:

- Groveport and Columbus are split between House Districts 1 and 7.
- West Carrollton and Dayton are split in House District 38.
- New Richmond and Union Township are split between House District 60 and 61.
- Springfield and Xenia are split in House District 69. Notably, there are 819 people in Xenia Township in House District 68 and another 5,923 people in Xenia Township in House District 69. If Xenia township had been wholly contained in House District 69, then House District 68 would be underpopulated by an impermissible 5.21%. This makes this split difficult to remedy without significant ripple effects.
- Buckland and Wapakoneta are split between House Districts 79 and 98. Notably, if Buckland and Wapakoneta were wholly contained in House District 98, the district would be 13.35% overpopulated.
- Marysville and Sidney are split in House District 92.

(See DiRossi ¶ 27). Beyond these constitutional violations, there are many districts that are not compact based on a visual inspection alone and appear to unnecessarily split cities throughout the state. (DiRossi ¶ 25-27).

The process followed by all Commission members was completely different from the process that resulted in the Original Plan. After substantial and direct collaboration with all of the Commission members, the Commission adopted a plan that matched the number of Republican districts previously offered by Senator Sykes, in which 58.3% of the districts leaned Republican (20 Republican leaning senate districts and 57 Republican leaning house districts). The Democratic members of the Commission offered a plan in which 55% of the districts leaned

Republican (55 Republican leaning house districts and 18 Republican leaning senate districts), but failed to meet the other requirements of the Constitution. Thus, during deliberations over the Revised Plan, both the Republican and Democratic members of the Commission offered plans that significantly reduced the number of Republican-leaning districts, but only the Revised Plan met the other constitutional requirements in addition to Section 6(A), (B) and (C).

On January 22, 2022, the Commission adopted the Revised Plan by a vote of 5-2, with the two Democratic members voting against the Revised Plan, resulting in a plan that will last four years instead of ten years. Further, as Article XI requires, the Commission voted 5-2, again with the two Democratic members dissenting, to adopt a Section 8(C)(2) statement explaining what the Commission determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of the districts in the plan whose voters favor each political party corresponds closely to those preferences. A copy of that Section 8(C)(2) statement is attached as Exhibit 11 in the Appendix filed concurrently herewith. To be sure, the two Democratic members of the Commission disagreed that the Revised Plan was constitutional. Through this brief, the Commission itself does not suggest that all Commission members agree that the Revised Plan is constitutional. The dissenting members submitted their own Minority Report into the record of the Commission meeting (the "Minority Report"). That Minority Report, explaining the views of the dissenting Commission members, is attached as Exhibit 12 to the Appendix filed concurrently herewith.

ARGUMENT

A. Standard of Review.

In its Opinion, the Court adopted the same standard of proof as in *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, ¶ 18-24 (2012). *See* Opinion ¶ 78. Thus, "the burden of proof on one challenging the constitutionality of an apportionment plan is to establish that the plan is

unconstitutional beyond a reasonable doubt. In the absence of evidence to the contrary, [the Court] must presume that the apportionment board performed its duties in a lawful manner." *Id*. Petitioners fail to meet their high burden to prove that the Revised Plan is unconstitutional beyond a reasonable doubt. As this Court clarified, challenges to district maps "are not ordinary civil cases," and as such "it is well-settled that the challenging party faces the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt." Opinion ¶ 78; *see also State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶ 21.

B. The Revised Plan Satisfies Article XI, Section 6(B).

1. The Court's Opinion Does Not Require Strict Proportionality.

In this Court's January 12, 2022 Opinion in this matter (*League of Women Voters of Ohio v. Ohio Redistricting Commission*, Slip Opinion No 2022-Ohio-65 ("Opinion")), this Court repeatedly recognized that strict proportionality was not necessary to satisfy Section 6(B). Rather, the Court recognized that Section 6(B) requires a plan that "correspond[s] closely" to statewide voter preferences. This Court held that to determine statewide voter preferences, the relevant measure is the "percentages of votes received by the candidates of each political party based on the total votes cast in statewide state and federal partisan elections during the preceding ten years." Opinion ¶ 108. After determining those percentages, "under Section 6(B), the [C]omission is required to attempt to draw a plan in which the statewide proportion of Republican-leaning districts to Democrat-leaning districts ***closely corresponds*** to those percentages." *Id*. (emphasis added); see also *id.* at ¶ 111 (Section 6(B) requires ***all*** members of the [C]ommission to attempt to draw a plan in which the proportional favor to each political party's candidates '***correspond[s] closely***' to statewide voter preferences over a defined period." (some emphasis added; quoting Section 6(B)).

