

IN THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, A. Philip
Randolph Institute of Ohio, Tom Harry, Tracy
Beavers, Valerie Lee, Iris Meltzer, Sherry
Rose, Bonnie Bishop,

Relators,

v.

Ohio Redistricting Commission, Michael
DeWine, Frank LaRose, Keith Faber, Matt
Huffman, Robert R. Cupp, Vernon Sykes, and
Emilia S. Sykes,

Respondents.

APPORTIONMENT CASE

Original Action Pursuant to
Ohio Const., Art. XI and
S.Ct. Prac.R. 14.03

2021-1193

**Relators' Supplemental Brief
on Sua Sponte Order**

Robert D. Fram (PHV 25414-2021)
Donald Brown (PHV 25480-2021)
Joshua González (PHV 25424-2021)
Juliana Goldrosen (PHV 25193 - 2021)
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105-2533
(415) 591-6000
rfram@cov.com

James Smith
L. Brady Bender (PHV 25192 - 2021)
Alexander Thomson (PHV 25462-2021)
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000
jmsmith@cov.com

Counsel for Relators

Freda J. Levenson (0045916)
ACLU of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
(614) 586-1972 x125
flevenson@acluohio.org

David J. Carey (0088787)
ACLU of Ohio Foundation, Inc.
1108 City Park Avenue, Suite 203
Columbus, OH 43206
(614) 586-1972 x2004
dcarey@acluohio.org

Alora Thomas (PHV 22010-2021)
Julie A. Ebenstein (PHV 25423-2021)
American Civil Liberties Union
125 Broad Street
New York, NY 10004
(212) 519-7866
athomas@aclu.org

Counsel for Relators (continued from first page):

Anupam Sharma (PHV 25418-2021)
James Hovard (PHV 25424-2021)
Yale Fu (PHV 25419-2021)
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306-2112
(650) 632-4700
asharma@cov.com

Madison Arent
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
(212) 841 1000
marent@cov.com

Counsel for Respondents:

Dave Yost, Ohio Attorney General
Erik J. Clark (0078732)
Counsel of Record
Ashley Merino (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 The Ohio
Redistricting Commission*

Dave Yost, Ohio Attorney General
Bridget C. Coontz (0072919)
Counsel of Record
Julie M. Pfeiffer (006762)
Michael A. Walton (0092201)
Michael J. Hendershot (0081842)
Constitutional Offices Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: (614) 466-2872
Fax: (614)782-7592
Bridget.Coontz@OhioAGO.gov
Julie.Pfeiffer@OhioAGO.gov
Michael.Walton@OhioAGO.gov

*Counsel for Respondents Ohio Governor
DeWine, Ohio Secretary of State LaRose,
and Ohio Auditor Faber*

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

Phillip J. Strach (PHV 25444-2021)
phillip.strach@nelsonmullins.com
Thomas A. Farr (PHV 254561-2021)
tom.farr@nelsonmullins.com
John E. Branch, III (PHV 25460-2021)
john.branch@nelsonmullins.com
Alyssa M. Riggins (PHV 25441-2021)
alyssa.riggins@nelsonmullins.com
NELSON MULLINS RILEY &
SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Telephone: 919-329-3800

*Counsel for Respondents Matt Huffman,
President of the Ohio Senate, and Robert R.
Cupp, Speaker of the Ohio House of
Representatives*

Diane Menashe (0070305)

Counsel of Record

John Gilligan (0024542)

ICE MILLER LLP

250 West Street, Suite 700

Columbus, Ohio 43215

T: (614) 462-6500

F: (614) 222-3468

Diane.Menashe@icemiller.com

John.Gilligan@icemiller.com

*Counsel for Respondents Senator Vernon
Sykes and House Minority Leader Emilia
Sykes*

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF CONTENTS

TABLE OF CONTENTS..... 4

TABLE OF AUTHORITIES 5

INTRODUCTION 1

LEGAL BACKGROUND 2

 A. Section 8: Impasse Procedure 2

 B. Section 9: Jurisdiction and Remedy..... 4

ARGUMENT..... 4

 A. Interpreting 8(C)(1) to Preclude Judicial Review For Maps Passed By
 Simple Majority Vote Leads to Inconsistency and Absurdity 4

