IN THE SUPREME COURT OF OHIO

Regina C. Adams, *et al.*, ***Petitioners*,** ***v.*** **Governor Mike DeWine, *et al.*,** ***Respondents*.**	**Case No. 2021-1428** **Original Action Filed Pursuant to Ohio Const., Art. XIX, Sec. 3(A)**

MOTION TO ENFORCE COURT'S ORDER

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Petitioners Regina Adams, *et al*. respectfully move the Court to enforce its January 14, 2022 Order in this matter, *Adams v. DeWine*, Slip Opinion No. 2022-Ohio-89. A memorandum in support is attached.

Dated: March 4, 2022

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE COURT'S ORDER

TABLE OF CONTENTS

I. Introduction

In decision after decision, this Court has given the Ohio Redistricting Commission clear directions for how to draw districting plans that comply with the Ohio Constitution. But the Commission refuses to follow those directions. The Commission has now adopted a second congressional plan. Yet again, the Commission "began with an invalidated plan." *League of Women Voters of Ohio v. Ohio Redistricting Comm.* (*"LWV II"*), Slip Opinion No. 2022-Ohio-342, ¶ 63. And, again, "guided by incorrect directives . . . [t]he commission set its compass wrong, and it wound up in the wrong place." *Id.*

The Court found that the original plan, passed by the General Assembly, did not comply with Article XIX, Sections 1(C)(3)(a) and (b) of the Ohio Constitution, because it was "infused with undue partisan bias." *Adams v. DeWine*, Slip Opinion No. 2022-Ohio-89, ¶ 101. In going back to the drawing board, the Commission had clear direction: "to draw a map that comports *with the directives of* [*the Court's*] *opinion*." *Id.* at ¶ 99 (emphasis in original). That opinion was clear that a map that unduly favors or disfavors a political party or its incumbents, or that unduly splits political subdivisions, would not comply with the Constitution. And the Court gave the Commission a clear roadmap as to how to achieve a constitutionally compliant plan.

The Commission did not recalibrate. In fact, it did not even pretend to follow the Court's directions. Instead, it drove off in the opposite direction entirely. Senate President Matt Huffman announced that the Commission now *was not required to comply* with the anti-gerrymandering provisions of Section 1(C)(3)(a) at all. And the new map reflects that fundamental misdirection.

Having embarked on its latest map-drawing journey with an irredeemably broken compass, it is no surprise that the Commission has once again found itself lost. The new congressional districting plan bears a striking resemblance to the plan struck down by the Court on January 14.

It is infused with the same partisan bias as before. It is an extreme partisan outlier again. It eschews sensible, compact districts that respect Ohio's political geography precisely *because* doing so would not result in extreme partisan advantage at odds with Ohio's voting patterns.

At this point, the Commission cannot be trusted behind the wheel. The Court should strike down the second congressional plan, continue the March 4 candidate filing deadline, stay other election deadlines and dates as appropriate, and, if necessary, itself adopt a constitutional plan as early as March 17, the day after the Commission's deadline for adopting a constitutional plan under this Court's order and Article XIX, Section 3.

II. Statement of Facts

A. This Court invalidated the November 20 Plan as an unconstitutional gerrymander.

Last year marked the first congressional redistricting cycle governed by Article XIX of the Ohio Constitution. In 2018, the General Assembly voted to refer congressional redistricting reform to the people for approval by referendum. Ohioans voted overwhelmingly to approve the General Assembly's proposal. (ADAMS_129 (Jessie Balmert, "Ohio voters just approved Issue 1 to curb gerrymandering in Congress," Cincinnati Enquirer (May 8, 2018))). They voted to impose new procedural requirements, technical line-drawing rules, and, for congressional plans passed on a party-line vote, additional anti-gerrymandering requirements, specifically that a congressional districting plan cannot (1) unduly favor a party or its incumbents, and (2) cannot unduly split political subdivisions. Ohio Constitution, Article XIX, Section 1(C)(3)(a)-(b).

In 2021, both the General Assembly and the Ohio Redistricting Commission declined to take any action on redistricting for several months. Finally, as the deadline to act grew near, the General Assembly drew a congressional plan in a secretive, partisan process. *See* Pet'r's Merits Br. at 1-2, *Adams v. DeWine*, No. 2021-1428. The General Assembly passed the plan on November 18, 2021, and Governor Mike DeWine signed it on November 20. *Id.* at 16-17. The 20 Plan was

an extreme partisan outlier that was even more skewed in favor of the Republican Party than the 2011 plan, the very gerrymander that had prompted voters to add Article XIX to the Constitution.

The next business day, on November 22, the *Adams* Petitioners filed a complaint in this Court as an original action. *See* Relators' Compl. in Original Action, *Adams*, No. 2021-1428. Petitioners argued that the November 20 Plan violated Article XIX, Section 1(C)(3)(a) and 1(C)(3)(b) of the Ohio Constitution.

On January 14, this Court held that the November 20 Plan was "invalid *in its entirety* because it unduly favors the Republican Party and disfavors the Democratic Party in violation of Article XIX, Section 1(C)(3)." *Adams* at ¶ 5 (emphasis added). The Court also held that the November 20 Plan "unduly splits Hamilton, Cuyahoga, and Summit Counties in violation of Section 1(C)(3)(b)." *Id.* The Court concluded that "[d]espite the adoption of Article XIX . . . the General Assembly did not heed the clarion call sent by Ohio voters to stop political gerrymandering." *Id.* at ¶ 4.

The Court explained that Section 1(C)(3)(a) prohibits "a plan that favors or disfavors a political party or its incumbents to a degree that is in excess of, or unwarranted by, the application of Section 2's and Section 1(C)(3)'s specific line-drawing requirements to Ohio's political geography." *Id.* at ¶ 40. It concluded that the evidence presented by Petitioners "overwhelmingly show[ed] that the enacted plan favors the Republican Party and disfavors the Democratic Party to a degree far exceeding what is warranted by Article XIX's line-drawing requirements and Ohio's political geography." *Id.* at ¶ 41. The Court looked to the enacted plan's overall expected partisan performance, the enacted plan's treatment of certain geographic areas of the state, and other measures of partisan bias. *See id.* at ¶ 52, 62, 63. In particular, the Court identified "the inescapable conclusion" that "in each of Ohio's three largest metropolitan areas, the enacted plan contains

districts that . . . are the product of an effort to pack and crack Democratic voters, which results in more safe Republican districts or competitive districts favoring the Republican Party's candidates." *Id.* at ¶ 62. In conducting this analysis, the Court held that alternative congressional plans, including computer-simulated plans, "are relevant evidence that the enacted plan unduly favors the Republican Party." *Id.* at ¶ 68.

In addition, the Court held that the November 20 Plan unduly split three counties in violation of Section 1(C)(3)(b). The Court explained that "[a] split may be unwarranted if it cannot be explained by any neutral redistricting criteria but instead confers a partisan advantage on the party that drew the map – regardless of whether the plan complies with Article XIX, Section 2(B)." *Id.* at ¶ 83; *see also id.* at ¶ 77 (concluding that the November 20 Plan contained undue splits because they "result[ed] in noncompact districts that cannot be explained by any neutral favor and serve no purpose other than to confer partisan advantage to the political party that drew the plan").

The Court held that the November 20 Plan's splits of Hamilton County were unwarranted and excessive, *id.* at ¶ 88, and the plan "split[] Summit and Cuyahoga Counties to confer partisan advantages on the Republican Party." *Id.* at ¶ 89.

In sum, the Court concluded that "[s]ystemic defects require[d] the passage of a new plan that complies with Article XIX." *Id.* at Section D. The Court explained:

> [I]n some circumstances, congressional plans that contain isolated defects may be subject to remediation simply by correcting the defects in the affected district or districts. But when a congressional-district plan contains systemic flaws such that constitutional defects in the drawing of some district boundaries have a consequential effect on the district boundaries of other contiguous districts, such a plan is incapable of being remediated with the surgical precision necessary to correct only isolated districts while leaving the rest of the plan intact.
>
> In this case, the partisan gerrymandering used to generate the 2021 congressional-district plan, through undue party favoritism and/or

> undue governmental-unit splits, extends from one end of the state to the other. This plan defies correction on a simple district-by-district basis, if only as a consequence of the equal-population requirement prescribed by Article XIX, Section 2 and governing law. We therefore see no recourse but to invalidate the entire congressional-district plan.

Id. at ¶ 95-96. The Court ordered that "[b]y the plain language of Article XIX, Section 3(B), both the General Assembly and the reconstituted commission, should that be necessary are mandated to draw a map that comports with the *directives of this opinion*." *Id.* at ¶ 99 (emphasis in original).

B. The General Assembly took no action to adopt a remedial plan.

Article XIX, Section 3(B)(1) provides that if a congressional plan is invalidated, then "[t]he general assembly shall pass a plan not later than the thirtieth day after" a final order is issued. Yet the General Assembly did not do so.