Indeed, this Court stated that a plan proposed by one of Petitioners' experts was constitutional even though it did not meet strict proportionality. Specifically, the Court found that Dr. Jonathan Rodden drew a plan (the "Rodden I Plan") "in which the partisan split in Republican candidates' favor was 57 percent to 43 percent in the House and 55 percent to 45 percent in the Senate." Opinion ¶ 126. Of course, this plan did not exactly correspond with the statewide voter preference measure of 54 percent to 46 percent. Nonetheless, the Court found that the Rodden I Plan "complied with Article XI." *Id*.; *see also id*. at ¶ 112. Accordingly, it seems clear from the Court's Opinion that in considering whether a plan "closely correspond[s]" to statewide voter preference, it is not necessary for the plan to correspond exactly.

Further, interpreting Section 6(B) to require strict proportionality would violate over 100 years of Ohio precedent regarding cannons of construction, and this Court should decline to disturb that precedent. See *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373 (1917) (holding that the court should avoid adopting a construction that renders a provision "meaningless or inoperative."); *New Riegel Local Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.*, 157 Ohio St.3d 164, 2019-Ohio-2851, ¶ 29 (holding that courts must "avoid construing a statute in a way that would render a portion of the statute meaningless or inoperative."); *State v. Moore*, 2018-Ohio-3237, 154 Ohio St. 3d 94, 97, ¶13 (holding the same).

Leader Russo and Senator Sykes, in their Minority Report, assert that this Court ordered exact proportionality, but this is incorrect. The Court's order regarding proportionality, the Minority Report contends, "translates to 45 House Democratic seats and 54 House Republican seats, and 15 Senate Democratic seats and 18 Senate Republican seats." (Minority Report at 1). Thus, the Minority Report concludes, "the [Revised Plan] does not have the requisite amount of

Democratic-leaning districts the Court directed this Commission to achieve." But as explained above, the Court never ordered that the Revised Plan must, if possible under Article XI's technical requirements, contain exactly 54 House Republican seats and 18 Senate seats. To the contrary, the Court recognized that the Constitution requires only "clos[e]" correspondence with statewide voter preferences, and the Court found constitutional a plan that did not achieve exact proportionality.

To support the contrary interpretation, the Minority Report cites the Court's statement that "[i]f it is possible for a district plan to comply with Section 6 ***and*** Section 2, 3, 4, 5, and 7, the [C]ommission must adopt a plan that does so." (Minority Report (quoting Opinion ¶ 88)). But this statement does not require exact proportionality. Instead, this statement dealt with the meaning of the Constitution's mandate that the Commission "attempt" to comply with Section 6's standards. Rejecting the argument that the word "attempt" may allow the Commission to comply with Section 6 without achieving a plan that actually achieves the Section-6 standards, the Court made clear that if it is possible to meet those standards while also complying with technical requirements, the Commission must do so. But this says nothing about the substance of the Section-6 standards themselves. Relevant here, Section 6(B) requires not strict proportionality, but "clos[e]" correspondence. That means that, in this case, while strict proportionality would equate to about 54% of all seats leaning Republican, there is some range above and below 54% that also satisfies Section 6(B). And while the Court did not need to define the boundaries of that range, the Court made clear that a plan with 56.8% Republican-leaning seats (i.e., the Rodden I Plan) would satisfy Section 6(B)'s proportionality standard.

