

**IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF OHIO EASTERN DIVISION**

MICHAEL GONIDAKIS, MARY
PARKER, MARGARET CONDITT, BETH
VANDERKOOI, LINDA SMITH,
DELBERT DUDUIT, THOMAS W. KIDD
JR., DUCIA HAMM,

Plaintiffs,

BRIA BENNETT, REGINA C. ADAMS,
KATHLEEN M. BRINKMAN, MARTHA
CLARK, SUSANNE L. DYKE, MERYL
NEIMAN, HOLLY OYSTER,
CONSTANCE RUBIN, EVERETT TOTTY,

Intervenor-Plaintiffs,

v.

FRANK LAROSE, in his capacity as Ohio
Secretary of State,

Defendant.

Case No. 2:22-cv-00773

Judge Algenon L. Marbley

Magistrate Judge Elizabeth Preston Deavers

BENNETT PETITIONERS' MOTION TO INTERVENE

Bria Bennett, Regina C. Adams, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Meryl Neiman, Holly Oyster, Constance Rubin, and Everett Totty (the "Bennett Petitioners") hereby move, pursuant to Fed. R. Civ. P. 24, to intervene in the above-captioned matter. Pursuant to Fed. R. Civ. P. 24(c), the attached Memorandum in Support states the grounds for intervention. This Motion is also accompanied by a proposed complaint (Exh. A) and a motion to abstain and stay (Exh. B) to be filed if intervention is granted, as well as a proposed order granting

intervention.

Prior to filing this Motion, counsel for the Bennett Petitioners contacted counsel for the existing Plaintiffs and Defendant in this Case via email to determine whether the parties would consent to or not oppose the Bennett Petitioners' intervention. Counsel for Plaintiffs confirmed receipt of the email but did not indicate whether they would oppose the Bennett Petitioners' intervention at this time. There has been no response from counsel for the Defendant as of this time.

Respectfully submitted,

s/ Donald J. McTigue

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** Motions for admission pro hac vice
forthcoming

Counsel for Bennett Petitioners

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MEMORANDUM IN SUPPORT

This action concerns Ohio's redrawing of districts for its bicameral state legislature, the General Assembly. That process is governed by Article XI of the Ohio Constitution, which bestows on the Ohio Supreme Court exclusive jurisdiction over any disputes arising under that constitutional provision. That process is, as described below, ongoing. The Gonidakis Plaintiffs ask the Court to interject itself, take control of Ohio's redistricting process away from the Ohio Supreme Court and Ohio Redistricting Commission, and order the adoption of a General Assembly plan that the Ohio Supreme Court has already declared invalid under the Ohio Constitution.

Proposed intervenors, the Bennett Petitioners¹, are currently litigating a case before the Ohio Supreme Court concerning the same redistricting process. In Ohio, the redrawing of General Assembly district lines is done by the Ohio Redistricting Commission (the "Commission"). The Commission approved a General Assembly plan on September 16, 2021, and the Bennett Petitioners filed a complaint challenging the plan eight days later. The challenge was successful: the Ohio Supreme Court struck down the plan in January 2022, concluding it violated Article XI of the Ohio Constitution. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, __ Ohio St.3d __, 2022-Ohio-65, 2022 WL 110261, at *28 (Ohio Jan. 12, 2022) ("*LWV I*"). When the Commission passed a remedial plan, the Bennett Petitioners objected, and were again successful: on February 7, 2022, the Ohio Supreme Court (1) struck down the Commission's remedial plan for violating the Ohio Constitution and (2) ordered the Commission to draw a new plan that complied with the state constitution by February 17 and file it with the court the following day. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, __ Ohio St.3d __, 2022-Ohio-342,

¹ In the action now pending before the Ohio Supreme Court, the proposed intervenors here (along with an additional individual voter who joined that suit but is not seeking intervention here) are styled as "petitioners." *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, __ Ohio St.3d __, 2022-Ohio-65, 2022 WL 110261, at *5 n.1 (Ohio Jan. 12, 2022). Accordingly, this motion refers to the proposed intervenors as the "Bennett Petitioners."

2022 WL 354619, at *14 (Ohio Feb. 7, 2022) (“*LWV II*”). This failed “remedial” plan is the very plan the Gonidakis Plaintiffs ask the Court to adopt.

In response to the Ohio Supreme Court’s February 7 order, and in what would appear to be a transparent attempt to lay the groundwork for the Gonidakis Plaintiffs’ lawsuit, the Republican supermajority on the Commission refused to draw new maps, rejected the proposal from the Democratic minority on the Commission, and refused to even consider a constitutional alternative plan proposed by the Bennett Petitioners. While the Commission imperiously styled its decision to refuse to follow the court-ordered deadline as an “impasse,” the Ohio Supreme Court has ordered the Commission, and its members, to “show cause by filing a response with the clerk of this court no later than 12:00 p.m. on February 23, 2022, why [they] should not be found in contempt for failure to comply with this court’s February 7, 2022 order.” Order, *Bennett v. Ohio Redistricting Comm’n*, 02/18/2022 Case Announcements #2, 2022-Ohio-498. In an apparent response to this show-cause order, during a Commission meeting held just a few hours ago, the Commission discussed scheduling an additional meeting as soon as tomorrow, February 23, to discuss further work on a General Assembly plan. Litigation concerning Ohio’s General Assembly plan is therefore actively ongoing before the Ohio Supreme Court and the Commission’s discussions of General Assembly plans are similarly still in progress.