Indeed, for the first week after this Court's ruling on the November 20 Plan, the General Assembly did nothing at all. Finally, Senator Rob McColley, the sponsor of the November 20 Plan, introduced a placeholder bill for a new congressional map on January 26. (*See* Second Aff. of Derek S. Clinger (Mar. 4, 2022), ADAMS_003 (2022 S.B. No. 286, As Introduced); ADAMS_004 (General Assembly's website showing status of 2022 S.B. No. 286 as of March 3, 2022).) That same day, President Huffman said that he expected the General Assembly to begin debating and potentially voting on a new map starting on February 7. (ADAMS_001-002 (Laura Hancock, "As congressional redistricting deadline looms, Ohio Senate Republicans head to sunny Florida for top-dollar fundraiser," Cleveland.com (Jan. 26, 2022).) President Huffman acknowledged that a congressional map would require approval from two-thirds of each chamber of the General Assembly, so that it could qualify as an emergency bill and take effect prior to the May 3, 2022 primary. (ADAMS_005-006 (Andy Chow, "Movement on new Ohio Congressional district map

not expected for another week," Statehouse News Bureau (Jan. 28, 2022)); *see also* Ohio Constitution, Article II, Section 1(d).

Committees in both the House and the Senate scheduled hearings for February 8. (*See* ADAMS_009 (Notice and agenda for the Ohio Senate Government Budget Committee's Feb. 8, 2022 meeting).) A second Senate hearing was scheduled for February 9, and an "as-needed" House hearing schedule for February 10. (*See* ADAMS_010 (Notice and agenda for the Ohio Senate Government Budget Committee's Feb. 9, 2022 meeting); ADAMS_013 (Feb. 8, 2022, 10:10 AM Tweet by Josh Rultenberg).)

The Republican caucus's approach to the remedial process changed dramatically on February 7, however. That day, this Court issued an order invalidating the Ohio Redistricting Commission's remedial General Assembly Plan, which it had passed on January 22. *See LWV II,* at ¶ 3. The Court explained that the Commission had once again failed to comply with the partisan fairness and proportionality requirements of Article XI, Section 6. *See id.* The Court concluded: "Our instruction to the commission is—simply—to comply with the Constitution." *Id.* at ¶ 64.

Following the issuance of that order, the House Government Oversight Committee abruptly removed consideration of congressional maps from the agenda of its February 8 hearing. (ADAMS_007-008 (Announcement and agenda for the Ohio House Government Oversight Committee's Feb. 8, 2022 meeting (2nd Rev.).) The next day, the Senate Budget Committee also announced that it would not introduce a congressional map. (ADAMS_011 (Feb. 8, 2022, 9:18 AM Tweet by Josh Rultenberg); ADAMS_012 (Feb. 8, 2022, 9:19 AM Tweet by Josh Rultenberg); ADAMS_013 (Feb. 8, 2022, 10:10 AM Tweet by Josh Rultenberg).)

On February 8, the Senate Democratic caucus released a proposed map, Senate Bill 237 ("February 8 Democratic Caucus Plan"). (ADAMS_014-016 (Feb. 8, 2022, 11:20 AM Tweet by

Josh Rultenberg).)[1] That same day, House Speaker Robert Cupp acknowledged that the Republican caucus would not even attempt to reach bipartisan agreement, stating, "It's pretty clear there's not going to be a two-third vote. So we'll just go where we can get it done so that we can have a primary election when it's scheduled in May." (ADAMS_017 (Feb. 8, 2022, 12:30 PM Tweet by Josh Rultenberg).) The Republican caucus thus chose not to introduce any congressional plan in the General Assembly, and let the clock run out on the remedial period, expressly because it did not want to try to reach bipartisan compromise.

The General Assembly's February 14 deadline for a new congressional map passed without a single committee hearing, a single plan introduced by the majority caucus, or a single vote.

C. The Commission adopted a new plan that was drawn without regard to Article XIX, Section 1(C)(3)(a) or 1(C)(3)(b).

1. The Commission did not introduce any congressional plans for the first half of its remedial period.

The Commission did nothing for the first week of the remedial period.[2] The Commission finally met at noon on February 22 to discuss congressional redistricting for the first time since October 2021. (ADAMS_019 (Notice and agenda for the Ohio Redistricting Commission's Feb. 22, 2022 meeting).) Commission Co-Chair Senator Vernon Sykes stated that morning that he did not have any idea what the agenda of the meeting would be. (ADAMS_018 (Feb. 22, 2022, 9:37 AM Tweet by Josh Rultenberg).)

[1] The February 8 Democratic Caucus Plan is available on the Commission's website. *See* Maps, Ohio Redistricting Commission, https://www.redistricting.ohio.gov/maps (last accessed Mar. 4, 2022) (available under "Congressional District Plans – Commission Member Sponsors" and labeled "Yuko/Sykes SB 237 Revision").

[2] This was also during the period where, in theory, the Commission was tasked with drawing a remedial General Assembly plan, before it declared "impasse" on February 17 and was required to address the Court's show cause order of February 18.

The meeting lasted less than ten minutes. (*See* ADAMS_020-022 (Transcript of the Ohio Redistricting Commission's Feb. 22, 2022 meeting).) The Commission Co-Chairs, House Speaker Bob Cupp and Senator Sykes, announced that the Commission would hold public hearings, but only individuals and organizations that had previously submitted full congressional plans would be permitted to speak. (*Id.* at ADAMS_021.) The Commissioners then discussed scheduling a meeting regarding the General Assembly district plan and adjourned the meeting. (*Id.* at ADAMS_022.)

The Commission held another meeting on February 23, during which three individuals who had previously submitted congressional plans testified. (ADAMS_029 (Notice and agenda for the Ohio Redistricting Commission's Feb. 23, 2022 meeting); ADAMS_030-052 (Transcript of the Ohio Redistricting Commission's Feb. 23, 2022 meeting).) On February 24, the Commission heard testimony on congressional plans from two individuals, and then shifted to discussing and adopting a new General Assembly district plan. (ADAMS_053-060 (Transcript of the Ohio Redistricting Commission's Feb. 24, 2022 meeting).)

2. President Huffman developed a plan that was not released to Democratic Commissioners or the public until the day before its passage.

On February 27, a meeting occurred between the Democratic caucus's staff and the Republican caucus's staff, including Republican map-drawer Raymond DiRossi. (*See* ADAMS_086 (Transcript of the Ohio Redistricting Commission's March 1, 2022 meeting).) House Minority Leader Allison Russo stated that no actual maps were shared with her staff, and that they did not receive answers to any of their questions about the Republican proposal. (*Id.* at ADAMS_091.) Senator Sykes would later say that the meeting "was just a one way

communication for the most part," in which the Democratic caucus was "sharing [its] ideas" but did not receive "suggestions from the majority as it relates to the map." (*Id.* at ADAMS_090.)[3]

On March 1, Co-Chair Speaker Cupp told a reporter that a Republican proposal would be introduced at 2 p.m. that afternoon, with a vote to be scheduled the next day, on March 2. (ADAMS_077 (3/1/22 12:25 PM Tweet by Josh Rultenberg).) The Democratic Commissioners reportedly did not receive the proposal until about an hour prior to the 2 p.m. meeting. (*See* ADAMS_079 (3/1/22 12:51 PM Tweet by Josh Rultenberg).)

President Huffman then presented his proposal. Leader Russo explained that she would have additional questions once she had more time to review the plan, but as an initial matter asked why the proposal did not place Cincinnati in a district entirely within Hamilton County. (ADAMS_086 (Transcript of the Ohio Redistricting Commission's March 1, 2022 meeting).) President Huffman responded that under Article XIX, Section 3(B)(2), the Commission was required to make "no other changes" beyond remedying the "legal defects in the previous plan identified by the court." (*Id.* at ADAMS_087.) President Huffman acknowledged that the court "identif[ied] Cuyahoga County and Hamilton County as problematic areas," but said that his proposal complied with the Court's directions and that the proposal's treatment of Hamilton County simply reflected "policy preferences and choices that commission members make." (*Id.*)

Leader Russo followed up, asking if President Huffman believed that his proposal addressed the Court's finding that the November 20 Plan "carve[d] out Hamilton County's northern Black population from its surroundings neighborhoods and combines it with a mostly

[3] Republican Commissioners disputed this characterization, although the precise reasons why are not clear from the public record. (*See* ADAMS_092-093 (Transcript of the Ohio Redistricting Commission's March 1, 2022 meeting).) Petitioners cannot say exactly what did or did not occur—because the meeting occurred behind closed doors rather than in a public and transparent Commission meeting.

rural district that ends 85 miles to the north." *Adams* at ¶ 86; (ADAMS_087 (Transcript of the Ohio Redistricting Commission's March 1, 2022 meeting).) President Huffman again cited "policy preferences." (ADAMS_087 (Transcript of the Ohio Redistricting Commission's March 1, 2022 meeting).) Next, Leader Russo suggested drawing a district entirely within Hamilton County. (*Id.*) She also suggested drawing District 9 to be more compact. (*Id.*) President Huffman responded that the map-drawers had not made changes to District 9 because "the court did not comment on . . . that district." (*Id.* at ADAMS_088.) Leader Russo then asked why District 15 was not drawn to be more compact. President Huffman acknowledged that District 15 was a "Frankenstein district" that resulted from other "choices in particular places." (*Id.* at ADAMS_088-089.) Finally, Leader Russo asked why District 7 was drawn in a noncompact manner. President Huffman said that District 7 "is a little bit like [District 15] where it's made up of parts." (*Id.* at ADAMS_090.)