 B. The Plain Text of Section 9 Grants This Court Authority to Remedy Any
 Four-Year Map That Violates Article XI..... 6

 C. The Structure and Context of Section 8(C)(1) Establishes That It Was Not
 Intended to Limit Remedies..... 6

CONCLUSION..... 7

RETRIEVED FROM DEMOCRACYDOCKETS.COM

TABLE OF AUTHORITIES

Cases

<i>AAAA Enterprises, Inc. v. River Place Cmty. Urban Redevelopment Corp.</i> , 50 Ohio St. 3d 157, 553 N.E.2d 597	4
<i>City of Centerville v. Knab</i> , 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167.....	5
<i>City of Cleveland v. State</i> , 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 466.....	6
<i>State ex rel. Sylvania Home Tel. Co. v. Richards</i> , 94 Ohio St. 287, 114 N.E. 263 (1916).....	5

Constitutional Provisions

Ohio Constitution, Art. XI, § 1	2, 6
Ohio Constitution, Art. XI, § 2	1, 5
Ohio Constitution, Art. XI, § 3	1, 5
Ohio Constitution, Art. XI, § 4	1, 5
Ohio Constitution, Art. XI, § 6	1, 2, 5, 7
Ohio Constitution, Art. XI, § 8	<i>passim</i>
Ohio Constitution, Art. XI, § 9	1, 4, 6, 7

INTRODUCTION

The Court has asked the parties to address “[w]hat impact, if any,” Article XI, Section 8(C)(1) of the Ohio Constitution has on the Court’s authority to grant relators’ requested relief “when the Ohio Redistricting Commission adopted the district plan by a simple majority vote of the commission.” The answer, in short, is none. This Court’s authority to declare the maps unconstitutional in this case, and to order the Commission to reconvene either to adopt a new general assembly district plan or to revise the previous one, is defined by Sections 9(A) and 9(B). Article XI Section 8, titled “Impasse procedure,” consists entirely of procedural provisions and does not affect jurisdiction or remedy. Section 8(C)(1) sets the beginning date and the default expiration date for maps approved by simple majority vote under that procedure, but does not restrict or limit the Court’s authority to review such maps.

Notably, no Respondent in this action has argued otherwise. To read Section 8(C)(1) to restrict this Court’s remedial authority would contradict the Article’s plain text, its structure, and the voters’ intent in enacting it. Disturbingly, such a reading would also provide a windfall to an intractable partisan majority, by rendering any plan passed by force of its majority completely immune to any challenge under *any* part of Article XI. This means that any 4-year impasse map could violate not only the Section 6 safeguards at issue here, but also any and all of the other rules contained in Sections 2, 3, 4, and elsewhere in the Article, with impunity. That is inconsistent with the intent of the voters who enacted Article XI.

Moreover, any suggestion that the provisions of Section 8(C)(1) somehow limit this Court’s purview over violations of Section 6 is undercut by the language in the immediately following provision, Section 8(C)(2). That provision states that, in the event that a map is enacted pursuant to Section 8(C)(1), the Commission “shall” provide a statement explaining the

compliance of the Enacted Plan with Section 6(b). That provision cannot be squared with the suggestion that an 8(C)(1) map is exempt from the requirements of Section 6.

In short, any suggestion that Section 8(C)(1) limits this Court's authority to issue an order to remedy violations of Section 6 would render the entire substance of Article XI a nullity *specifically and exclusively* when it is most needed: whenever a majority party alone uses its power to gerrymander.

LEGAL BACKGROUND

Sections 1 and 8 of Article XI, as amended by the voters in 2015, outline the procedures according to which the Ohio Redistricting Commission must adopt a state legislative map.

A. Section 8: Impasse Procedure

As its title suggests, Section 8 serves a discrete purpose: establishing the procedures for the Commission to follow in the event of an impasse. If the Commission is unable to reach consensus with two opposition members by September 1 as prescribed by Section 1, it can use Section 8's procedures to introduce a proposed General Assembly plan by simple majority vote. The Commission then has until September 15 to adopt a final map. Ohio Constitution, Article XI, § 8(A)(3). If a plan is adopted by September 15 with two members of the opposition party voting in favor, the plan would be in force for ten years. *Id.* § 8(B).