Consider a hypothetical case in which strict proportionality equated to 54% favoring Republicans, and all agreed that it was possible to construct a technically-compliant plan that

achieved 55% Republican-leaning seats, but no fewer. Further, assume that the range around 54% that closely corresponds to statewide voter preference is plus or minus five percentage points. In this hypothetical, this Court's statement in paragraph 88 does not mean that any plan with 56, 57, 58, or 59 percent Republican-leaning seats is automatically unconstitutional. In stating that if the Commission can adopt a plan compliant with Section 6 and Sections 2, 3, 4, 5, and 7, it must do so, the Court allowed for the possibility of a plan that is close enough to strict proportionality even if it is not the closest possible. Rather, in this hypothetical, any plan with between 55 and 59 percent Republican-leaning seats would satisfy Section 6(B). Conversely, if technical requirements made it impossible to construct a plan with fewer than 61% Republican-leaning seats, then a plan with 61% Republican-leaning seats would still be constitutional, given that Section 6 is subordinate to the technical requirements. This is the meaning of the Court's statement in paragraph 88. If the lowest possible percentage of Republican-leaning seats is outside of the range of close correspondence required in Section 6(B), then, perhaps, the Commission would be required to construct a plan that got as close as possible to proportionality as the technical requirements allowed. But if the technical requirements allow for a number of plans all of which fit within the range of close correspondence, then any plan that falls within that range would satisfy close correspondence, even if not the closest to strict proportionality.

Indeed, Petitioners seem to acknowledge that this Court stopped short of ordering that only a plan with the closest possible proportionality will suffice. Even after the Court's Opinion, the Bennet Petitioners submitted a proposed plan (the Rodden II Plan) that achieved the same percentage of Republican-leaning seats (56.8%) as the Rodden I Plan. Of course, this plan likewise does not achieve strict proportionality, despite the Minority Report's assertion that a strictly proportional plan is technically feasible. In short, nothing in the Court's Opinion

establishes that only the ***most*** proportional plan possible, given technical requirements, will satisfy Article XI. Rather, Section 6(B) expressly allows some range of proportionality that satisfies the standard of "close" correspondence, and any plan within this range will satisfy Section 6(B).

2. The Revised Plan Complies With The Court's Order.

Here, the Revised Plan satisfies Section 6(B). The Revised plan includes 77 Republican-leaning seats out of 132 total House and Senate seats. This amounts to 58.3% of all seats, a proportion that is only 1.5% higher than the Rodden I Plan that this Court found satisfied Article XI. The Revised Plan contains the same amount of Republican-leaning House seats as the Rodden I plan and just two additional Republican-leaning Senate seats. While the Court did not define the boundaries within which a plan corresponds closely enough to proportionality, it is difficult to imagine that a plan so close to one the Court did not hesitate to find constitutional nonetheless crosses the Section-6(B) line.

But even if the Court disagrees, here, the Revised Plan ***was*** the most proportional map introduced in the Commission meetings, because, as explained above, the maps proposed by the Democratic Commission members and Petitioners do not satisfy the anti-gerrymandering provisions of the Ohio Constitution. Thus, none of the alternative plans proposed by the Democratic map drawer or the Petitioners in this litigation satisfied the technical requirements. As explained more fully below, the only plan before the Commission or this Court that did satisfy the technical requirements was the Revised Plan. Accordingly, even if this Court did require the most proportional plan possible that satisfies the technical requirements, out of all proposed plans before the Commission or this Court, the Revised Plan is that plan.

3. The Revised Plan Should Not Be Found Unconstitutional Based On Any Alleged Failure To Attempt To Satisfy Section 6's Standards.

The Revised Plan satisfies Section 6's requirement that the Commission "attempt" to achieve proportionality. In the Opinion, this Court found that the Commission's process in adopting the Original Plan did not constitute an "attempt" to achieve Section 6 standards, pointing to evidence that executive-branch Commission members were not given access to the mapping programs, and only two Commission members were involved when the Original Plan was drawn. Opinion ¶ 103. Further, the Court noted that the two Commission members involved in the drawing of the Original Plan "never asked the principal map drawers . . . to try to comply with Section 6." *Id*. at ¶ 109. The Court further stated that instead of members from one party trying to draw a plan acceptable to the other, Section 6(B) "requires ***all*** members of the commission to attempt to draw a plan" that satisfies proportionality. *Id*. at ¶ 111. But none of these factors support a conclusion that the Revised Plan is unconstitutional.

