

IN THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, <i>et al.</i> , Petitioners, v. Ohio Redistricting Commission, <i>et al.</i> , Respondents.	Case No. 2021-1193 Original Action Filed Pursuant to Ohio Const., Art. XI
Bria Bennett, <i>et al.</i> , Petitioners, v. Ohio Redistricting Commission, <i>et al.</i> , Respondents.	Case No. 2021-1198 Original Action Filed Pursuant to Ohio Const., Art. XI
Ohio Organizing Collaborative, <i>et al.</i> , Petitioners, v. Ohio Redistricting Commission, <i>et al.</i> , Respondents.	Case No. 2021-1210 Original Action Filed Pursuant to Ohio Const., Art. XI

**MOTION TO DISMISS AND VACATE
OF RESPONDENTS ROB MCCOLLEY AND JEFF LARE**

Dave Yost
Ohio Attorney General

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

*Special Counsel for Respondents
Senator Robert McColley and Representative Jeffrey LaRe*

Freda J. Levenson (0045916)
ACLU OF OHIO FOUNDATION, INC.
4506 Chester Avenue
Cleveland, OH 44103
T: (614) 586-1972 x 125
flevenson@acluohio.org

David J. Carey (0088787)
ACLU OF OHIO FOUNDATION, INC.
1108 City Park Avenue, Suite 203
Columbus, OH 43206
T: (614) 586-1972 x2004
dcarey@acluohio.org

Kelsey Miller
Julie A. Ebenstein (PHV 25423-2023)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
T: (212) 519-7866
jebenstein@aclu.org

Robert D. Fram (PHV 25414-2021)
Donald Brown
Joshua González (PHV 25424-2021)
David Denuyl (PHV 25452-2021)
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105-2533
T: (415) 591 6000
rfram@cov.com

Anupam Sharma (PHV 25418-2021)
James Hovard (PHV 25420-2021)
Yale Fu (PHV 25419-2021)
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306-2112
T: (650) 632-4700
asharma@cov.com

DAVE YOST
OHIO ATTORNEY GENERAL
Julie M. Pfeiffer
Counsel of Record (0069762)
Michael J. Hendershot (0081842)
Jonathan D. Blanton (0070035)
Michael A. Walton (0092201)
30 E. Broad Street
Columbus, OH 43215
T: (614) 466-2872
F: (614) 728-7592
julie.pfeiffer@ohioago.gov
michael.hendershot@ohioago.gov
jonathan.blanton@ohioago.gov
michael.walton@ohioago.gov

Counsel for Respondents
Secretary of State Frank LaRose and
Auditor Keith Faber
- and -
Counsel for Governor Mike DeWine and the
Ohio Redistricting Commission

C. Benjamin Cooper (0093103)
Charles H. Cooper (0037295)
Chelsea C. Weaver (0096850)
COOPER & ELLIOTT, LLC
305 W. Nationwide Blvd
Columbus Ohio 43215
T: (614) 481-6000
benc@cooperelliott.com
Chipc@cooperelliott.com
Chelseaw@cooperelliott.com

Counsel for Respondents Senate Minority
Leader Nickie Antonio and House Minority
Leader Allison Russo

Abha Khanna (PHV 2189-2021)
Ben Stafford (PHV 25433-2021)
ELIAS LAW GROUP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
akhanna@elias.law
bstafford@elias.law
T: (206) 656-0176
F: (206) 656-0180

Aria C. Branch (PHV 25435-2021)
Jyoti Jasrasaria (PHV 25401-2021)
ELIAS LAW GROUP
10 G St NE, Suite 600
Washington, DC 20002
abbranch@elias.law
jjasrasaria@elias.law
T: (202) 968-4490
F: (202) 968-4498

Donald J. McTigue (0022849)
Counsel of Record
Derek S. Clinger (0092075)
McTIGUE & COLOMBO LLC
545 East Town Street
Columbus, OH 43215
dmctigue@electionlawgroup.com
dclinger@electionlawgroup.com
T: (614) 263-7000
F: (614) 368-6961

Counsel for Bennett Petitioners

Peter M. Ellis (0070264)
M. Patrick Yingling (PHV 10145-2021)
REED SMITH LLP
10 South Wacker Drive, 40th Floor
Chicago, IL 60606
T: (312) 207-1000
F: (312) 207-6400
pellis@reedsmith.com
mpyingling@reedsmith.com

Brad A. Funari (PHV 3139-2021)
Danielle L. Stewart (0084086)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
T: 412-288-4583
F: 412-288-3063
bfunari@reedsmith.com
dstewart@reedsmith.com

Brian A. Sutherland (PHV 25406-2021)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
T: (415) 543-8700
F: (415) 391-8269
bsutherland@reedsmith.com