Leader Russo suggested that President Huffman amend his map to address the abovementioned regions and asked on what timeline the Republican Commissioners would like to receive proposed amendments on the map. (*Id.* at ADAMS_092.) Speaker Cupp said he was available that day but added the caveat that "one of the constraints, of course, is the time it would take to move things around." (*Id.*) Leader Russo responded that she had repeatedly asked for a draft of the map since the February 27 meeting but never received one. (*Id.*) It was also her understanding that other members of the Commission actually saw the map on the evening of February 27. (*Id.*) President Huffman responded that DiRossi presented "concepts" to members of the Commission but that the discussed map did not exist until February 28.[4] (*Id.*) Leader Russo contested that characterization, stating that her staff was not presented with any "concepts" during

[4] President Huffman did not explain why the map was not shared with Leader Russo on February 28 and was instead provided approximately one hour before the March 1 meeting.

the February 27 hearing. (*Id.* at ADAMS_093.) The Commission recessed until 10 a.m. the next day.

When the Commission reconvened on March 2, Senator Sykes moved that the Commission vote on the February 8 Democratic Caucus Plan. (ADAMS_112 (Transcript of the Ohio Redistricting Commission's March 2, 2022 meeting).) President Huffman expressed his opposition to the Democratic proposal, stating that he viewed it as "a step backwards." (*Id.* at ADAMS_115). Backwards from what is unclear: this was the first and only proposal offered by the Democratic caucus after the Court issued its January 14 decision. The Commission then immediately proceeded to a vote, rejecting the proposal on a 5-2 party-line vote (*Id.* at ADAMS_115.)

President Huffman then moved that the Commission vote on an updated version of the map he had introduced the previous day. Only two changes were made between the March 1 and March 2 versions of President Huffman's plan. First, the boundary of District 15 was shifted slightly so that Republican Congressman Mike Carey's residence fell within that district. Second, certain subdivision splits were eliminated in District 1. (*Id.* at ADAMS_116-117.)

Leader Russo proposed four amendments to President Huffman's proposal, which she explained would "mak[e] the least changes necessary to get this map to a map that we feel . . . upholds the Constitution by not unduly favoring the Republicans and disfavoring the Democrats." (*Id.* at ADAMS_117-118). She proposed swapping territory in Districts 1 and 8 so that District 1 would be wholly within Hamilton County; swapping territory between Districts 5 and 9 so that District 9 would be more compact and its Democratic vote share would move above toss-up range; changing the boundaries between Districts 15, 4, and 3 so that Districts 15 and 4 would be more compact, and swapping territory between Districts 7 and 11 to move District 7 into the Democratic-leaning tossup range. (*Id.*) Leader Russo stated that these changes would "result[] in an overall

map . . . that does not unduly favor the Republican Party and disfavor the Democratic Party." (*Id.* at ADAMS_118).

President Huffman then expressed his view that the requirements of Article XIX, Section 1(C)(3)(a) and (b) do not apply to the Commission when it draws a congressional plan to replace an invalidated map. (*Id.* at ADAMS_119-121.) He argued that because Section 3(B)(2) did not contain the text of those sections, "there's no unduly requirement." (*Id.* at ADAMS_119-120.) President Huffman further claimed that Article XIX was intentionally framed so that the majority party could act unilaterally and without the constraints of Sections 1(C)(3)(a) and 1(C)(3)(b) when drawing a map under Section 3(B)(1) or (2), because such a remedial process would most likely occur close to the date of primary elections. (*Id.* at ADAMS_120-121.)

Leader Russo expressed her view that this position was absurd, explaining that it was like "robbing a bank and saying that is my money." (*Id.* at ADAMS_121.) Senator Sykes expressed similar concerns. After Leader Russo once more urged the other Commissioners to take additional time to discuss and attempt to reach bipartisan agreement, the Commission voted against her amendments on a party-line 5-2 vote. (*Id.* at ADAMS_124-125.) The Commission then immediately voted to adopt President Huffman's proposal, on a party-line 5-2 vote. (*Id.* at ADAMS_125-126.)

Secretary of State Frank LaRose is now moving forward with implementing the new gerrymandered plan. (*See* ADAMS_130-132 (Secretary of State's Directive 2022-27).) On March 2, 2022, the same day the plan was passed, Secretary LaRose sent a memo to "County Boards of Elections Board Members, Directors, and Deputy Directors" ordering them to "immediately begin the process of reprogramming their voter registration systems based on the March 2, 2022 congressional district maps" and certify partisan candidate petitions by March 14, 2022. *Id.* Furthermore, Secretary LaRose has required that all declarations of candidacy to appear on the ballot for the U.S. House of

Representatives be submitted by 4:00 p.m. on March 4, 2022. *Id.*

D. The March 2 Plan is a partisan gerrymander and partisan outlier.

Like the November 20 Plan, the March 2 Plan is an extreme partisan outlier that unduly favors the Republican Party and disfavors the Democratic Party.

1. The March 2 Plan excessively advantages the Republican Party and its incumbents.

Democrats have received about 47% and Republicans about 53% of the statewide vote share in recent years (2016-2020). (Affidavit of Dr. Jonathan Rodden at ¶ 12 (March 4, 2022) ("Rodden Aff.").) The March 2 Plan comes nowhere near to approximating this partisan split. (*Id.* at ¶ 23.) It, like the plan before, starkly advantages Republicans.

Dr. Jonathan Rodden concludes that the March 2 Plan is likely to award Republicans *at least* 11 (or 73%) of Ohio's 15 congressional seats. (*Id.*) The March 2 Plan creates only three seats with Democratic majorities greater than 52% (indeed, one of those is at just 52.15%), and it creates two seats with bare Democratic majorities of 50.23% and 51.04%. (ADAMS_127 (Statistics for March 2, 2022 Congressional Plan); Rodden Aff. at ¶ 14.) Even if one were to assume that Democrats are likely to win the seat indexed at 52.15% and to win one of the two razor-thin toss-up seats—a highly optimistic outcome for Democrats—Democrats can anticipate winning only four, or a mere 27%, of the state's congressional seats. (Rodden Aff. at ¶ 20.) Again, this is despite a statewide vote share of 47%—a full 20 percentage points greater than the share of congressional seats they would realistically be able to achieve under the March 2 Plan.

In addition, while most of the Democratic-leaning seats are barely Democratic, the Republican-leaning seats are all highly Republican. None of the ten Republican-leaning seats in the new plan has a Republican majority in the 50-52% vote share range. The most "competitive" Republican-leaning seat still gives Republicans a 53.3% expected vote share. (*See id.* at ¶ 26.) The

advantage that this gives Republican candidates—even before one considers incumbency effects—is dramatic. Even if Democrats won 50% of the statewide vote—which would be 3% more than their average performance over the last three election cycles—they would win, at most, five of the state's 15 seats, and not pick up *any* of the Republican-leaning seats. (*Id.* at ¶ 27.). Yet, if Republicans were to experience an equivalent shift of 3% above their average performance in the same last three election cycles, and win 56% of the statewide vote, they would win 13 of the state's 15 seats, a total of approximately 87% of Ohio's congressional delegation. (*Id.* at ¶ 28.) The Commission's manipulation of competitive seats to create a durable ceiling on Democrats' ability to translate votes into political power evinces highly unequal treatment of Ohio's two major parties. Partisan metrics confirm this: the March 2 Plan has an efficiency gap of 10%—much higher than the alternative plans that Dr. Rodden considered—and an electoral bias measure of around 17%—exactly the same as that in the November 20 Plan. (*Id.* at ¶ 47-48.)