To start, this Court's conclusion that the Commission did not attempt to satisfy Section 6 in adopting the Original Plan should not be interpreted as always requiring any particular procedure. Rather, if a plan ***achieves*** proportionality, that itself means that Section 6(B) is satisfied. Indeed, this Court explained that Section 6 uses the word "attempt" to acknowledge that, relevant to Section 6(B), it may not be possible to draw a map that closely corresponds to voter preferences while still satisfying the technical requirements, and when that is the case, Section 6(B) is subordinate to the technical requirements. Opinion ¶ 88; *id*. at ¶ 90 ("Section 6 speaks not of desire but of direction . . . . While Section 6 contemplates that the standards set forth in it may not come to fruition, it nevertheless requires the [C]ommission to try to achieve them." Given this interpretation of "attempt," when a plan ***does*** achieve proportionality, it cannot be found unconstitutional under Section 6 based on allegations that, procedurally, the

Commission achieved proportionality without trying to do so. This Court's consideration of procedural evidence relevant to adopting the Original Plan was an alternative finding. In essence, the Court rejected the argument that "attempt" required only an effort regardless of result. But it further explained that even if "attempt" were interpreted this way, the evidence established that in adopting the Original Plan, the Commission did not do what is necessary to satisfy this alternative interpretation of "attempt." Given this, the Court's findings regarding the Commission's lack of attempt in enacting the Original Plan should not be interpreted as imposing additional procedural requirements, under Section 6, that could render a plan unconstitutional even if the Court found that the standards set forth in Sections 6(A), 6(B), and 6(C) were ultimately satisfied. In short, the Court made clear that if a plan does not satisfy proportionality, and it is possible for a plan to do so, then the plan is unconstitutional under Section 6, regardless of the efforts the Commission made. Opinion at ¶ 88. Likewise, the converse is true. If the Court agrees that the Revised Plan falls within the permissible close-correspondence range of proportionality, then Section 6(B) is satisfied regardless of ***how*** the Commission adopted the plan.

In any event, as explained above, in adopting the Revised Plan, the Commission did engage in a procedure that addressed all of the procedural deficiencies that the Court identified in the original process. Commission members or their staff had access to the map drawers and engaged in significant consultation as the Revised Plan was drafted. Further, the map drawers attempted to comply with Section 6. In short, even if the process were relevant despite the fact that the Revised Plan achieves the standards of Section 6, Petitioners cannot establish beyond a reasonable doubt that this process was unconstitutional.

C. The Revised Plan Satisfies Article XI, Section 6(A).

This Court has not established any concrete standard for the Commission to follow to comply with the related requirements of Section 6(A), which prohibit a plan from being drawn primarily to favor or disfavor a political party. It is significant to note that the effect of complying with Section 6(B)'s proportionality standard is to require the Commission to proactively draw specific districts to favor a political party, causing an inherent conflict in complying with the standards set forth in Sections 6(A) and 6(B). Therefore, strict compliance with Section 6(B) expressly requires that otherwise constitutional and compact Republican-leaning districts in places like Hamilton and Lake Counties must be cracked to place those voters in Democratic-leaning districts. (*See* Appx. 119-122). Certainly, Republican voters in those areas could conclude that their districts were specifically drawn to disfavor them in order to favor their Democratic neighbors, or that the plan imposed upon them specifically favors Democrats. (Appx. 199-122).

The primary test stated in Section 6(A) is analogous to a test advocated by the Plaintiffs in *Vieth v. Jubrlirer*, 541 U.S. 267, 285 (2004). Plaintiffs in *Vieth* argued that under their proposed test, a statewide plan could be declared an unlawful partisan gerrymander upon proof that the "predominant intent" of the plan was to advantage one party at the expense of the other. *Vieth*, 541 U.S. at 284-84. In rejecting the test proposed by the *Vieth* Plaintiffs for evaluating whether a plan was politically gerrymandered, the Court described the "predominant intent standard" as being "vague," but one which might be used to evaluate a single district. *Id.* at 285. However, the Court further held that the usefulness of a predominant intent standard "evaporates when applied statewide." *Id*. In the Court's view, absent additional guidance, it is impossible for a Court to conclude whether a statewide plan was drawn with the predominant intent of benefitting one party over the other. For example, does it mean "that partisan intent must outweigh all other goals—contiguity, compactness, preservation of neighborhood, etc.—statewide?" *Vieth*, 541 U.S. at 285.