Alicia L. Bannon (PHV 25409-2021)
Yurij Rudensky (PHV 25422-2021)
Michael Li (PHV 25430-2021)
Ethan Herenstein (PHV 25429-2021)
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF
LAW
120 Broadway, Suite 1750
New York, NY 10271
T: (646) 292-8310
F: (212) 463-7308
alicia.bannon@nyu.edu

*Counsel for Petitioners The
Ohio Organizing Collaborative et al.*

IN THE SUPREME COURT OF OHIO

League of Women Voters of Ohio, <i>et al.</i> , Petitioners, v. Ohio Redistricting Commission, <i>et al.</i> , Respondents.	Case No. 2021-1193 Original Action Filed Pursuant to Ohio Const., Art. XI
Bria Bennett, <i>et al.</i> , Petitioners, v. Ohio Redistricting Commission, <i>et al.</i> , Respondents.	Case No. 2021-1198 Original Action Filed Pursuant to Ohio Const., Art. XI
Ohio Organizing Collaborative, <i>et al.</i> , Petitioners, v. Ohio Redistricting Commission, <i>et al.</i> , Respondents.	Case No. 2021-1210 Original Action Filed Pursuant to Ohio Const., Art. XI

**MOTION TO DISMISS AND VACATE
OF RESPONDENTS ROB MCCOLLEY AND JEFF LARE**

Respondents Rob McColley and Jeff LaRe move to dismiss these actions (Case Nos. 2021-1193, 2021-1109, and 2021-1210) and to vacate five orders entered in these cases (2022-Ohio-65, 2022-Ohio-342, 2022-Ohio-789, 2022-Ohio-1235, and 2022-Ohio-1727). This motion is filed pursuant to Supreme Court Practice Rule 14.03(B)(1)¹ and Ohio Civil Rules 12(B)(1),

¹ Section 14 of the Practice Rules, as it existed when these lawsuits were filed, did not provide for the filing of either an answer or a motion to dismiss to complaints filed in redistricting cases (then called apportionment cases). Former S.Ct.Prac.R. 14.03, amended Sept. 24, 2021. Current Section 14 was amended, effective January 1, 2023, to include the possibility of respondents' filing of an answer or motion to dismiss. S.Ct.Prac.R. 14.03(B). Thus, this motion to dismiss is appropriate at this stage when Petitioners seek to revive the litigation.

12(B)(6), and 54(B).² The motion should be granted for the reasons set out in the memorandum in support below.

Respectfully submitted this the 19th day of October, 2023.

/s/ william stuart dornette

Dave Yost
Attorney General of Ohio

W. Stuart Dornette (0002955)

dornette@taftlaw.com

Beth A. Bryan (0082076)

bryan@taftlaw.com

Philip D. Williamson (0097174)

pwilliamson@taftlaw.com

TAFT STETTINIUS & HOLLISTER LLP

425 Walnut St., Suite 1800

Cincinnati, OH 45202-3957

Telephone: 513-381-2838

*Special Counsel for Respondents McColley
and LaRe*

² By entries dated September 24, 2021 in *League of Women Voters v. Ohio Redistricting Comm.*, 2021-Ohio-3377, and *Bennett v. Ohio Redistricting Comm.*, 2021-Ohio-3391, and dated September 27, 2021 in *Ohio Organizing Collaborative v. Ohio Redistricting Comm.*, 2021-Ohio-3415, this Court directed that “[t]he Ohio Rules of Civil Procedure shall supplement the Rules of Practice of the Supreme Court of Ohio for this case, unless clearly inapplicable.” Neither Civ. R. 12 nor 54 is clearly inapplicable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF FACTS	1
ARGUMENT	2
1. There is no operative complaint before this Court.	2
2. Because neither the Complaints nor the recently filed proposed objections allege a violation of Sections 2, 3, 4, 5, or 7 of Article XI of the Ohio Constitution, this Court lacks subject-matter jurisdiction.	4
3. Because this Court lacked subject-matter jurisdiction, the prior decisions of this Court should be vacated.	10
CERTIFICATE OF SERVICE	13

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Cases	Page(s)
<i>City of Toledo v. State</i> , 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257	7
<i>Fed. Home Loan Mortg. Corp. v. Schwartzwald</i> , 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214	10
<i>Hoagland v. Hoagland</i> , 113 Ohio St. 228, 148 N.E. 585 (1925)	8
<i>In re Byard</i> , 74 Ohio St.3d 294, 658 N.E.2d 735 (1996)	12
<i>In re K.K.</i> , 170 Ohio St.3d 149, 2022-Ohio-3888, 209 N.E.3d 660	10, 12
<i>Lamb v. Lane</i> , 4 Ohio St. 167 (1854).....	8
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm.</i> , 168 Ohio St. 3d 522, 2022-Ohio-1727, 200 N.E.3d 197	1, 4
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm.</i> , 167 Ohio St. 3d 255, 2022-Ohio-65.....	2, 4
<i>League of Women Voters v. Ohio Redistricting Comm.</i> , 168 Ohio St.3d 309, 2022-Ohio-789, 198 N.E.3d 812	6-7
<i>Matter of Establishing the Solar Generation Fund Rider</i> , 169 Ohio St.3d 740, 2022-Ohio-4348, 207 N.E.3d 762 (O’Connor, C.J.)	8, 9
<i>Myers v. Toledo</i> , 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176	8
<i>Onderko v. Sierra Lobo, Inc.</i> , 148 Ohio St.3d 156, 2016-Ohio-5027, 69 N.E.3d 679	5
<i>Ostaneck v. Ostaneck</i> , 166 Ohio St.3d 1, 2021-Ohio-2319, 181 N.E.3d 1162	11
<i>Patton v. Diemer</i> , 35 Ohio St.3d 68, 518 N.E.2d 941 (1988)	11
<i>Pratts v. Hurley</i> , 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992	5, 11