Section 8(C)(1) prescribes the terms of redistricting plans passed pursuant to simple majority vote. Under Section 8(C)(1)(A), a plan adopted by a simple majority vote "shall remain effective until two general elections for the house of representatives have occurred under the plan," *i.e.*, for four years, "[e]xcept as otherwise provided in division (C)(1)(b)."¹ *Id.* § 8(C)(1)(a). Under

¹ Division (C)(1)(b) applies to plans that have been adopted "to replace a plan that ceased to be effective under division (C)(1)(a) of this section before a year ending in the numeral one[.]"

8(C)(1)(B), a plan that is adopted “by a simple majority vote of the commission . . . to replace a plan that ceased to be effective under division (C)(1)(a) of this section before a year ending in the numeral one shall remain effective until a year ending in the numeral one, except as provided in Section 9 of this article.”²

When a simple majority plan is adopted under either 8(C)(1)(a) or 8(C)(1)(b), then pursuant to Section 8(C)(2), the Commission “*shall include* a statement explaining what the commission determined to be the statewide preferences of the voters of Ohio and the manner in which the statewide proportion of districts in the plan whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party corresponds closely to those preferences.” *Id.* § 8(C)(2) (emphasis added). Thus, even with a map passed along partisan lines, the Commission is required to consider representational fairness, to eschew partisan self-dealing, and attempt to achieve partisan fairness in its map.

Section 8(D) outlines procedures for replacing “a general assembly district plan adopted under division (C)(1)(a) of this section [that] ceases to be effective.” Specifically, it provides that “the commission shall be reconstituted as provided in Section 1 of this article, convene, and

² A plan “cease[s] to be effective under division (C)(1)(a)” (emphasis added) after “two general elections for the house of representatives have occurred under the plan,” as set forth in division (C)(1)(a). A plan passed pursuant to division (C)(1)(a), and not overturned by this Court, must therefore be replaced after two general election cycles by a plan passed pursuant to division (C)(1)(b).

A plan does not cease to be effective “under division (C)(1)(a),” however, when that plan is overturned by this Court pursuant to Section 9. *Compare* § 8(D) (“After a general assembly district plan adopted under division (C)(1)(a) of this section ceases to be effective . . .”) (emphasis added). As a result, a plan passed by simple majority vote to replace a plan overturned by this court pursuant to Section 9 must be adopted pursuant to Section 8(C)(1)(a). Of course, if this court overturns a plan pursuant to Section 9, it is also possible that the Commission could enact a bi-partisan plan and not use Section 8 at all.

adopt a new general assembly district plan in accordance with this article, to be used until the next time for redistricting under this article.”

B. Section 9: Jurisdiction and Remedy

Section 8 is silent on this Court’s jurisdiction or judicial remedies, as those matters are expressly covered by Article XI, Section 9. Section 9 gives this Court “exclusive, original jurisdiction in all cases arising under this article” without limitation. *Id.* § 9(A). Section 9(B) authorizes this Court to remedy any violation of any valid provision of Article XI.

Specifically, Section 9(B) allows the Court to issue a remedial order “[i]n the event that any section of this constitution relating to redistricting, any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid . . .” *Id.* § 9(B). In that event, “notwithstanding any other provisions of this constitution, the commission shall be reconstituted” in order to “determine a general assembly district plan . . . to be used until the next time for redistricting under this article in conformity with such provisions of this constitution as are then valid.” *Id.*

ARGUMENT

A. Interpreting §(C)(1) to Preclude Judicial Review For Maps Passed By Simple Majority Vote Leads to Inconsistency and Absurdity

Nothing in Section 8(C)(1) limits this Court’s remedial authority, much less immunizes a four-year map from judicial review. Such an interpretation, if adopted, would necessarily preclude remedies for *any* violation of Article XI in the event of a plan approved by a simple majority—which, of course, is the situation in which partisan gerrymandering is most likely to occur, and so where judicial review is most warranted. *See AAAA Enterprises, Inc. v. River Place Cmty. Urban Redevelopment Corp.*, 50 Ohio St. 3d 157, 160, 553 N.E.2d 597 (“We must not abdicate the

historic role of the courts in the protection of constitutional rights through the exercise of the power of judicial review.”).