If so, then the plan put forth by Democratic members violated this standard when it subordinated principles of compactness and split municipalities to achieve Democratic leaning districts, and was properly rejected by the Commission. Further, "how is the statewide 'outweighing' to be determined?" *Id.* "If three-fifths of the map's districts forgo the pursuit of partisan ends in favor of strictly observing political-subdivision lines, and only two-fifths ignore those lines to the disadvantage of the plaintiff, is observance of political subdivisions the predominant goal between the those two?" *Id.*

The only justiciable limits measuring whether a plan favors or disfavors a party are those contained in the remaining portions of Section 6. Petitioners cannot show that a plan was primarily drawn to favor Republicans or disfavor Democrats when the evidence shows that a plan complies with Section 6(B), is comprised of "compact" districts as required by Section 6(C), and where any modifications sought under Section 6(A) or 6(B) would result in the plan violating Article XI, Sections 2, 3, 4, 5, or 7. Any other limits or tests proposed by Petitioners for measuring whether the Revised Plan was drawn primarily to favor Republicans or disfavor Democrats, including all of the mathematical standards described by Petitioners' experts, are not identified in the Ohio Constitution and were not adopted by the voters.

The voters did not elect to transfer redistricting authority to an "independent redistricting commission." Opinion ¶ 142. (O'Conner, C.J., concurring). Instead, the authority was given to specific statewide elected officials and legislative leaders. The voters also did not require a unanimous decision by the Commission to adopt a new general assembly district plan and instead agreed that the Commission could adopt a plan by simple majority vote. This, of course, assumes that there could be political differences in the way different Commission members analyze a map and that political considerations still could play a lawful role in the drawing of districts. Because

of that, voters limited the political discretion of the Commission by stating that plans cannot be drawn to primarily favor or disfavor a party, along with a requirement that the total number of Republican- and Democrat-leaning districts "correspond closely" to a statewide composite.

However, the voters also strictly limited the extent of the requirements they adopted by prohibiting plans that violate the other criteria stated in Article XI including restrictions that proportionality cannot be achieved by drawing districts that are not compact. By not precisely defining the terms "correspond closely" and "compact", the voters left to the Commission at least some discretion to interpret these terms when developing a general assembly district plan. At some point, the Court should defer to the Commission when making a reasonable interpretation of these terms when drawing general assembly districts. *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367 (2012) (citing *Voinovinch v. Ferguson*, 63 Ohio St.3d 198 (1992)).

Section 6(C) also fails to define compactness or specify how this traditional districting principle should be measured. As a result, that discretion is properly left to the Commission. There are numerous tests for determining compactness, including dispersion tests which feature the "Reock Test" or the "Polsby-Popper" perimeter test.[3] There are also interocular tests for compactness, which is rooted in the idea that an egregious gerrymander can be spotted with the naked eye, such as the infamous North Carolina 12th Congressional district discussed in *Shaw v. Reno* that snaked hundreds of miles, following a thin boarder of Interstate 85. 509 U.S. 360, 658 (1993). The Commission clearly chose to employ an interocular test with respect to testing the compactness of districts, and as a result concluded that proposals made by the Democratic members achieved statewide proportionality at the expense of compactness. However, Section

[3] Petitioners' experts cite to these tests, but there is no indication the Commission relied upon them, and certainly no provision in Article XI requiring them to do so.

6(C)'s compactness requirement is not subordinate to Section 6(B)'s proportionality standard. In fact, no particular subsection of Section 6 is superior nor subordinate to any other subsection of Section 6. The application of all three subsections of Section 6, and the outcome, is for the Commission to decide. The Court should not substitute its judgment for that of the Commission's by reading into the Constitution any one particular test that Petitioners prefer but is nowhere to be found in Article XI. *See State ex rel. Lorain v. Stewart,* 119 Ohio St.3d 222, 2008-Ohio-4062, ¶ 36 (noting that the Court must not add or delete words from the constitutional or statutory text).