The Republican partisan advantage is even starker in the treatment of incumbent candidates. Much like the November 20 Plan, Republican incumbents largely continue to enjoy Republican majorities in their districts based on the electoral data described above. Of the 12 Republican incumbents that held seats under the 2011 plan, one is not running for re-election, ten are still in safe Republican seats, and only one (Congressman Chabot) is in a nominally Democratic-leaning district. (*Id.* at ¶ 31.) As Dr. Rodden notes, even Congressman Chabot's seat is safer for Republicans than it appears: he consistently out-performs the statewide Republicans running in his district and has a four-point incumbency advantage (*Id.* at ¶ 15.) Given that his district under the March 2 Plan retains about 70 percent of its population under the 2011 plan, Congressman Chabot is still likely to win re-election (*Id.*). The story is entirely different for Democratic incumbents. Of the four congressional incumbents, only two reside in safe Democratic

districts, and the other two live in dramatically reconfigured ones. Congressman Ryan (who is running for Senate) is placed in a safely Republican district already held by a Republican incumbent. (*Id.* at ¶ 32.) And Congresswoman Kaptur is placed in a district with a bare Democratic-majority with only about half of the population from her previous district. (*Id.* at ¶ 16.)

2. Neither the technical-line drawing requirements of Article XIX nor Ohio's political geography explain the extreme Republican skew of the March 2 Plan.

The Court is already familiar with the 1,000 computer-simulated congressional plans generated by Dr. Jowei Chen using the non-partisan criteria specified by the Ohio Constitution, including equal population, contiguity, and minimizing splits of political subdivisions. (*See* Aff. of Dr. Jowei Chen ¶ 11-12, 14. (Dec. 10, 2021).) As Dr. Chen has explained, these simulations "fully account for Ohio's unique political geography, its political subdivision boundaries, and its unique constitutional districting requirements." (*Id.* at ¶ 94.) They were *not* programmed to achieve any partisan outcome. (*Id.* at ¶ 14.) Dr. Chen previously used this "districting simulation analysis" "to identify how much of the electoral bias in [the November 20 Plan] is caused by Ohio's political geography and how much is caused by the map-drawer's intentional efforts to favor one political party over the other." (*Id.* at ¶ 95.)[5]

Dr. Chen has now had the opportunity to examine the March 2 Plan using the same analysis and found that, like the November 20 Plan, the new plan "is an extreme partisan outlier, both at the statewide level and with respect to the partisan characteristics of its individual districts." (Affidavit of Dr. Jowei Chen ¶ 3 (Mar. 4, 2022) ("Chen Aff.").) The point is made most clearly by a comparison of the district-level partisan vote share of the March 2 Plan's districts and the

[5] The block assignment files of each of Dr. Chen's 1,000 simulated congressional plans were provided to the Court and Respondents on December 10, 2021. *See* Affidavit of Derek S. Clinger ¶ 15 (Dec. 10, 2021).

corresponding districts in the computer-simulated plans. Similar to its predecessor, the March 2 Plan packs Democratic voters into a small number of districts, thereby improving Republican performance in other districts. The most Democratic district in the March 2 Plan, District 11, is more heavily Democratic than ***98.8%*** of the most-Democratic districts in each of the 1,000 computer-simulated plans. (*Id.* at ¶ 14.) District 11 achieves this by packing Democratic voters in the Cleveland area to a more extreme extent than nearly all of the computer-simulated plans. Similarly, the second-most Democratic district in the March 2 Plan, District 3, is more heavily Democratic than ***90.4%*** of the second-most Democratic districts in each of the 1,000 computer-simulated plans. (*Id.* at ¶ 15.) District 3 packs Democratic voters in the Columbus area, making it a more Democratic district than the second-most Democratic district in the vast majority of the computer-simulated plans. Meanwhile, the March 2 Plan's most Republican district, District 2, is *less* heavily Republican than ***90.1%*** of the most Republican districts in each of the 1,000 computer-simulated plans. (*Id.* at ¶ 16.) Dr. Chen explains that these partisan characteristics "are consistent with an effort to favor the Republican party by packing Democratic voters into a small number of districts that very heavily favor the Democratic party." (*Id.* ¶ 11.)

As Dr. Chen explains, the three districts described above (Districts 11, 3, and 2) contain more Democratic voters than the vast majority of their counterparts in the 1,000 computer-simulated plans. (*Id.* at ¶ 17.) By placing "extra" Democratic voters in the three most partisan-extreme districts, the map-drawers of the March 2 Plan allocated fewer Democratic voters to other districts, thus improving likely Republican performance in those other areas. (*Id.*) Indeed, four districts in the March 2 Plan have a Republican vote share that is higher than over ***95%*** of their counterpart districts in the computer-simulated plans, demonstrating that packing Democrats into the three abovementioned districts allowed for the emergence of four unusually safe Republican

districts. (*Id.* at ¶ 17-23.) Like the November 20 Plan, the March 2 Plan is a partisan outlier that packs Democratic voters into a small number of districts to maximize Republican performance in the remaining districts. The March 2 Plan favors the Republican Party in a manner and to an extent that is unexplainable by Ohio's political geography.

The March 2 Plan is also a statistical outlier in terms of the number of districts it creates that are safely Republican versus safely Democratic. Using the definition of competitiveness articulated by the Commission during the passage of the November 20 Plan, Dr. Chen found that the March 2 Plan contains nine safe Republican seats, one *more* than the November 20 Plan. (*Id.* ¶ 25, 27.) The March 2 Plan also contains more safe Republican seats than 97% of the 1,000 computer-simulated plans. (*Id.* ¶ 31.) Moreover, it contains only two safe Democratic seats, the same number as the November 20 Plan and fewer than 95.1% of the computer-simulated plans. (*Id.* ¶ 28, 30.)

Finally, the March 2 Plan is a statistical outlier in terms of its compactness. Dr. Chen noted that every single one of the 1,000 computer-simulated plans had a greater average Polsby-Popper score and a greater Reock score[6] than the March 2 Plan. Thus, the plan "is significantly less compact . . . than what could reasonably have been expected from a districting process adhering to the Ohio Constitution's requirements." (*Id.* at ¶ 36-37.)

3. The March 2 Plan's treatment of Ohio's urban areas needlessly splits communities and starkly disadvantages Democrats, to the benefit of Republicans.

Like the November 20 Plan, the March 2 Plan prevents the emergence of Democratic-majority districts by needlessly splitting communities and subordinating traditional redistricting

[6] Polsby-Popper and Reock are widely accepted measurements for measuring district compactness. Higher Polsby-Popper scores or higher Reock scores suggest higher compactness. (Rodden Aff. ¶ 38).

principles, particularly in metropolitan areas, which tend to favor Democrats. For example, in Hamilton County, the March 2 Plan separates the city of Cincinnati from its northern suburbs, instead combining the city of Cincinnati with rural white areas in Warren County that tend to favor candidates of the opposite party. That maneuver ensures that District 1 is attainable by Republicans.

Likewise, in Franklin County, the March 2 Plan packs the most Democratic part of Columbus into District 3 and submerges other Democratic-leaning parts of the city and suburbs in a safe Republican-leaning District 15 that includes the most rural, Republican communities in west-central Ohio. The Court can in fact see this for itself: downtown Columbus, where this Court sits, is in the same congressional district as half of Shelby County, almost 100 miles away. Given this geography, it should not be surprising to learn that District 15 is extremely noncompact compared to Columbus-area districts in alternative plans that were before the Commission.

The configuration of Cuyahoga County in the March 2 Plan follows this same pattern. The most Democratic communities in the Cleveland area are packed into District 11, while Democratic-leaning suburbs are split off and combined with rural areas in the south to produce a safely Republican District 7. Similarly, the March 2 Plan extracts Lorain County from its surrounding environment altogether, combining it not with District 9 in the northwest nor with the Cleveland suburbs, but instead with rural counties reaching all the way to the western border of the state. The resulting non-compact districts are again evidence of partisan advantage.

Dr. Chen's simulations analysis confirms Dr. Rodden's qualitative analysis. Dr. Chen found that the March 2 Plan's districts in Franklin, Cuyahoga, and Hamilton Counties "are outliers in terms of compactness and partisanship, in ways that systematically favor the Republican Party." (Chen Aff. ¶ 32.) He explained that those districts "exhibit more favorable partisan characteristics

for the Republican Party than the vast majority of districts covering the same local areas in the 1,000 computer-simulated plans." (*Id.* at ¶ 33.)

In Franklin County, Dr. Chen finds that the March 2 Plan's "two Columbus-area districts are clearly more favorable to Republicans than the two Columbus-area districts in the vast majority of the simulated plans." (*Id.* at ¶ 43.) He explains that District 3, "which contains most of Columbus' population, is more heavily Democratic than 89.6% of the 1,000 simulated plans' districts with the most Columbus population." (*Id.* at ¶ 43.) As a result, District 15, "which contains the second-most of Columbus' population, is more heavily Republican than ***99.4%*** of the simulated plans' districts with the second-most Columbus population." (*Id.* at ¶ 43 (emphasis added).) Moreover, the March 2 Plan's District 15 "is less geographically compact than nearly every computer-simulated district containing the second-most of Columbus' population." (*Id.* at ¶ 46.) Dr. Chen concludes the March 2 Plan's "Columbus-area districts were drawn in order to create a more Republican-favorable outcome than would normally emerge from a districting process following the Ohio Constitution's Article XIX requirements." (*Id.* at ¶ 45.) This outcome was achieved "by sacrificing the geographic compactness of" District 15. (*Id.* at. ¶ 46.)