The result would be antithetical to the function of the entire Article. A simple partisan majority of Commission members could, for instance, draw multimember districts, in violation of Article XI, Section 2; draw non-contiguous districts, in violation of Sections 3(B)(3) and 4(A); draw districts that split counties, municipalities, and townships with abandon, in violation of Sections 3(C)-(E) and 4(B); and draw districts that are entirely partisan and non-compact, in violation of Section 6, with no possibility that these—or any other—blatant violations could be reviewed. Rather than encouraging bipartisan cooperation, such a reading of Article XI would reward members of the Redistricting Commission who adopt a plan along strict party lines. This could not have been what Ohio’s voters intended when they amended Article XI in 2015 to strengthen its protections against partisan gerrymandering. *See* Br. at 4-6. *See, e.g., City of Centerville v. Knab*, 162 Ohio St.3d 623, 629, 2020-Ohio-5219, ¶ 22, 166 N.E.3d 1167 (“In construing constitutional text that was ratified by direct vote, we consider how the language would have been understood by the voters”); *State ex rel. Sylvania Home Tel. Co. v. Richards*, 94 Ohio St. 287, 294, 114 N.E. 263 (1916) (“[i]t is the duty of the court to ascertain and give effect to the intent of the people” in constitutional interpretation).

This interpretation would also controvert the interpretations of the parties to this case, *all of whom have explicitly acknowledged* that the Court has authority to invalidate a four-year map passed by simple majority vote, and to order the Commission to adopt a new plan. *See* HC Br. at 5; SEO Br. at 9; Commission Br. at 1; Sykes Br. at 33; Reply Br. at 1-3, 19-20. The parties’ unanimous agreement on this question is no coincidence; the only reasonable interpretation of

Article XI is that plans passed pursuant to Section 8(C)(1)(a) are subject to judicial remedy under Section 9.

Lastly, this interpretation is irreconcilable with Section 9(D)(3)(c). That Section expressly contemplates that this Court would be “considering a plan adopted under division (C) of Section 8” for the purposes of providing a remedy for violating certain district standards. Notably, nothing in Section 9(D)(3) provides that it is the *exclusive* remedy in a challenge to a plan adopted under Section 8(C). *See infra* section B. The language of Section 9(D)(3) does, however, buttress the conclusion that maps enacted under Section 8(C) are reviewable.

B. The Plain Text of Section 9 Grants This Court Authority to Remedy Any Four-Year Map That Violates Article XI

The text of Section 9(B) makes clear that plans adopted pursuant to a simple majority vote remain subject to this Court’s authority. *See generally* Br. at 9 (noting that 9(B) provides a “global remedy”). To remove any question about its reach, the section provides the Court with authority to order the Commission to reconvene and draw a new plan, “notwithstanding any other provisions of this constitution.” The mere absence of any specific reference to Section 9 contained within Section 8(C)(1)(a) cannot negate this court’s authority to order remedies against plans passed by simple partisan majority. *See City of Cleveland v. State*, 157 Ohio St.3d 330, 336, 2019-Ohio-3820, ¶ 23, 136 N.E.3d 466 (when the Constitution’s text is “plain and unambiguous, we may not resort to other forms of constitutional interpretation”).

C. The Structure and Context of Section 8(C)(1) Establishes That It Was Not Intended to Limit Remedies

Section 8 is entitled “Impasse Procedure.” That title accurately describes the section’s contents, which cover procedures for adopting a redistricting plan after the deadline required by Section 1 has passed, and the default tenure of plans adopted according to those procedures. *See City of Cleveland* at ¶ 23 (the “structure of the Constitution” may be considered if plain text does

not resolve the issue). Nowhere does this section address this Court's jurisdiction or authority to remedy an unconstitutional map. Section 9, in contrast, expressly addresses the "Jurisdiction of the Supreme Court" and "effect of determination of unconstitutionality." The Court should not force an unnatural reading that would not only extend Section 8 beyond its stated scope into subject matter fully addressed by Section 9, but would radically limit the latter's reach.