At the end of the day, Article XI instructs only that the Commission shall attempt to comply with the provisions of Section 6 and that the Commission has at least some reasonable discretion to determine what is meant by such terms "correspond closely" and "compact". As Chief Justice O'Connor's concurrence alludes, the discretion afforded to the Commission, under the recent amendments to Article XI, still have an element of partisan decision-making due to the makeup of the Commission. Nowhere in Article XI is there a discussion about how to limit this "partisan element" of discretion, other than to say that a plan may not be drawn to "primarily" favor or disfavor one political party over the other. Here, the Commission used its discretion to determine that the Revised Plan "corresponds closely" with the statewide preferences of the voters of Ohio. Because that decision is rooted in good law, common sense, and is not clearly erroneous or unconstitutional, the Court should uphold the Revised Plan. This is not dissimilar to the situation this Court faced in *Wilson v. Kasich,* where the Court declined to read provisions into the Constitution that were not there. In the decade that followed that provision, Ohioans took that decision seriously, and passed constitutional amendments governing limits for redistricting. But those new constitutional provisions are the limit now. The Court should continue the precedent

from *Wilson* and decline to add requirements limiting Commission discretion that are not covered in Article XI.

The fact that the people of Ohio selected certain statewide elected officials and legislative leaders of the Commission to develop districts for the general assembly, "shows of itself, that in the judgment of the framers of the constitution, in applying the rules prescribed, a discretion would have to be exercised, and that those officers were selected to exercise it." *Voinovich v. Ferguson*, 63 Ohio St.3d 198, 586 N.E.2d 1020, 1024 (1992) (Holmes, J., concurring). And "whether the discretion conferred" on the Commission "has been wisely or unwisely exercised in this instance is immaterial in this proceeding." *Id*. Thus, this Court "does not sit as a super apportionment board to determine whether a plan presented by the [Petitioners] is better" than the plan adopted by the Commission. *Wilson*, 981 S.E.2d at 824. Instead, this Court is called upon to determine whether the Commission acted within its discretion conferred upon it by Ohioans in the provisions of Article XI. *Id*.

In summary, there is no basis for finding that the Revised Plan was drawn "primarily" to favor Republicans. It includes compact districts and complies with all other provisions of the Article XI. The Revised Plan substantially drops the percentage of Republican leaning districts as compared to the prior plan. While the 55% Republican leaning plan offered by the Democratic Commission members also dropped the percentage, as was clearly evident at the January 22, 2022 Commission hearing, that plan did so at the expense of other constitutional provisions regarding compactness, municipality splits, and rules regarding incumbents and numbering, all of which that are expressly mandated in Sections 2, 3, 4, 5, 6, and 7 of Article XI.

D. The Commission Respectfully Requests That The Court Issue A Decision by February 11, 2022, Or Alternatively Stay Any Decision Until After The 2022 General Election.

Finally, with the utmost respect for this Court's authority and autonomy to decide this matter on its own time frame, the Commission respectfully requests that if the Court is unable to decide this matter by February 11, 2022, the Court should consider staying the matter until after the 2022 General Election, allowing the Revised Plan to remain in effect in the interim.

Important elections administration deadlines for the May 3, 2022, Primary Election are imminent. Four days after this pleading is filed partisan candidates for the General Assembly will be required to file petitions to appear on the primary ballot. These candidates need certainty as to the district in which they will run so that they can file their petitions. And though the primary date—May 3, 2022—may seem far away now, we must remember that Ohio no longer has just an Election ***Day***. It is more accurate to describe May 3, 2022, as the day that voting in the primary election ***ends***.

"There is no dispute that Ohio is generous when it comes to absentee voting," *Mays v. LaRose*, 951 F.3d 775, 779 (6th Cir. 2020). Ohio's expansive early voting framework amounts to an election ***season*** that begins with early in-person and absentee voting 29 days before the primary. R.C. 3509.01(B)(2) and (3). This year, that date is April 5, 2022. Even before that date, Ohio's 88 county Boards of Election must have printed and ready to be mailed Uniformed and Overseas Citizen Absentee Voting Act ("UOCAVA") ballots. Federal law requires Ohio's Boards to begin mailing UOCAVA ballots to overseas voters no later than 45 days before the primary election date. This year, that date is March 19, 2022. 52 U.S.C. § 20302(a)(8)(A). Thus, Ohio law requires the Boards to have those ballots printed and ready to be mailed no later than forty-***six*** days before the primary election date, which is March 18, 2022. R.C. 3511.04(B). Though the General Assembly can, and has, temporarily amended Ohio law to move some of Ohio's election deadlines

for the primary election, the federal UOCAVA deadline is set by federal statute it cannot be moved by the General Assembly or the Secretary.