In Hamilton County, the March 2 Plan's Cincinnati-based district, District 1, has a higher Republican vote share than over 84.2% of the simulated districts containing Cincinnati. (*Id.* at ¶ 51.) Dr. Chen explains that District 1 "achieves this unnaturally high Republican vote share by . . . connecting Warren County with the fragmented portion of Hamilton County containing Cincinnati." (*Id.* at ¶ 51-52.) This "increas[es] the Republican vote share of [District 1] to a significantly higher level than if the Cincinnati-based district had been drawn entirely within Hamilton County." (*Id.* at ¶ 51.) Dr. Chen explains that District 1 is less compact than the vast majority of simulated districts: it has "a lower Polsby-Popper score than 96.9% of the simulated

districts containing Cincinnati." (*Id.* at ¶ 52.) Thus, "by subordinating geographic compactness, the [March 2 Plan] created a Cincinnati-based district that was more favorable to the Republican Party" than the vast majority of simulated plans. (*Id.*)

Finally, in Cuyahoga County, the March 2 Plan's "districts are clearly more favorable to Republicans than the two Cuyahoga-based districts in the vast majority of the simulated plans." (*Id.* at ¶ 57). District 11, which contains Cleveland, "is more heavily Democratic than 98.8% of the 1,000 simulated plans' Cleveland-based districts. Consequently, [District 7], which contains the second-most of Cuyahoga's population, is more heavily Republican than all 100% of the simulated plans' districts with the second-most Cuyahoga population." (*Id.*) "In other words, every one of the 1,000 simulated plans contains one safe Democratic district based in Cleveland, as well as a second Cuyahoga-based district that is electorally competitive or Democratic leaning." (*Id.* at ¶ 58.) But the March 2 Plan packs Democratic voters into District 11 in order to increase the Republican vote share of District 7, making it safely Republican. (*Id.*). As with the other urban areas, both District 11 and District 7 are "significantly less geographically compact than the vast majority of their geographically analogous districts in the simulated plans." (*Id.* at ¶ 59.) Dr. Chen therefore concludes that the March 2 Plan's "Cuyahoga County-area districts were collectively drawn in a manner that favors the Republican Party by subordinating geographic compactness." (*Id.* at ¶ 61.)

III. Argument

The March 2 Plan violates Article XIX of the Ohio Constitution and this Court's January 14, 2022 order. It was based on its invalidated predecessor, with only modest changes. And, like that predecessor, it once again unduly favors the Republican Party and its incumbents and unduly splits governmental units. The Court found that partisan bias infused the November 20 Plan and

struck it down in its entirety. In response, the Commission tinkered with the November 20 Plan around the margins; a characterization they do not dispute but, rather, embrace.

In fact, Republican Commissioners have stated on the record—and will likely argue before this Court—that Section 1(C)'s anti-gerrymandering requirements (and thus by implication this Court's opinion interpreting and applying those requirements) are irrelevant. In their view, those requirements apply only to the General Assembly; the Commission is now liberated to adopt a gerrymandered map by a simple majority.

This interpretation of Article XIX—which does violence to its text, structure, and history—ignores that this Court ordered "both the General Assembly, and the reconstituted Commission, should that be necessary . . . to draw a map that comports with the *directives of this opinion*." *Adams* at ¶ 99 (emphasis in original). The Commission's failure to set its compass to the Court's order leaves it to this Court to set things straight.

A. Proposition of Law 1: The Commission was bound by this Court's previous order and simply chose to ignore it.

The March 2 Plan is invalid because it violates an order of this Court. When this Court issues an order, the order binds all parties before the Court, as well as any person acting in concert with them. Civ. R. 65 ("Every order granting an injunction . . . is binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order whether by personal service or otherwise."). The Court also has power to enforce its orders against nonparties. Ohio Civ. R. 71 ("when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party"). In striking down the invalidated November 20 Plan, this Court stated in no uncertain terms that "the partisan gerrymandering used to generate the [November 20] plan, through undue party favoritism and/or

undue governmental-unit splits, extends from one end of the state to the other. . . . We therefore see no recourse but to invalidate the entire congressional-district plan." *Adams* at ¶ 96. The Court ordered "the General Assembly to pass a new congressional-district plan, as Article XIX, Section 3(B)(1) requires, that complies in full with Article XIX of the Ohio Constitution and is not dictated by partisan considerations." *Id.* at ¶ 102. Equally clear was the Court's instruction that both the General Assembly *and*, if necessary, the Commission comply with its order: "By the plain language of Article XIX, Section 3(B), both the General Assembly and the reconstituted commission, should that be necessary, are mandated to draw a map that comports with the *directives of this opinion*." *Id.* at ¶ 99 (emphasis in original).

By President Huffman's own admission, Republican mapmakers did not start with a new plan, but instead made small changes to the November 20 Plan. Defending this decision, President Huffman explained that, under Section 3(B), the Commission was required to make "no other changes" beyond the "legal defects in the previous plan identified by the court." But this Court invalidated the *entire* November 20 Plan. In doing so, it recognized that, "in some circumstances, congressional plans that contain isolated defects may be subject to remediation simply by correcting the defects in the affected district or districts," but *in this case*, the plan contained "systemic flaws" that "def[y] correction on a simple district-by-district basis," leaving the Court "no recourse but to invalidate the entire congressional-district plan." *Id.* at ¶ 95-96.

The Commission's small-adjustment approach was in direct violation of the Court's order. *Compare with LWV II* at ¶ 34-35 (noting, in striking down remedial General Assembly Plan as partisan gerrymander, "[w]e made clear [in *League of Women Voters of Ohio v. Ohio Redistricting Comm.* ("*LWV I*"), Slip Opinion No. 2022-Ohio-65] that we were invalidating the original plan, in its entirety, under Section 9(B). Yet the commission did not adopt an entirely new plan."). The

March 2 Plan is therefore invalid.

In light of President Huffman's remarks at the Commission's March 2 meeting, it is likely the Commission will attempt to defend its decision to adopt a plan that flagrantly violates this Court's January 14 order by claiming that they are free to ignore this Court. The argument goes like this: because the undue-partisanship and undue-splits requirements are listed only in in Section 1, they cannot bind the General Assembly during the remedial stage under Section 3(B)(1) or the Commission during the remedial stage under Section 3(B)(2), and the Commission is therefore free to seek undue partisan advantage in congressional maps to its heart's delight. The Commission has, in various ways, through months of litigation, sought to aggrandize to itself the power to partisan gerrymander—a power that the people of Ohio, in passing Article XI and Article XIX, took away. This novel reading of Article XIX is more of the same. It is impossible to square with the provision's text, structure, and history.

First, the argument ignores the plain meaning of the remedial process prescribed under Section 3:

> In the event that . . . any congressional district plan, or any congressional district or group of congressional districts is challenged and is determined to be invalid by an unappealed final order of a court of competent jurisdiction then, notwithstanding any other provisions of this constitution, the general assembly shall pass a congressional district plan in accordance with the provisions of this constitution that are then valid, to be used until the next time for redistricting under this article in accordance with the provisions of this constitution that are then valid.

Ohio Constitution, Article XIX, Section 3(B)(1). If the General Assembly cannot pass a new plan within thirty days of the order, the Commission is to be reconstituted to pass a plan within the next thirty days. *Id.* at Section 3(B)(2). It is under this provision that the Commission passed the March 2 Plan. The Commission is reconstituted for the sole purpose of passing a plan that "remed[ies]

legal defects in the previous plan identified by the court"; it cannot make "changes to the previous plan other than those made in order to remedy those defects." *Id.* at Section 3(B)(1). Again, the "legal defects" identified by the Court were the plan's undue partisan favoritism and undue splitting of political subdivisions. *Adams* at ¶ 41, 77. When the Commission reconvened to pass a remedial plan, it was required to remedy "those defects;" it was not free to unilaterally substitute its judgment for the Court's judgment as to the defects in the plan, nor was it suddenly unshackled from the anti-gerrymandering requirements of the Constitution that resulted in the invalidation of the original plan.