Interpretation of Section 8(C)(1) is also informed by 8(C)(2), which requires the Redistricting Commission to produce a statement explaining compliance with Section 6(B) for any "final general assembly district plan adopted under division C(1)(a) or (b)" of Section 8. This requirement functions, in part, *to facilitate* judicial review. It would be a pointless exercise if redistricting plans adopted pursuant to Section 8(C)(1)(a) could not be remedied, including for violations of Section 6(B). *See* Br. at 8. In fact, this provisions explicit reference to both Sections 8(C)(1)(a) and (b) indicates that plans passed under either provision are subject to this Court's jurisdiction.

CONCLUSION

Accordingly, Relators respectfully maintain their request that this Court:

1. Declare that the maps that Respondents adopted are invalid for failure to comply with Article XI of the Ohio Constitution; and
2. Order the Commission to adopt a new general assembly district plan or, at a minimum, to amend the maps that Respondents adopted to correct the violations, as contemplated in Article XI, Section 9(B).

Respectfully submitted,

/s/ Freda J. Levenson

Robert D. Fram (PHV 25414-2021)
Donald Brown (PHV 25480-2021)
Joshua González (PHV 25424-2021)
Juliana Goldrosen (PHV 25193 - 2021)
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105-2533
(415) 591-6000
rfram@cov.com

James Smith
L. Brady Bender (PHV 25192 - 2021)
Alexander Thomson (PHV 25462-2021)
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-6000
jmsmith@cov.com

Anupam Sharma (PHV 25418-2021)
James Hovard (PHV 25424-2021)
Yale Fu (PHV 25419-2021)
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306-2112
(650) 632-4700
asharma@cov.com

Madison Arent
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
(212) 841 1000
marent@cov.com

Freda J. Levenson (0045916)
ACLU of Ohio Foundation, Inc.
4506 Chester Avenue
Cleveland, Ohio 44103
(614) 586-1972 x125
flevenson@acluohio.org

David J. Carey (0088787)
ACLU of Ohio Foundation, Inc.
1108 City Park Avenue, Suite 203
Columbus, OH 43206
(614) 586-1972 x2004
dcarey@acluohio.org

Alora Thomas (PHV 22010-2021)
Julie A. Ebenstein (PHV 25423-2021)
American Civil Liberties Union
125 Broad Street
New York, NY 10004
(212) 519-7866
athomas@aclu.org

Counsel for Relators

CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that a true and correct copy of the foregoing document was sent by electronic mail on this 17th day of December, 2021, to the following individuals:

Erik J. Clark, ejclark@organlegal.com
Ashley Merino, amerino@organlegal.com
Mary Mavourneen DeGenaro, MDeGenaro@ohioauditor.gov
Matthew Jay Donahue, matthew.donahue@governor.ohio.gov
David Michael Grodhaus, mgrodhaus@OhioSOS.Gov
*Special Counsel to Attorney General Dave Yost
Counsel for Respondent the Ohio Redistricting Commission*

Bridget C. Coontz, bridget.coontz@ohioago.gov
Julie M. Pfeiffer, julie.pfeiffer@ohioago.gov
Michael A. Walton, michael.walton@ohioago.gov
Michael J. Hendershot, michael.hendershot@ohioago.gov
*Counsel for Respondents Ohio Governor DeWine, Ohio Secretary of State LaRose, and
Ohio Auditor Keith Faber*

W. Stuart Dornette, dornette@taftlaw.com
Beth A. Bryan, bryan@taftlaw.com
Philip D. Williamson, pwilliamson@taftlaw.com
Phillip J. Strach, phil.strach@nelsonmullins.com
Thomas A. Farr, tom.farr@nelsonmullins.com
John E. Branch, III, john.branch@nelsonmullins.com
Alyssa M. Riggins, alyssa.riggins@nelsonmullins.com
*Counsel for Respondents Matt Huffman, President of the Ohio Senate, and Robert R.
Cupp, Speaker of the House of Representatives*

John Gilligan, John.Gilligan@icemiller.com
Diane Menashe, Diane.Menashe@icemiller.com
Counsel for Respondents Senator Vernon Sykes and House Minority Leader Emilia Sykes

Paul DiSantis, Paul.Disantis@ohiohouse.gov
Legal Counsel for the Ohio House of Representatives

Frank Strigari, Frank.Strigari@ohiosenate.gov
Legal Counsel for the Ohio Senate

SO CERTIFIED, this 17th day of December, 2021.

s/ Freda J. Levenson
Freda J. Levenson (0045916)