<i>Rogers v. Lodge</i> , 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982)	7
<i>State v. Droste</i> , 83 Ohio St.3d 36, 697 N.E.2d 620 (1998)	9
<i>State ex rel. Food & Water Watch v. State</i> , 153 Ohio St. 3d 1, 2018-Ohio-555, 100 N.E.3d 391	10
<i>State ex rel. Grendell v. Davidson</i> , 86 Ohio St.3d 629, 716 N.E.2d 704 (1999)	7
<i>State ex rel. Johnstone v. Cincinnati</i> , 165 Ohio St.3d 178, 2021-Ohio-3393, 176 N.E.3d 742 (Stewart, J.).....	9
<i>State ex rel. Jones v. Suster</i> , 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998)	10, 11
<i>State ex rel. LetOhioVote.org v. Brunner</i> , 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462	8
<i>State ex rel. M'Cready v. Hunt</i> , 2 Hill 1, 20 S.C.L. 1 (S.C. Ct. App. 1834)	9
<i>State ex rel. Walgate v. Kasich</i> , 147 Ohio St. 3d 1, 2016-Ohio-1176, 59 N.E.3d 1240	10
<i>State v. Mobarak</i> , 10th Dist. Franklin No. 16AP-162, 2016-Ohio-4632, <i>rev'd on other grounds</i> , 150 Ohio St.3d 28, 2016-Ohio-8368, 78 N.E.3d 833	9
<i>Steele, Hopkins & Meredith Co. v. Miller</i> , 92 Ohio St. 115, 110 N.E. 648 (1915)	5

Rules

Civ. R. 15	3
Civ. R. 54	11, 12
Evid. R. 201	4
Ohio Constitution, Article XI, Section 1(B)(3)	2, 7
Ohio Constitution, Article XI, Section 2	<i>passim</i>
Ohio Constitution, Article XI, Section 3	<i>passim</i>
Ohio Constitution, Article XI, Section 4	<i>passim</i>

Ohio Constitution, Article XI, Section 5	<i>passim</i>
Ohio Constitution, Article XI, Section 6	<i>passim</i>
Ohio Constitution, Article XI, Section 7	<i>passim</i>
Ohio Constitution, Article XI, Section 8	5, 7, 8
Ohio Constitution, Article XI, Section 9	<i>passim</i>
Sup.Ct.Prac.R. 14.03.....	2, 3

Other Authorities

Scalia & Garner, <i>Reading Law: The Interpretation of Legal Texts</i> 108 (2012)	9
-----------------------------------------------------------------------------------------	---

RETRIEVED FROM DEMOCRACYDOCKET.COM

INTRODUCTION

The basis for this motion to dismiss and vacate, filed by Respondents Representative Jeff LaRe and Senator Rob McColley, members of the Ohio Redistricting Commission (the “Commission”) and of the Ohio General Assembly, is three-fold.

First, there is no operative complaint before the Court. The allegations of the three Complaints filed in September 2021 centered on the divided, party-line vote of the Commission to adopt a General Assembly districting plan in September 2021. However, the districting plan presently before the Court was adopted unanimously by the bipartisan Commission. Any objections that Petitioners, or some of them, have to the current bipartisan districting plan cannot be based on the allegations in any of their Complaints.

Second, Section 9 of Article XI of the Ohio Constitution (“Article XI”) does not give this Court jurisdiction to fashion a remedy for alleged violations of Section 6 unless it first finds a violation of at least one of the neutral map-drawing requirements set out in Sections 2, 3, 4, 5, or 7. And, even then, arguably only when there is a partisan divide in adopting a plan—not a unanimous bipartisan plan like the one now before the Court. Article XI, Sec. 9. Because the Complaints allege no violations of those requirements, none asserts a claim that the Court has subject-matter jurisdiction to address. The objections that have been filed, even if accepted as amended pleadings, fare no better. On that basis, the Complaints should be dismissed.

Finally, this Court, lacking subject-matter jurisdiction over the claims raised in the three actions, should vacate the interlocutory orders previously entered in these cases.