Huffman's reading of Article XIX is also at odds with its structure. Section 1 prescribes a sequenced redistricting process that passes between the General Assembly and Commission between September and November in every year ending in one. In September, the General Assembly may pass a plan, but it must have bipartisan support. Article XIX, Section 1(A). In October, the process moves to the Commission, who may also only act with bipartisan support. *Id.* at Section 1(B). Finally, in November, the process moves to the General Assembly, who may only pass a ten-year plan with bipartisan support (albeit at a lower level than what is required in September). *Id.* at Section 1(C). It may also pass a four-year plan with a simple majority, but this plan is subject to "strict anti-gerrymandering requirements." (Huffman et. al, Statement in Support of Issue 1 (2018), Compl. Ex. 16); Article XIX, Section 1(C)(3). This structure allows a redistricting authority to take one of two routes (depending on the month and the authority): (1) pass a plan with bipartisan support; or (2) pass a simple-majority plan that is subject to additional guardrails to ensure partisan fairness and preclude undue political subdivision splits. Nowhere does Article XIX authorize either the Commission or the General Assembly to have its cake and eat it too: a body cannot pass a simple-majority map that is not subject to anti-gerrymandering

requirements.

Canons of construction similarly render this interpretation untenable. First, it would render the anti-gerrymandering requirements surplusage. "[N]o part of the Constitution 'should be treated as superfluous unless that is manifestly required' . . . [this Court] should avoid any construction that makes a provision 'meaningless or inoperative.'" *LWV I* at ¶ 94. In *LWV I*, Respondents advanced an argument quite similar to the one they are likely to advance here. They argued that this Court lacked jurisdiction to review a state legislative plan's compliance with the anti-gerrymandering requirements of Article XI, Section 6, outside of very narrow circumstances. *Id.* at ¶ 92. The Court rejected this argument, in part because the interpretation would effectively render Section 6 inoperative by preventing the Court's review of the Commission's compliance with a mandatory provision. *See id.* at ¶ 94. So too here: if the Commission is free to ignore the Section 1(C) requirements after this Court has struck down a plan, then those requirements are a dead letter. And the resulting reality would be absurd: it would permit the General Assembly to pass a blatant partisan gerrymander in November, have it struck down in January, stall through February, and then the Commission could reconvene in March and repass the same gerrymander without this Court being able to say a word about it. *See State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382, 384, 481 N.E.2d 632 (1985) ("It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences.").

Such a reading of Section 1(C) would also be at odds with this Court's previous opinion, *see Adams* at ¶ 34 ("[C]ontrary to what Senate President Huffman and House Speaker Cupp argue, Ohio voters intended that the anti-gerrymandering requirements in Article XIX, Section 1(C)(3) have teeth."), and the expressed intent of the voters who approved Article XIX. (Huffman et al., Statement in Support of Issue 1 (2018), Compl. Ex. 16) ("Voting YES on Issue 1 will establish

fair standards for drawing congressional districts through its requirement of bipartisan approval, or use of strict anti-gerrymandering criteria.").

Finally, the fact that election-related deadlines are approaching is irrelevant. At the March 2 hearing, President Huffman suggested that the Commission was free to pass a gerrymandered map at this stage because too much time has elapsed, and a map must be adopted before the candidate filing deadline. This argument fails for several reasons. First, nothing in the text of Article XIX suggests that its requirements give way to accommodate election deadlines. *See State v. Billotto*, 104 Ohio St. 13, 135 N.E. 285, 286 (1922) ("The people in their paramount law, the Constitution, having made provision as to former jeopardy, neither the Legislature, nor a court, nor any other agency of government, has any right to add to or subtract from the plain and usual meaning of the constitutional provision."). Second, election deadlines are set by statute, not the Constitution; if the General Assembly (or, for that matter, this Court) wishes to move them, it is free to do so. The Constitution, on the other hand, is the supreme law of this state. *See State ex rel. Ohio Gen Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, ¶ 30 ("Our analysis begins and ends with the Ohio Constitution, our state's most fundamental law.") (Cupp, J.); *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 99 N.E. 1078, 1079 (1912) ("There can be no honest controversy but that the written constitution of the state is the paramount law, and while courts are required to accept the law as given them by the lawmaking power of the state, yet when that law is clearly in conflict with the constitution under authority of which it was enacted, it is the duty of the court to sustain the paramount law and refuse to enforce any and all legislation in contravention thereof."). President Huffman's rewriting of Article XIX would reverse this principle and have these constitutional requirements bend to statutory deadlines. Third, as discussed in Petitioners' merits brief, the history of Article XIX shows that the voters of Ohio

adopted the new provision to stop the gerrymandering of congressional maps, full stop. Adams Pet'r's Merits Brief at 6-8. They did not, as President Huffman's interpretation would suggest, seek to stop partisan gerrymandering only up to the point where the General Assembly and Commission delay long enough to cry administrative convenience.

Under Article XIX, the Commission was required on remand to draw a map that complied with the partisan fairness and splits requirements of Section 1(C)(3). Because the November 20 Plan's constitutional deficiencies "extend[ed] from one end of the state of the other" the Commission was required to draw a new map as well. The Commission did neither. Instead, as discussed below, the Commission's recent plan once again unduly favors Republicans and Republican incumbents and unduly splits governmental units.

B. Proposition of Law 2: The March 2 plan is nearly identical to the invalidated November 20 Plan, and similarly unduly favors Republicans and Republican incumbents.

The March 2 Plan violates Section 1(C)(3)(a)'s prohibition of undue partisanship for much the same reason as the November 20 Plan. This is unsurprising: the plans are nearly identical. As this Court explained in its prior opinion, "Section 1(C)(3)(a) prohibits the General Assembly from passing by a simple majority a plan that favors or disfavors a political party or its incumbents to a degree that is in excess of, or unwarranted by, the application of Section 2's and Section 1(C)(3)(c)'s specific line-drawing requirements to Ohio's natural political geography." *Adams* at ¶ 40. Applying this standard, the Court found that the evidence before it "compelled beyond any reasonable doubt the conclusion that [the November 20 Plan] excessively and unwarrantedly favors the Republican Party and disfavors the Democratic Party." *Id.* at ¶ 51. The March 2 Plan is more of the same.

First, the March 2 Plan is once again grossly out-of-sync with the statewide preferences of Ohio voters. While proportionality is not the sine qua non of partisan fairness under Section

1(C)(3)(a)'s partisan fairness requirement, this Court does not "simply ignore a gross departure from proportionality" in conducting its analysis. *Adams* at ¶ 103 (O'Connor, C.J., concurring). In statewide partisan elections from 2016-2020, Republicans have received about 53% of the vote on average. (Rodden Aff. at ¶ 12.) *See* March 2 Commission Data (reporting partisan seat share using same 2016-2020 statewide index that Dr. Rodden and Dr. Chen use in their analysis); *Adams* at ¶ 67 (crediting Dr. Rodden's and Dr. Chen's analysis using the 2016-2020 data set). The March 2 Plan, however, awards Republicans anywhere from 67% to 87% of the seats. (*Id.* ¶ 23, 37-28.) This disparity between statewide vote share and congressional seat share is astounding.

Although the Commission nominally improved the seat allocation of the congressional plan, it did so by slightly shifting the lines of two previously Republican-leaning seats to make them nominally Democratic-leaning competitive toss-up seats—one with a popular Republican incumbent. In the March 2 Plan, three out of the five "Democratic-leaning" seats favor Democrats by less than 52.15%, by the Commission's own account. (ADAMS_127 (Statistics for March 2, 2022 Congressional Plan) (reporting seats with 52.15%, 51.04%, and 50.23% Democratic vote shares).) In stark juxtaposition, *zero* of the ten Republican-leaning seats favor Republicans by less than 53.32%. In drawing this asymmetrical map, the Commission took a page directly from its failed General Assembly districting playbook. *LWV II* at ¶ 37 (describing approach of "switching competitive Republican-leaning districts to competitive Democratic-leaning districts"). This Court has already found that this ploy is evidence of unconstitutional partisan favoritism. *LWV II* at ¶ 40 ("The commission's adoption of a plan that absurdly labels what are by any definition 'competitive' or 'toss-up' districts as 'Democratic-leaning'—at least when the plan contains no proportional share of similar 'Republican-leaning' districts—is demonstrative of an intent to favor the Republican Party.")

As explained above, *see supra* Part II.D, the slight adjustment of district lines from the November 20 Plan to the March 2 Plan did nothing to mitigate the extreme partisan advantage to the Republican Party and its incumbents. And critical to this Court's analysis, the bias of the March 2 Plan is unexplainable by any neutral factors, such as compliance with the remainder of Article XIX or Ohio's political geography. *See Adams* at ¶ 40 ("[Section 1(C)(3)(a)] does bar plans that embody partisan . . . favoritism not warranted by legitimate, neutral criteria."). As Dr. Chen outlines in his report, the March 2 Plan is an extreme partisan outlier, both at a statewide level and with respect to the partisan characteristics of individual districts. (Chen Aff. ¶ 3.)