The March 18 UOCAVA ballot deadline carries with it numerous implications for Ohio's Boards. First, in order to have printed ballots that are ready to be mailed by that date, the Boards need to determine who is legally permitted to be on them. This requires Boards to re-program their electronic voter registration systems to re-assign House and Senate candidates and each of Ohio's approximately 8 million voters to the correct House and Senate districts. Most of Ohio's 88 county Boards contract with a vendor to do this, but in reality, there are only a limited number of vendors in Ohio that provide this service to the Boards. The highly technical task of re-programming the Boards' voter registration systems *and* their voting and vote tabulating equipment to reflect new districts must be done carefully and accurately. It will take time. Once re-programmed, all those systems must then be rigorously tested and re-tested for accuracy so that voters receive the correct ballot. It will take roughly three weeks to make certain that ***all*** 88 Boards have successfully re-programmed their voter registration and other voting systems. Thus, the House and Senate districts must be final on or about February 11, 2022, so the Boards can begin the process of re-programming their systems to be able to timely proceed to the next step in the process of having ballots ready by March 18, 2022.

Second, once the Boards' voter registration systems are accurately re-programmed, Boards need to verify signatures on the House and Senate candidates' petitions and then hear and decide any protests to candidate petitions. Even truncating the protest process, if the House and Senate district maps are not finalized on or about February 11, 2022, there is risk that some of the Boards may not be able to have primary election ballots printed and ready to be mailed by the March 18, 2022 UOCAVA deadline. Though the Secretary can seek a waiver from the 45-day UOCAVA

requirement under limited circumstances, there is no guarantee that it will be granted and Ohio cannot simply assume that it will be. 52 U.S.C. § 20302(g).

In the event that the Court does not decide this matter by on or about February 11, 2022, the Commission requests to proceed with the 2022 state legislative primary and general election using the Revised Plan. There is precedent for this approach. In *Wilson v. Kasich*, 131 Ohio St.3d 249 (2012), this Court permitted the 2012 state legislative elections to proceed under the 2011 House and Senate district maps while those new maps were being challenged. There, the Court based its decision on laches, an argument that admittedly does not exist here. Nonetheless, the implications of further delay in having final House and Senate district maps are the same. In *Wilson*, this Court said that deciding the Relators' challenges to the 2011 maps so close to election 2012 primary election deadlines would cause "prejudice to boards of elections, candidates, and the public, who have all relied on respondents' apportionment plan setting the state legislative districts for the imminent 2012 elections." *Wilson*, 131 Ohio St. 3d at 250 (¶ 6). This Court then decided the merits of the challenges to the 2011 district maps after the November 2012 General Election. Likewise, not having final House and Senate district maps on or about February 11, 2022, will cause prejudice to the boards of elections, candidates, and to the public, all of whom are counting on having final state legislative districts in place for the imminent 2022 primary election. Boards of election, candidates and the voters who need to know who is vying to represent them need certainty and proceeding pursuant to the map under challenge will provide it.

CONCLUSION

For the reasons set forth herein, the Commission respectfully requests that the Court overrule Petitioners' objections and hold that the Revised Map is constitutional.[4]

Dated: January 28, 2022

Respectfully submitted,

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[4] Petitioners have pointed to a few minor violations of Section 3(D)(3) in the Revised Plan. Mr. DiRossi has examined these errors and concluded that they are isolated and affect less than 200 people. The errors can be easily corrected without having to redraw other districts. This is unlike the violations in the Democratic proposal and the Rodden II Plan which affect thousands of people and would require substantial redrawing. Thus, if the Court deems it necessary, under section 9(D)(3)(a), the court could remand to the Commission to "amend the plan to correct the [isolated] violations" and to then send the corrected plan to the Secretary of State for implementation.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 28, 2022, a copy of the foregoing was served by electronic mail upon the following:

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