STATEMENT OF FACTS

The Commission adopted four General Assembly district plans by straight party-line votes between September 2021 and March 2022. *See League of Women Voters of Ohio v. Ohio*

Redistricting Comm., 168 Ohio St. 3d 522, 2022-Ohio-1727, 200 N.E.3d 197 at ¶ 1. This Court invalidated each of those plans by an interlocutory order that kept the cases open as authorized by Article IV, Section 2(B)(1)(f) of the Ohio Constitution as “necessary to achieve closure and complete relief” in the three pending actions. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 167 Ohio St. 3d 255, 294, 2022-Ohio-65, ¶ 136 (“*League P*”).

On September 13, 2023, the Commission convened to address the open issue of General Assembly redistricting. On September 26, 2023, the Commission unanimously adopted the Unified Bipartisan Redistricting Plan (the “Plan”) by a vote of 7-0, with all members—both Democrats and Republicans—voting to adopt it.³ As a result, the Plan meets the requirements of Article XI, Section 1(B)(3) and, therefore, will be effective through the 2030 election.

On October 2, 2023, the Commission filed the Plan with this Court. Four days later, some, but not all, of the Petitioners in each of the three pending lawsuits filed Motions for Leave to File Objections to the Plan (“Motions for Leave”). As emphasized above, the then-pending lawsuits, to which Petitioners’ objections apply, were first filed in 2021, with the Complaints challenging the initial redistricting plan adopted in 2021. The Motions for Leave are wholly unrelated to the Complaints’ allegations and are currently pending before this Court.

ARGUMENT

1. There is no operative complaint before this Court.

It is fundamental that to invoke the original jurisdiction of this Court in a redistricting case, a petitioner must file a complaint that “clearly identif[ies] that the case involves a challenge

³ On September 29, 2023, the Commission met briefly to consider one technical amendment to the Plan adopted on September 26th. The Commission adopted that amendment and reaffirmed its adoption of the Plan, as amended, 6-0, with Governor DeWine unable to attend. Given the technical nature of the amendment adopted on September 29th, this motion will refer to the action of the full Commission on September 26th when discussing the bipartisan, unanimous action of the Commission in adopting the Plan.

to redistricting or a plan of redistricting * * *” S.Ct.Prac.R. 14.03(A). As in all cases, the complaint frames the issues for the lawsuit. Here, the central focus of the three Complaints filed two years ago was the Commission’s divided party-line vote to adopt a plan in September 2021. (*E.g.*, League of Women Voters Complaint, ¶ 1 (“Just after midnight on September 16, 2021, with a 5-2 vote along strictly partisan lines, Ohio’s Redistricting Commission enacted maps that are intended to, and will, entrench a Republican veto-proof supermajority in both chambers of Ohio’s General Assembly for the next four years”); Ohio Organizing Collaborative Complaint, ¶ 3 (“on September 16, 2021, just after midnight, the Ohio Redistricting Commission voted 5-2 on party lines to adopt a district plan that has the intent and effect of entrenching a veto-proof Republican supermajority in both chambers of the General Assembly for the next four years”).)

Those allegations plainly have nothing to do with the Plan adopted this year. Directly contrary to those allegations, on September 26, 2023, the Commission met and unanimously adopted a bipartisan redistricting plan for the General Assembly. To the extent some Petitioners take issue with the process or the results of that action, those issues are completely untethered from the allegations of any of their Complaints. Objecting Petitioners have the right to seek leave of this Court to amend or supplement their Complaints pursuant to Civ. R. 15, but they have chosen not to do so. Because the Complaints all allege facts demonstrably false as they relate to the Plan that exists today and the process by which the Commission adopted it,⁴ those Complaints can provide no basis for this Court to take any action, and they should be dismissed.

⁴ While the Commission’s September 2023 adoption of the Plan is outside the face of the Complaints, Ohio courts may take judicial notice of a fact “not subject to reasonable dispute” that is “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” Evid. R. 201(B). The unanimous adoption of the bipartisan redistricting plan, which plan has now been filed with this Court, is an official action by a co-equal branch of government and certainly meets those requirements.

2. Because neither the Complaints nor the recently filed proposed objections allege a violation of Sections 2, 3, 4, 5, or 7 of Article XI of the Ohio Constitution, this Court lacks subject-matter jurisdiction.

None of the Complaints allege that the plan that they were addressing, from September 2021, had any violations of the neutral map-drawing requirements of Sections 2, 3, 4, 5, or 7 of Article XI, which the Commission must absolutely meet. And, obviously, none of the Complaints alleges anything about the Plan adopted in September 2023.