This Court also credited Dr. Rodden's and Dr. Chen's previous analyses "showing how the enacted plan's treatment of certain urban counties unduly favors the Republican Party and disfavors the Democratic Party." *Adams* at ¶ 52. Again, here, Dr. Rodden lays out all the ways in which the March 2 Plan dilutes Democratic votes around cities, often cracking communities of color and submerging them in overwhelmingly white, Republican districts. (*See, e.g.*, Rodden Aff. ¶ 33-46.) Those case studies exemplify that the March 2 Plan's supermajority Republican advantage is in spite of, and not because of, natural groupings of precincts and communities of interest. Dr. Chen, too, shows that the urban districts in the March 2 Plan are more favorable to Republicans than comparable districts in the vast majority of his 1,000 simulated plans. (*See* Chen Aff. ¶ 32-61.)

Both Dr. Chen and Dr. Rodden explain that the partisan skew of the March 2 Plan again *cannot* be explained by geography or compliance with the rest of Article XIX. (Chen Aff. ¶ 62-65; Rodden Aff. ¶ 5, 49.) Rather, if one follows the geographic-based line-drawing requirements set out in Article XIX and avoids drawing contorted district boundaries, the result comes nowhere near the Republican advantage in the March 2 Plan. (Chen Aff. ¶ 64-65; *see also* Rodden Aff. ¶

5.)

Finally, the process used to generate the March 2 Plan itself evidences partisan bias and intent. The General Assembly seemingly took no action to even attempt to draw a plan itself because it was unwilling to attempt to reach the bipartisan agreement that would be necessary to pass emergency legislation. *See supra* Part II.B.

Then the Commission took up the baton. As described above, the Commission did not take public feedback into account, despite putting up the charade of inviting testimony—just not after the majority Commissioners unveiled the March 2 Plan. Likewise, after releasing a near-final map the day before the final vote, no modifications were made in response to the Democratic Commissioners' concerns or suggestions; instead, one of the only changes it made in the final 24 hours was in response to feedback from a Republican member of Congress, for whom the Commission shifted lines to ensure that he was not double-bunked with a Democratic incumbent. (*See* ADAMS_116 (Transcript of the Ohio Redistricting Commission's March 2, 2022 meeting).) The Commission's decision to flout the order of this Court and use the invalidated November 20 Plan as the basis for its new plan also shows an unwarranted degree of partisan favoritism. As this Court found in the analogous context of General Assembly redistricting: "We clearly invalidated the entire original plan in [*LWV I*]. The commission's choice to nevertheless start with that plan and change it as little as possible is tantamount to an intent to preserve as much partisan favoritism as could be salvaged from the invalidated plan." *LWV II* at ¶ 38. Likewise, here, the Commission opted to keep most of the November 20 Plan intact.

C. Proposition of Law 3: The Commission's revised plan again unduly splits governmental units.

The March 2 Plan once again unduly splits governmental units. Article XIX Section 1(C)(3)(b) prohibits a congressional plan from "unduly split[ting] governmental units, giving

preference to keeping whole, in the order named, counties, then townships and municipal corporations." This Court previously found that the November 20 Plan unduly split urban counties throughout the state. *Adams* at ¶ 77. While the Commission purported to cure constitutional defects in the November 20 Plan by lowering the *number* of splits to urban areas, it regurgitates the same *pattern* of partisan splitting as the previous plan. As this Court has previously explained, "the splitting of a governmental unit may be 'undue' if it is excessive or unwarranted. A split may be unwarranted if it cannot be explained by any neutral redistricting criteria but instead confers a partisan advantage on the party that drew the map—regardless of whether the plan complies with Article XIX, Section 2(B)." *Adams* at ¶ 83.

Certain of the March 2 Plan's splits continue to defy explanation by any neutral criteria. For example, in Hamilton County, the March 2 Plan nominally improves upon the November 2 Plan by lowering the number of districts branching out of Hamilton County from three to two. Good. But the point remains that it is possible to draw a highly compact Cincinnati-based district that is fully contained within Hamilton County; it was therefore possible to split Hamilton County with only one district (as was seen in several maps submitted to the Commission).

While the *number* of splits in Hamilton County may not show a violation in-and-of-itself, the question remains *why* Hamilton County is split the way that it is. And there is no neutral explanation for the bizarre districts before the Court.

District 1 once again pairs its urban core of Cincinnati proper with rural, Republican Warren County by way of a narrow corridor through northeast Hamilton County. There is no reason to do this, except to ensure the district is as Republican-leaning as possible without splitting Hamilton County between more than two districts. Another parallel between the invalidated November 20 Plan and the March 2 Plan is its decision to pair the primarily Black suburbs to the

north of Cincinnati with white rural counties to the north of Hamilton County. Again, no valid explanation exists for this separation of Cincinnati from its immediate suburbs, or the pairing of both primarily Democratic areas with rural counties. Neither of these issues should come as a surprise to the Commission: the Court noted substantially similar (and unwarranted) pairings in the November 20 Plan when it struck down that plan for unduly splitting Hamilton County. *See Adams* at ¶ 86. Undeterred, the Commission has repackaged this strategy with two districts instead of three, but has once again offered no explanation for making the pairings beyond a vague allusion to "policy preferences." The March 2 Plan therefore unduly splits counties.

IV. Remedy

As set out above, the Commission ignored this Court's directives and passed another unconstitutional plan. As the Court noted in its opinion, "Gerrymandering is the antithetical perversion of representative democracy. It is an abuse of power—by whichever political party has control to draw geographic boundaries for elected state and congressional offices and engages in that practice—that strategically exaggerates the power of voters who tend to support the favored party while diminishing the power of voters who tend to support the disfavored party." *Adams* at ¶ 2. The Commission has shown, yet again, that it is seeking to create undue partisan advantage for the Republican Party, demonstrating ambivalence, and even contempt, for the anti-gerrymandering provisions of Article XIX. In passing the March 2 Plan, the Commission scarcely pretended that this plan complies with Section 1(C)(3)(a)'s partisan fairness standard. It simply dismissed any responsibility to draw fair maps wholesale.

The Court has many tools at its disposal to fix the problems with the plan that Petitioners have identified above. Its deployment of those tools should be tailored to the task at hand: timely implementation of a constitutionally-compliant congressional plan, notwithstanding certain

Commissioners' decision to play chicken with the looming primary election in service of seeking undue partisan advantage. Specifically, the Court should declare the March 2 Plan unconstitutional, enjoin further implementation of the plan, postpone election deadlines as necessary, and implement a new congressional map that comports with Article XIX.

A. The power of the Court to enforce its January 14 Order is clear and required to protect the rights of all Ohioans to constitutional congressional districts.

The Court has ample authority to enforce its January 14 order by invalidating the Commission's congressional-district plan and ordering any of the remedies suggested herein. For one, it is well-established in Ohio that courts have inherent authority enforce their orders. *See Infinite Sec. Solutions, LLC v. Karam Props. II,* 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 27 citing *Rieser v. Rieser*, 191 Ohio App.3d 616, 2010-Ohio-6227, 947 N.E.2d 222, ¶ 5 (2d Dist.); *In re Whallon* 6 Ohio App. 80, 83, 25 Ohio C.A. 167, 26 Ohio C.C. (n.s.) 167 (1st Dist. 1915) ("Courts have inherent authority to enforce their final judgments and decrees."). Such inherent powers are "necessary to the orderly and efficient exercise of [a court's] jurisdiction." *Hale v. State*, 55 Ohio St. 210, 45 N.E. 199 (1896).

Ohio courts even have the express authority to make and enforce orders against persons or entities that are not parties to an action. This is set forth in Civil Rule 71, which provides, in relevant part, that "when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."[7] This principle applies here to the Commission because, even though it had been dismissed as a party at the beginning of the case, in the Opinion in support of its January 14 order, the Court

[7] An analogous provision in Civ.R. 65(D) applicable to injunctions and restraining orders provides that such an order is "binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order whether by personal service or otherwise."

made clear that the Commission has a duty to draw a congressional-district plan that complies with Article XIX of the Ohio Constitution should the General assembly fail to act:

> By the plain language of Article XIX, Section 3(B), both the General Assembly and the reconstituted commission, should that be necessary, are mandated to draw a map that comports with the *directives of this opinion*.
>
> *Adams* at ¶ 99 (emphasis original).

