

**IN THE
SUPREME COURT OF OHIO**

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

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

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

**RESPONSE OF RESPONDENT GOVERNOR MIKE DEWINE
TO PETITIONERS' OBJECTION TO THE OHIO REDISTRICTING COMMISSION'S
FEBRUARY 24, 2022 REVISED PLAN**

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INTRODUCTION

The Commission's February 24, 2022 legislative redistricting plans comport with the Ohio Constitution and all other applicable laws. They are the product of the deliberative process undertaken by the Commission consistent with its constitutional responsibilities under Section 1(A) of Article XI, and with the benefit of the guidance and instructions provided by this Court in its two prior orders. Governor Mike DeWine repeatedly urged his colleagues to re-double their efforts and formulate redistricting plans satisfying the Court's expectations, and believes the new redistricting plans satisfy those expectations and the many constitutional requirements.

For the reasons outlined below, the Court should overrule all remaining objections and permit the State to proceed forthwith with implementing the legislative redistricting plans for the upcoming primary election.

A. The Redistricting Plans Comport With All Applicable Law.

Consistent with the Court's expectations, the pending legislative redistricting plans are new maps. As evidenced by the public record, they were drawn from a blank canvas, and the subject of deliberation and debate before the Commission. They offer strict proportionality between the statewide proportions of Republican-leaning to Democratic-leaning districts. These plans also include far fewer asymmetrical districts than previous plans, but necessarily include some given other fundamental considerations, such as Ohio's geography, the high concentration of Democratic voters in certain locations, and the goal of avoiding gerrymandering of districts, the latter of which was the point of Article XI in the first place.

At this point, Petitioners have no credible basis for objection, and thus, premise their objections on their continually evolving asymmetry test—one found nowhere in the Constitution, any statute, and as best as can be reasonably discerned, case law from any jurisdiction prior to this Court’s Second Decision. Ignoring fundamental principles of mathematics, Petitioners seek to incrementally reset by one percentage point at a time the mathematical threshold necessary to classify a district as Republican or Democrat leaning. If Petitioners were successful in their objections, presumably the threshold would move once again until political strongholds are artificially created throughout the state.

But their objections are unfounded, both legally and factually. This Court previously declined to treat a district as leaning Democratic when the vote share above 50% is less than 1%. However, nothing in this Court’s decisions can be read to suggest the Commission must create partisan “safe” districts that cannot be impacted by independent voters, let alone independently thinking voters. Petitioners cannot demand a specific percentage representation merely to guarantee the successful election of a candidate from a specific party.

Each election is different: The strengths and weakness of the respective candidates vary. Yes, candidates matter. The national and local issues of public importance are constantly changing. Yes, issues matter. Voter enthusiasm and turnout matter too. The Commission may not disregard other constitutional considerations merely to create districts favoring one party over another with the hope that neither the candidate nor the issues matter.

At bottom, Petitioners have no legal or practical standing to quibble on whether the threshold for labelling a district as leaning in favor of one party versus the other should be 51, 52 or some other percentage. Legally, they cannot demand a gerrymandered district—which is the mirror image of what they seek. Factually, they cannot establish with the requisite proof that such differential would matter in upcoming elections given the myriad of considerations impacting the electorate in each election. Indeed, they have offered no evidence a 52% asymmetry test has any statistical benefit over the Commission's current plan with a 51% minimum standard.

B. The Democrats' February 16, 2022 Redistricting Plans Ran Afoul Of The Constitution.

As an insightful point of contrast to the plans adopted by the Commission, we address the February 16, 2022 plans tendered by the Democratic commission members, the so-called "Glassburn Plans." See Ohio Redistricting Commission, *Sykes/Russo 2/15/22 General Assembly Map*, <https://redistricting.ohio.gov/maps>. (accessed March 2, 2022). For sure, the Glassburn Plans include the same proportional numbers of 54 Republican-leaning house and 18 Republican-leaning senate districts as the Commissions plans. However, they otherwise commit numerous constitutional violations in an effort to impermissibly favor Democrats, and they do so with little regard for voters' preferences or the limitations imposed by Article XI. As outlined in Senate President Matt Huffman's comments during the February 24 Commission meeting, the Glassburn Plans:

- Split political subdivision boundaries (Cities of Akron and Toledo) to disfavor Republicans
- In multiple instances, violate the compaction requirement

- Pair 10 Republican incumbents into 5 house districts
- Place another Republican incumbent into a house district drawn into a Democratic incumbent's district—thus, in total, double bunking 12 incumbent House Members, 11 of whom were Republicans.
- Structure senate districts to effectively eliminate Republican senators' ability to run for re-election
- Structure districts so that the incumbent would no longer live in the district, thus preventing the incumbent from running for reelection.

See Ohio Redistricting Commission, *Transcript of Feb. 17, 2022 Meeting, Parts 1 & 2*, <https://redistricting.ohio.gov/meetings> (accessed March 2, 2022.)

But most importantly, the Glassburn Plans use the same level of asymmetry as the Commission's plans, evidencing two simple points: First, no matter who prepares the plans, "perfection" cannot be achieved. Second, the Democrats, at least implicitly, acknowledge that the asymmetry levels contained in the Commission's plans are appropriate and unavoidable.

C. Petitioners' Efforts To Usurp The Constitutional Role Of The Commission Should Be Summarily Denied.

No court shall order, ***in any circumstance***, the implementation or enforcement of any general assembly district plan that has not been approved by the commission in the manner prescribed by this article.

"No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.

[Article XI, Section 9 (D)(1)-(2), Ohio Constitution (emphasis added).]

Beyond unfounded complaints, Petitioners' objections now expressly state what clearly has been their objective from day one: to usurp the constitutional power and discretion of the Redistricting Commission and compel the adoption of their own redistricting plan. Several Petitioners urge the Court to simply circumvent the

Constitution and adopt Dr. Rodden's plan (or whatever its most recent reiteration is or ultimately may be¹) without the required constitutional approval of at least four members of the Commission, notwithstanding Ohioans's express delegation of powers made to the Commission and limitations imposed upon this Court's jurisdiction under Section 9 of Article XI, as quoted above. If nothing else, Petitioners' stated position, although facially unconstitutional, is refreshingly honest.

The upshot of Petitioners' unconstitutional proposition is that the express limitations imposed by Ohioans on this Court's jurisdiction and power should be only honored until the Court concludes that they should not be. Under Petitioners' view, the Court can pick and choose among sections found in a single article of the Constitution and indiscriminately determine when and how they apply.

Petitioners' arguments are a direct affront to the Ohio Constitution and this Court's precedent. Under our system of separation of powers, the powers and jurisdiction of the respective branches are circumscribed and extend only to the boundaries prescribed by the Constitution. See *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 63 Ohio St. 442, 451, 59 N.E. 109 (1900) ("The distribution of the powers of government-legislative, executive, and judicial-among three co-ordinate branches, separate and independent of each other, is a fundamental feature of our system of constitutional government."). Preservation of the distinction between these coequal powers is, in the words of this Court, akin to "the preservation of all the rights, civil and

¹ It is unwise to assume the current version of Dr. Rodden's plan satisfies the requisite constitutional requirements. Justice Kennedy's February 7 concurrence recounts Dr. Rodden's previous flawed submission and the fact that a majority of this Court had mistakenly relied upon it. [Feb. 7 Decision ¶¶ 112, 126] Dr. Rodden's current iteration is, of course, disproportional, suffers from the same asymmetry issues Petitioners complain of, and "double bunks" a disproportionate number of Republican incumbents. Even the Democrat members of the Commission have not advanced Dr. Rodden's plan as a viable alternative.

political, of the individual, secured by our free form of government[.]” *Id.* “[A]ny encroachment by one [branch] upon the other is a step in the direction of arbitrary power.” *Id.*