Moreover, the proposed objections attached to each of the Motions for Leave concern only an alleged violation of Article XI, Section 6(B):

- *Bennett*: “The September 2023 Plain clearly fails to comply with Section 6(B)” (Motion for Leave, filed Oct. 5, 2023, proposed objection, at 8);
- *Ohio Organizing Collaborative*: “For the sixth time, the Ohio Redistricting Commission has made no attempt to draw a General Assembly district plan that meets the representational fairness requirements of the Ohio Constitution, Article XI, Section 6(B)” (Motion for Leave, filed Oct. 5, 2023, proposed objection, at 1);
- *League of Women Voters*: “the General Assembly redistricting plan adopted on September 29, 2023 * * * violates Article XI, Section 6(B) of the Ohio Constitution” (Motion for Leave, filed Oct. 5, 2023, proposed objection, at 1).

Even if those objections were accepted as amended pleadings, each action would still seek invalidation of a General Assembly district plan without alleging any violation of Sections 2, 3, 4, 5, or 7 of Article XI. Without such a violation, this Court has no subject-matter jurisdiction to invalidate the Plan. Without an allegation of such a violation, the Court “lacks the authority to do anything but announce its lack of jurisdiction and dismiss.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 21.

In reviewing earlier plans, this Court found that Section 9(D)(3)(c) provided it with a basis for invalidating a plan for alleged stand-alone violations of Section 6(B). *League I* at ¶¶ 71-75, 83. But by its plain language, Section 9(D)(3)(c) applies only to plans adopted under Section 8(C), which does not apply to the Plan now before the Court.

Article XI expressly limits this Court’s authority, providing in Section 9(D)(3) that “[i]f the supreme court of Ohio determines that a general assembly district plan adopted by the commission does not comply with Section 2, 3, 4, 5, or 7,” it may invalidate a plan in whole or in part. Those sections set out the neutral, anti-gerrymandering line-drawing requirements written into the Constitution. Petitioners, in effect, attempt to rewrite Section 9(D)(3) to remove the words “of Section 2, 3, 4, 5, or 7,” rendering those words mere surplusage.⁵ That, however, ignores the consistently recognized duty of courts to “give effect to all of the statute’s words,” which applies equally to constitutional provisions. *Onderko v. Sierra Lobo, Inc.*, 148 Ohio St.3d 156, 2016-Ohio-5027, 69 N.E.3d 679, ¶ 26; *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 120, 110 N.E. 648 (1915) (“effect should be given to every part of the instrument as amended, and in the absence of a clear reason to the contrary no portion of a written Constitution should be regarded as superfluous”).

There is sound reason for how Section 9 is structured. Unlike Sections 2, 3, 4, 5, and 7, Section 6 speaks not of doing something, but of **attempting** to do something. It is not an objective standard, but a subjective one with no requirement that the Commission **succeed** in its attempt. Instead, the principal thrust of Section 6 is to set out subjective benchmarks for the Commission to keep in mind when drawing the plan according to constitutionally-prescribed objectively neutral criteria. And the words “shall attempt” make it clear that the Commission has multiple pathways to attempt to meet the three, often conflicting, standards in Section 6(A)-(C).

⁵ To get to the result Petitioners seek with respect to the unanimous Plan presently before the Court, they also necessarily seek to strike the words “in considering a plan adopted under division (C) of Section 8 of this article” from Section 9(D)(3)(c), effectively rendering that provision, to use the words of Petitioners League of Women Voters, a “mere toothless appendage.” (League of Women Voters Motion for Leave, at 3.)

That the three standards can conflict is nowhere more apparent than in this litigation. Respondent's opposition to the pending Motions for Leave demonstrated the direct conflict between 6(A) and 6(B): the closer one tries to get to statewide preferences in Section 6(B), the more the plan necessarily disfavors Republican voters in Ohio's urban counties contrary to Section 6(A). (Respondents' Memorandum in Opposition to Motions for Leave, filed October 16, 2023, 7-9). The 41% of the urban counties' voters who support Republican candidates must be packed and cracked, directly contrary to what Section 6(A) requires, in order to achieve the mythical "representational fairness" standard Petitioners seek to graft onto Section 6(B). As a result, the proposed objections demand that these Republican voters, although they constitute 41% of the voters in the urban counties, be able to elect no more than 10-15% of the Ohio House members from those six counties. (*Id.*)

It thus made good sense for the drafters of Article XI to omit Section 6 from the list of sections with a remedy in Section 9. A brief survey of the enumerated Section 9(D)(3) violations demonstrates why they are more logically remediable by the court:

- Section 2 provides that each Ohio House district is entitled to one representative, and the same for each Ohio Senate district.
- Section 3, lays out specific, objective requirements for the manner in which districts (mostly related to the House) must be drawn.
- Section 4 prescribes additional specific, objective requirements for Senate districts.
- Section 5 specifies senatorial assignment when Senate district boundaries change.
- Section 7 requires district boundaries to comport with the county, municipal, and township boundaries existing at the time of the most recent decennial census.

Each provision lays out clear, objective requirements with which the Commission must comply.