The Court's authority to order the Commission to comply with the directives of its opinion, including the instruction to adopt a map that is "not dictated by partisan considerations," *Adams* at ¶ 102, is further supported by the undeniable fact that the Commission is in privity with the General Assembly regarding the passage of a remedial congressional-district plan. *See, e.g.*, *State ex rel. Jackson v. Ambrose*, 151 Ohio St.3d 536, 2017-Ohio-8784, 90 N.E.3d 922, ¶ 13 ("A final judgment rendered on the merits by a court of competent jurisdiction is a complete bar to any subsequent action on the same claim between the same parties or those in privity with them."). Under Article XIX, Section 3(B), the Commission and the General Assembly have the joint responsibility to adopt a remedial congressional-district plan following the invalidation of a plan by this Court; per Section 3(B)(1), the General Assembly has the first opportunity pass a remedial plan, and if it fails to do so within 30 days following the Court's decision, the Commission must pass a remedial plan (per Section 3(B)(2)). Such privity also derives from the fact that four of the seven Commission members, a majority, are members of the General Assembly who either appointed themselves to the Commission, pursuant to their authority as leaders of their respective legislative caucus, or were appointed by their legislative caucus's leader. Accordingly, any order to the General Assembly concerning a remedial congressional-district plan would apply with equal force to the Commission and its members. Further, Secretary LaRose, also a member of the Commission, remained as a party in the case since the beginning.

For all of the above reasons, the authority of the Court to take appropriate action to enforce its January 14, 2022 Order and protect the right of all Ohioans to constitutional congressional districts is clear.

B. The Court should declare the plan unconstitutional and enjoin its implementation.

First, this Court should declare the new plan unconstitutional for the reasons described above. *See supra* Part III. The Commission, as well as the General Assembly, is bound by this Court's order to adopt maps that comply with Article XIX, Section 1(C)(3). *Adams* at ¶ 99. As a result, the March 2 Plan should be struck down, and any attempt to implement it should be enjoined. In doing so, this Court should also enjoin Secretary LaRose from directing local election officials to proceed under the March 2 Plan. (*See* ADAMS_130 (Secretary of State's Directive 2022-27).)

C. This Court should postpone upcoming election deadlines.

Second, this Court should postpone relevant election deadlines in light of the upcoming primary election on May 3, 2022. This Court has broad authority to issue orders postponing election deadlines to address the harm that would occur if elections were to proceed under an unconstitutional map. *Hale*, 55 Ohio St. at 213 (explaining that courts have "powers as are necessary to the orderly and efficient exercise of jurisdiction," which also "must be regarded as inherent"). Other state courts have made similar election-schedule modifications in the redistricting context. *See, e.g.*, *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022) (modifying congressional and statewide election calendar due to impasse and noting suspension of state legislative election deadlines until resolution of litigation); Order, *In the Matter of 2022 Legislative Districting of the State*, Misc. Nos. 21, 24, 25, 26, 27 (Md. Feb. 11, 2022) (postponing candidate filing and related deadlines before 2022 primaries); Order, *Harper v. Hall*, No. 413P21 (N.C. Dec. 8, 2021) (postponing 2022 primary filing deadlines before primary);

Mellow v. Mitchell, 530 Pa. 44, 607 A.2d 204, 237, 244 (1992) (revising pre-primary deadlines in similar congressional redistricting impasse case "to provide for an orderly election process"). And the U.S. Supreme Court has authorized federal district courts to do the same. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("[W]e leave it to [the District Court] in the first instance to determine whether to modify its judgment [as to the state's congressional apportionment plan] and reschedule the [congressional] primary elections for Dallas County or . . . to allow the election to go forward in accordance with the present schedule."); *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972) ("If time presses too seriously [to implement a remedial reapportionment plan], the District Court has the power appropriately to extend the [election deadline] time limitations imposed by state law."); *see also Larios v. Cox*, 305 F. Supp. 2d 1335, 1343 (N.D. Ga. 2004) (noting court's power to extend election deadlines and ordering new statewide maps be drawn in time for upcoming primary election).

If the election were to go forward under the March 2 Plan, the harm would be irreparable and acute. Half of the elections held under a "four-year" map would be held under an unconstitutional plan. At the very least, the Court should stay the filing date of March 4, 2022. But if this Court deems it appropriate, or the General Assembly refuses to exercise its own authority to alter the statutorily-set primary date, this Court can and should take further action, including enjoining the May 3, 2022 primary date to ensure that elections do not proceed under an unconstitutional map.

D. This Court should order a new map that does not violate Section 1(C)(3).

Third, this Court has the authority to implement a map that remedies the defects it articulated in its last opinion. While Article XI of the Ohio Constitution provides that "no court shall order" the implementation or adoption of any specific plan for legislative districts, Ohio Constitution Article XI, Section 9(D), Article XIX, which governs congressional redistricting,

does not contain any provision limiting this Court's remedial authority. *See* Article XIX, Section 3. This contrast is particularly telling given that the provision in Article XI was adopted before Article XIX. *Compare* Article XI Section 9 (adopted 2015) *and* Article XIX Section 3 (adopted 2018). The voters who approved Issue 1 (and consequently Article XIX) were aware of Article XI Section 9's limitation on judicial intervention and made a conscious choice to exclude it from the new process for congressional maps. *See City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 28 ("[W]e presume that the voters who approved an amendment were aware of existing Ohio law.").

Familiar principles of interpretation require the Court to give meaning to textual differences such as this. When a drafter includes particular language in one section of a statute, but excludes it in another, it is generally presumed that the drafter acted "intentionally and purposely in the disparate inclusion or exclusion." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1933); *Bates v. United States*, 522 U.S. 23, 29 (1997) (finding that the choice to include the "intent to defraud" language in one provision and exclude it in another was intentional); *Chapman v. United States*, 500 U.S. 453, 459 (1991) (finding that because U.S. sentencing guidelines distinguished between a "mixture or substance" containing a drug and a "pure" drug, it was proper to conclude that Congress's failure to so distinguish with respect to LSD was not inadvertent). A similar negative inference is warranted here.

In fact, Section 3 of the Article, which speaks directly to this Court's jurisdiction, only says that in the event a plan passed by the General Assembly is ruled unconstitutional, the "general assembly shall pass that [remedial] plan not later than… the thirtieth day after the day on which the order is issued." If the general assembly fails, the Commission "shall adopt a congressional district plan" that "remed[ies] any legal defects in the previous plan identified by the court." As

described above, that process has already begun. The General Assembly failed to pass a remedial plan by February 13, 2022, and the Commission was reconstituted with 30 days to pass a constitutional plan of its own. *See supra* Part II.A-C. That period ends on March 16, 2022. By the plain language of Article XIX, Section 3, then, the Commission has only until March 16, 2022 to pass a constitutional plan.

In the event that it misses that deadline, this Court should exercise its own authority to implement a plan that does not violate Section 1(C)(3) to remedy the constitutional violations it has found, and it should do so on March 17. Doing so would not break any new ground. Courts routinely enforce applicable state and federal constitutional provisions by adopting districting plans if the redistricting authority fails to adopt a constitutional plan in time, often by choosing from maps offered by parties in the case. *See Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 72, 399 Wis. 2d 623, 630; *Harper v. Hall*, No. 21 CVS 500085 (North Carolina Superior Court), Order on Remedial Plans (entered February 23, 2022); *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022); *Wattson v. Simon*, No. A21-0243, 2022 WL 456357, at *8 (Minn. Feb. 15, 2022); *see also Branch v. Smith*, 538 U.S. 254, 272 (2003) (explaining that federal law enacted by Congress "embraces action by state and federal courts when the prescribed legislative action has not been forthcoming" and that "when a federal court redistricts a State in a manner that complies with that State's substantive districting principles, it does so" in a manner entirely consistent with the text of the U.S. Constitution); *Growe v. Emison*, 507 U.S. 25, 33 (1993) (finding that the state court's "issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan)" by a date certain was "precisely the sort of state judicial supervision of redistricting [the Court] has encouraged"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a State to require valid reapportionment or to formulate a

valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.").

This Court, too, can order the parties to submit maps and supplemental briefs for consideration within a number of days of its order, such that the Court can review and implement maps in time for the primary date. Petitioners propose five days from the date of an opinion invalidating the March 2 Plan. Should the Court wish to invite the public participation that the Commission has eschewed, it could offer interested amici a chance to participate by proposing their own maps with accompanying briefs. Parties can detail how the maps comply with the provisions of the Article XIX, as well as federal law and traditional redistricting principles. Additionally, should the assistance of a special master be useful to the Court, it could appoint one with expertise in redistricting to aid in its decision. *State ex rel. Allstate Ins. Co. v. Gaul*, 131 Ohio App. 3d 419, 431, 722 N.E.2d 616 (8th Dist. 1999) ("[A]s jurisprudence developed in Ohio, it is clear that the appointment of a special master was inherent in courts of equity and in actions to which the parties were not entitled to a jury.").

V. Conclusion

For the foregoing reasons, Petitioners request that this Court declare the March 2 Plan invalid and order a new congressional plan. Given the filing deadline for congressional candidates, the Court should set forth clear directives for the remedial plan and retain jurisdiction to ensure the remedial plan complies with the Court's directives.

Dated: March 4, 2022

Respectfully submitted,

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I hereby certify that the foregoing was sent via email this 4th day of March, 2022 to the following:

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