Courts must therefore abstain from exercising any power that is not clearly conferred by the constitution. “[It] can exercise only such powers as the constitution itself confers, or authorizes the legislature to grant. **The Court can derive no power elsewhere.**” *Kent v. Mahaffy*, 2 Ohio St. 498, 498–99 (1853) (emphasis added). The judiciary’s careful observation of the limits on its constitutional role is crucial not merely for fostering respect between the branches, but for securing the rights of the voting public. “It is a well-settled axiom that the union of . . . the legislative and judicial” powers “is tyranny.” *City of Zanesville*, 63 Ohio St. at 451 (brackets omitted). “Theorists and practical statesmen concur in this opinion.” *Id.*

Necessarily then, “[t]he courts, no less than the political branches of the government, must respect the limits of their authority,” *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77, 108 S. Ct. 2268, 101 L.Ed.2d 6 (1988), and their jurisdiction “is carefully guarded against expansion by judicial interpretation,” *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17–18, 71 S. Ct. 534, 95 L.Ed. 702 (1951). “[N]either statute **nor rule of court** can expand [the Court’s] jurisdiction beyond the constitutional grant.” *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St. 3d 39, 41, 577 N.E.2d 1077 (1991) (emphasis added).

Nevertheless, Petitioners purport to invoke Article XI, Section 10, noting that the “various provisions of [Article XI] are intended to be severable, and **the invalidity** of one or more of such provisions shall not affect the validity of the remaining provisions.”

(Emphasis added.) This Section does not authorize the Court to unilaterally “sever away” a constitutional provision expressly limiting its power, irrespective of the specific context. Rather, Section 10 merely memorializes the power this Court already possesses and has exercised, ironically in the redistricting context, to separate the remaining parts of an otherwise constitutional article from the “**unconstitutional** sections.” *King v. Rhodes*, 11 Ohio St. 2d 95, 101 228 N.E.2d 653 (1967) (emphasis added). In *King*, this Court addressed a legislative apportionment plan adopted under a prior version of Article XI. A federal court found certain portions of Article XI unconstitutional under the U.S. Constitution, and the issue before our Supreme Court was whether the remaining articles could be severed and therefore enforced. This Court answered “yes,” holding it was obligated “to sustain the validity of constitutional provisions if possible, and the remaining parts of Article XI passed the “test of severability” because the “remaining parts of the article, standing alone and without reference to the unconstitutional sections, can be effective and operable.” *Id.*

Here, of course, no one contends that the express limitation imposed on this Court’s authority in Article XI violates the U.S. Constitution. Nor could they do so. Thus, it is a specific and enforceable constitutional limitation—one that supersedes all general provisions or other considerations. See *MacDonald v. Cleveland Income Tax Bd. of Review*, 151 Ohio St.3d 114, 2017-Ohio-7798, 86 N.E.3d 314, ¶ 27 (“when there is a conflict between a general provision and a more specific provision in a statute, the specific provision controls”). The pertinent provisions are not “invalid,” and this Court is expressly obligated to faithfully apply them, in their entirety. The necessity for doing so is perhaps never more paramount than where the subject provision limits the Court’s

jurisdiction in deference to an independent branch of government, thereby implicating separation of powers considerations.²

D. Petitioners' "Other Demands" Are Not Properly Before This Court.

The Court's February 25 Order afforded the Petitioners the opportunity to lodge objections to the Commission's redistricting plans. However, some Petitioners have sought other affirmative relief, ranging from (as noted above) the ordering of specific maps or declaratory relief to an award of attorneys' fees. These assorted "other demands for relief" are not within this Court's original jurisdiction under Section 9 of Article XI, as contemplated or permitted by the February 25 Orders, and/or otherwise properly submitted to this Court under its Rules of Practice. See S.Ct.Prac.R. 12.01; Ohio Civil Rule 7(B). The Court should, therefore, summarily deny them.

CONCLUSION

For these reasons, Petitioners have failed to establish the Commissions plans are unconstitutional beyond a reasonable doubt and thus the objections should be overruled.

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² Similarly, this Court has repeatedly held it "will not indulge in advisory opinions" and thus may not opine (or grant declaratory relief) on redistricting plans that have not proceeded through the proper constitutional channels. *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 18.

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