The palpable outlier—not just in purpose but also in Section 9(D)(3)'s text—is Section 6. The question of whether the Commission has applied the standards in Section 6 is “solely a

matter of degree.” *League of Women Voters v. Ohio Redistricting Comm.*, 168 Ohio St.3d 309, 2022-Ohio-789, 198 N.E.3d 812, ¶ 133 (Kennedy and DeWine, J.J., dissenting). In other words, the determinations of partisan favoritism, proportionality, compactness, and whether the Commission made a sufficient attempt to address any or all of them are subjective determinations that the Court is not in a position to make. *Rogers v. Lodge*, 458 U.S. 613, 629, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (Powell, J., dissenting) (noting the “unseeml[iness]” of inviting courts “to engage in deeply subjective inquiries into the motivations of local officials in structuring local governments”); *cf.*, *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 27, quoting from *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 633, 716 N.E.2d 704 (1999) (“The separation-of-powers doctrine * * * precludes the judiciary from asserting control over ‘the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control’”).

Moreover, Article XI provides a non-judicial remedy for failing to reach Section 6’s standards. If the Commission cannot, for whatever reason, meet those standards to the satisfaction of at least two commissioners representing each major political party, *see* Art. XI, Section 1(B)(3), and instead passes a map on a simple majority vote, then the map has a shorter life of four years instead of ten. Article XI, Section 8(C)(1)(a). This is why Article XI specifically incentivizes the two major political parties to negotiate and compromise in drafting a redistricting plan. By favoring a redistricting plan that receives bipartisan support, *i.e.*, an affirmative vote of at least two members of both major political parties, Article XI places the determination of whether the plan unduly favors a political party or fails to closely correspond to the statewide preferences of Ohio voters under the judgment of the Commission members.

It is also why a plan adopted by a simple majority vote must be accompanied by a statement specifically addressing the 6(B) standard—a public statement for which the elected officials who adopted the plan may be held accountable by the voters. Article XI, Section 8(C)(2). No such statement is required of a unanimous plan. Similarly, Section 9 includes a specific separate authorization for Supreme Court review of a simple majority plan’s compliance with 6(B). Art. XI, Section 9(D)(3)(c). Again, no such separate scrutiny is provided for a unanimous plan. Where the Commission adopts a unanimous, bipartisan plan, as it has done here, the text of Article XI confirms that the Commission has met its duties under Section 6.

Thus, Section 6’s absence from Section 9’s enumeration of remediable sections is entirely consistent with the structure of and purposes behind Article XI. The most natural reading of Section 9’s text and structure is that its authors and ratifiers intentionally excluded Section 6 from judicial consideration by enumerating which claimed violations this Court could redress.

This Court has long applied the doctrine *expressio unius est exclusio alterius* to both constitutional provisions and statutes. *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 39, quoting *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶24) (Constitutional question: “As we have consistently held, ‘[t]he canon * * * tells us that the express inclusion of one thing implies the exclusion of the other’”); *Hoagland v. Hoagland*, 113 Ohio St. 228, 242–43, 148 N.E. 585, 589–90 (1925) (“This court in the construction of Constitution and statutes has often invoked the doctrine *expressio unius est exclusio alterius*”); *Lamb v. Lane*, 4 Ohio St. 167, 171 (1854) (Constitutional question).

The doctrine directly applies here where “the expression of one item in an associated group or series excludes unmentioned items.” *Matter of Establishing the Solar Generation Fund*

Rider, 169 Ohio St.3d 740, 2022-Ohio-4348, 207 N.E.3d 762, ¶ 34, fn.2 (O'Connor, C.J.). *See also State ex rel. Johnstone v. Cincinnati*, 165 Ohio St.3d 178, 2021-Ohio-3393, 176 N.E.3d 742, ¶ 14 (“the expression of one or more items of a class implies that those not identified are to be excluded from the class”) (Stewart, J.); *State v. Mobarak*, 10th Dist. Franklin No. 16AP-162, 2016-Ohio-4632, ¶ 10, fn. 2 (Applying *expressio unius*: “This legal maxim or principle of interpretation is that when particularized items are expressed, those that are not expressed are inferred to be excluded”) (Brunner, J.), *rev'd on other grounds*, 150 Ohio St.3d 28, 2016-Ohio-8368, 78 N.E.3d 833.

Section 9 of Article XI expressly lists the sections that this Court may judicially enforce; namely Sections 2, 3, 4, 5, and 7. The express listing is plainly “an associated group or series,” and it “excludes [an] unmentioned item[.]” *Fund Rider* at ¶ 34, fn. 2. Where what are listed are provisions that this Court has authority to review, and therefore has subject-matter jurisdiction over, the exclusion of Section 6 from that list drives the inescapable conclusion that this Court has no constitutional basis for enforcing a stand-alone violation of Section 6. *State v. Droste*, 83 Ohio St.3d 36, 39, 697 N.E.2d 620 (1998) (“Under the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded”); *State ex rel. M'Cready v. Hunt*, 2 Hill 1, 171, 20 S.C.L. 1, 230 (S.C. Ct. App. 1834) (Johnson, J.) (“Does not the act of prescribing the mode, necessarily imply a prohibition to all other modes?”). *See also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 108 (2012) (“The more specific the enumeration, the greater the force of the canon”).

For the same reason, it is no argument to say that Section 9(A) is broad enough to encompass Section 6. Section 9(A) acts as a limit on other courts, not as a grant of plenary

authority to this Court to strike down legitimate maps for reasons not specified in Section 9(D)(3). None of the words in Section 9(A) is a synonym for unilateral or plenary. The language “exclusive” and “original” simply means that redistricting cases originate exclusively in this Court. To read it more broadly circumvents the carefully articulated structure of Section 9 and the purpose behind that structure.

Because Section 9 does not create a right of action for a failure to accomplish the goals set out in Section 6, neither Petitioners’ claims nor the objections are redressable. A party seeking relief in this Court must show it has suffered (1) an injury (2) fairly traceable to another party’s allegedly unlawful conduct, that is (3) redressable. *State ex rel. Walgate v. Kasich*, 147 Ohio St. 3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶ 18. Failure to plead, let alone prove, any of these elements is fatal to Petitioners’ standing in these cases and to the Court’s jurisdiction.

Because the remedies in Section 9 are limited to violations of Sections 2, 3, 4, 5, and 7, complaints solely under Section 6 are not redressable. Lacking redressability, Petitioners cannot show standing. *State ex rel. Food & Water Watch v. State*, 153 Ohio St. 3d 1, 2018-Ohio-555, 100 N.E.3d 391, ¶ 25. Without this bedrock jurisdictional component, *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 22, this Court lacks the jurisdiction to rule upon the merits of Petitioners’ stale allegations and therefore should dismiss their long outdated Complaints.

3. Because this Court lacked subject-matter jurisdiction, the prior decisions of this Court should be vacated.

It is a fundamental principle of law that subject-matter jurisdiction empowers a court to hear and decide a case. *In re K.K.*, 170 Ohio St.3d 149, 2022-Ohio-3888, 209 N.E.3d 660, ¶ 49 (“Subject-matter jurisdiction is a condition precedent to a court’s power to adjudicate and render judgment in a case”); *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998)

(“Subject matter jurisdiction is a court’s power to hear and decide a case on the merits”).

Conversely, a lack of subject-matter jurisdiction deprives a court of the power to make such determinations. *Pratts*, 102 Ohio St.3d 81, at ¶ 21 (“in the absence of subject-matter jurisdiction, a court lacks the authority to do anything but announce its lack of jurisdiction and dismiss”); *Suster*, 84 Ohio St.3d at 75 (“If a court acts without jurisdiction, then any proclamation by that court is void”).

Here, the Constitution carefully circumscribes the jurisdictional basis for this Court in redistricting litigation. Because that jurisdictional basis does not include evaluating or providing remedies for a violation of Section 6 in the absence of a violation of Sections 2, 3, 4, 5, or 7, the Complaints provided no jurisdictional basis—from the outset—for this Court to take any action other than to declare the lack of subject-matter jurisdiction here and dismiss the cases. As a result, the prior decisions of this Court fall alongside Petitioners’ claims. *Ostaneck v. Ostaneck*, 166 Ohio St.3d 1, 2021-Ohio-2319, 181 N.E.3d 1162, ¶ 22, quoting *Suster*, 84 Ohio St.3d at 75 (“Because subject-matter jurisdiction is a condition precedent to a court’s power to adjudicate and render judgment in a case, ‘[i]f a court acts without jurisdiction, then any proclamation by that court is void’”); *Patton v. Diemer*, 35 Ohio St.3d 68, 518 N.E.2d 941, 942 (1988), paragraph three of the Syllabus (“A judgment rendered by a court lacking subject matter jurisdiction is void ab initio”).

It is no answer to say that those orders have any precedential value that must be respected. Under the Civil Rules, made applicable to all three cases by order of this Court in the early days of this litigation, none of them amounted to a final judgment resolving all issues of the litigation and closing the case. Instead, any such order, “however designated, * * * is subject to

revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.” Civ. R. 54(B).

Timeliness is likewise immaterial. Subject-matter jurisdiction is paramount to a court’s authority to decide a matter; thus it is not waivable and may be raised, by a party or the court, at any point in litigation. *K.K.*, 170 Ohio St.3d 149, 2022-Ohio-3888, 209 N.E.3d 660, at ¶ 49 (“Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived or forfeited and may be challenged at any time”); *In re Byard*, 74 Ohio St.3d 294, 296, 658 N.E.2d 735 (1996) (“The issue of subject matter jurisdiction cannot be waived and therefore can be raised at any time during the proceedings”).

Because this Court initially lacked, and still lacks, subject-matter jurisdiction over the claims raised in the Complaints—as well as in the proposed objections—the Court should dismiss the Complaints and vacate its five prior orders in these cases.

Respectfully submitted this the 19th day of October, 2023.

/s/ william stuart dornette

Dave Yost
Attorney General of Ohio

W. Stuart Dornette (0002955)

dornette@taftlaw.com

Beth A. Bryan (0082076)

bryan@taftlaw.com

Philip D. Williamson (0097174)

pwilliamson@taftlaw.com

TAFT STETTINIUS & HOLLISTER LLP

425 Walnut St., Suite 1800

Cincinnati, OH 45202-3957

Telephone: 513-381-2838

*Special Counsel for Respondents McColley
and LaRe*

CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of October, 2023, I have served the foregoing document by email:

Freda J. Levenson (0045916)
ACLU OF OHIO FOUNDATION, INC.
4506 Chester Avenue
Cleveland, OH 44103
T: (614) 586-1972 x 125
flevenson@acluohio.org

David J. Carey (0088787)
ACLU OF OHIO FOUNDATION, INC.
1108 City Park Avenue, Suite 203
Columbus, OH 43206
T: (614) 586-1972 x2004
dcarey@acluohio.org

Kelsey Miller
Julie A. Ebenstein (PHV 25423-2023)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
T: (212) 519-7866
jebenstein@aclu.org

Robert D. Fram (PHV 25414-2021)
Donald Brown
Joshua González (PHV 25424-2021)
David Denuyl (PHV 25452-2021)
COVINGTON & BURLING LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, CA 94105-2533
T: (415) 591 6000
rfram@cov.com

Anupam Sharma (PHV 25418-2021)
James Hovard (PHV 25420-2021)
Yale Fu (PHV 25419-2021)
COVINGTON & BURLING LLP
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306-2112

DAVE YOST
OHIO ATTORNEY GENERAL
Julie M. Pfeiffer
Counsel of Record (0069762)
Michael J. Hendershot (0081842)
Jonathan D. Blanton (0070035)
Michael A. Walton (0092201)
30 E. Broad Street
Columbus, OH 43215
T: (614) 466-2872
F: (614) 728-7592
julie.pfeiffer@ohioago.gov
michael.hendershot@ohioago.gov
jonathan.blanton@ohioago.gov
michael.walton@ohioago.gov

Counsel for Respondents
Secretary of State Frank LaRose and
Auditor Keith Faber
- and -
Counsel for Governor Mike DeWine and the
Ohio Redistricting Commission

C. Benjamin Cooper (0093103)
Charles H. Cooper (0037295)
Chelsea C. Weaver (0096850)
COOPER & ELLIOTT, LLC
305 W. Nationwide Blvd
Columbus Ohio 43215
T: (614) 481-6000
benc@cooperelliott.com
Chipc@cooperelliott.com
Chelseaw@cooperelliott.com

Counsel for Respondents Senate Minority
Leader Nickie Antonio and House Minority
Leader Allison Russo

T: (650) 632-4700
asharma@cov.com

Abha Khanna (PHV 2189-2021)
Ben Stafford (PHV 25433-2021)
ELIAS LAW GROUP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
akhanna@elias.law
bstafford@elias.law
T: (206) 656-0176
F: (206) 656-0180

Aria C. Branch (PHV 25435-2021)
Jyoti Jasrasaria (PHV 25401-2021)
ELIAS LAW GROUP
10 G St NE, Suite 600
Washington, DC 20002
abbranch@elias.law
jjasrasaria@elias.law
T: (202) 968-4490
F: (202) 968-4498

Donald J. McTigue (0022849)
Counsel of Record
Derek S. Clinger (0092075)
McTIGUE & COLOMBO LLC
545 East Town Street
Columbus, OH 43215
dmctigue@electionlawgroup.com
dclinger@electionlawgroup.com
T: (614) 263-7000
F: (614) 368-6961

Counsel for Bennett Petitioners

Peter M. Ellis (0070264)
M. Patrick Yingling (PHV 10145-2021)
REED SMITH LLP
10 South Wacker Drive, 40th Floor
Chicago, IL 60606
T: (312) 207-1000
F: (312) 207-6400
pellis@reedsmith.com
mpyingling@reedsmith.com

Brad A. Funari (PHV 3139-2021)
Danielle L. Stewart (0084086)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
T: 412-288-4583
F: 412-288-3063
bfunari@reedsmith.com
dstewart@reedsmith.com

Brian A. Sutherland (PHV 25406-2021)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
T: (415) 543-8700
F: (415) 391-8269
bsutherland@reedsmith.com

Alicia L. Bannon (PHV 25409-2021)
Yurij Rudensky (PHV 25422-2021)
Michael Li (PHV 25430-2021)
Ethan Herenstein (PHV 25429-2021)
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF
LAW
120 Broadway, Suite 1750
New York, NY 10271
T: (646) 292-8310
F: (212) 463-7308
alicia.bannon@nyu.edu

*Counsel for Petitioners The
Ohio Organizing Collaborative et al.*

/s/ william stuart dornette
W. Stuart Dornette