The Bennett Petitioners have significant interests at stake in the case now before this Court. Given the complicated procedural history of the ongoing state court proceedings, the Bennett Petitioners’ present and future interests are also complicated. On the one hand, the Bennett Petitioners seek to “defend” their victory in the Ohio Supreme Court. In particular, the relief sought by the Gonidakis Plaintiffs is the implementation of a Commission plan that the Bennett Petitioners successfully argued was unconstitutional as a matter of Ohio law before the Ohio Supreme Court.

The Bennett Petitioners also have an interest in ensuring that Ohio's new General Assembly districts comply with state and federal law, which would be impaired if this Court orders the implementation of a plan already declared invalid by the Ohio Supreme Court. Any other relief that might be granted in this litigation would also prejudice the Bennett Petitioners' ability to seek relief in the Ohio Supreme Court. Indeed, as set out in the Motion to Abstain and Stay filed herewith, the Bennett Petitioners submit that this Court should duly defer to the ongoing state redistricting process under *Growe v. Emison*, 507 U.S. 25, 34 (1993).

The Bennett Petitioners also have an interest in ensuring that they are able to cast votes in state legislative districts that are properly apportioned and fully compliant with both federal and state law. These are interests that are properly vindicated, at this stage, before the Ohio Supreme Court. But ultimately, the Bennett Petitioners raise claims in this litigation that have common questions of law and fact with those raised by the Gonidakis Plaintiffs, even if this action is a premature attempt to do an end run around the Ohio Supreme Court.

Thus, in the event further action in this lawsuit ultimately is warranted, the Bennett Petitioners allege that the prior General Assembly plan is malapportioned and that, prior to the 2022 election, a General Assembly Plan must be implemented that complies with state and federal law. Accordingly, whether under Fed. R. Civ. P. 24(a) (mandatory intervention) or 24(b) (permissive intervention), intervention on the part of the Bennett Petitioners as intervenor-plaintiffs is proper in this action.²

² For the reasons set out above, the Bennett Petitioners submit that they plainly have protectible interests that warrant intervention under Fed. R. Civ. P. 24, and believe that such intervention is most appropriately construed as intervention as *plaintiffs* rather than *defendants*, as the Bennett Petitioners do not seek to defend the existing malapportionment, but to ensure their rights are protected, should the existing malapportionment ultimately be addressed by this Court. That said, the Bennett Petitioners acknowledge the complicated procedural considerations that have led another group of petitioners from the ongoing state court litigation to style themselves as intervenor-defendants in their own pending motion to intervene. League of Women Voters & A. Philip Randolph Institute of Ohio's Motion to Intervene, ECF No. 3 at 1 (Feb. 20, 2022).

RELEVANT FACTUAL BACKGROUND

I. Prior Litigation

The Commission is responsible for the drawing of General Assembly districts in Ohio following each decennial census. The Commission consists of the Governor, Secretary of State, Auditor of State, and appointees of the state Senate and House leadership for each of the two largest political parties in each chamber of the General Assembly. Ohio Const. Art. XI § 1(A). Data for the 2020 census was released on August 12, 2021. *LWV I*, 2022 WL 110261, at *6. On September 16, 2021, the Commission approved a redistricting plan (“First Commission Plan”) on a party-line, 5-2, vote. *Id.* at *4.

The Bennett Petitioners, a group of voters from throughout the state of Ohio, filed a lawsuit in the Ohio Supreme Court challenging the First Commission Plan on September 24, 2021. *Id.* at *5. The complaint alleged that the First Commission Plan violated Sections 6(A) and 6(B) of Article XI of the Ohio Constitution, which require the Commission to attempt to pass a plan that complies with the following provisions: “(A) No general assembly district plan shall be drawn primarily to favor or disfavor a political party; (B) The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.” On September 29, the Ohio Supreme Court issued a scheduling order requiring the submission of all evidence that the parties intended to use in the action on October 22, merits briefs from Petitioners on October 29, briefs from Respondents on November 5, and replies from Petitioners on November 10. Order, *Bennett v. Ohio Redistricting Commission*, 09/29/2021 Case Announcements #2, 2021-Ohio-3424. The parties then engaged in discovery for the next three weeks, at the end of which they submitted evidence and briefs. Oral argument was held in the case

on December 8. *LWV I*, 2022 WL 110261, at *6.

On January 12, the Ohio Supreme Court issued a decision declaring the First Commission Plan invalid, concluding that it violated both Sections 6(A) and 6(B) of Article XI. *Id.* at *1. The Ohio Supreme Court then ordered the Commission to pass a plan that complied with the Ohio Constitution within ten days, and ordered Petitioners to file any objections to the plan within three days of the new plan's approval by the Commission. *Id.* at *28-29.

On January 22, 2022, the Commission approved another General Assembly plan ("Second Commission Plan"), again on a 5-2 party-line vote. *LWV II*, 2022 WL 354619, at *5. Three days later, the Bennett Petitioners filed their objections in the Ohio Supreme Court, arguing that the Second Commission Plan once again violated Sections 6(A) and 6(B) of Article XI. *Id.* at *1. The Ohio Supreme Court again agreed, and on February 7 issued an opinion declaring the Second Commission Plan invalid under Sections 6(A) and 6(B) and ordering the Commission to adopt a new plan by February 17. *Id.* at *14.

II. The Commission's "Impasse"

After the Ohio Supreme Court's February 7 order, the Commission did not convene until the day of the court's deadline. In the interim, the Republican members of the Commission ignored entreaties by the members of the Democratic minority for the Commission to convene to consider new maps. Josh Rultenberg, Twitter (@JoshRultNews) (Feb. 9, 2022, 4:06 PM), <https://twitter.com/joshrultnews/status/1491518880761757704?s=21>. Finally, on February 15, with two days to go before the court-ordered deadline, Speaker Cupp announced a meeting to take place on the day of the deadline. Ohio Redistricting Comm'n, *Announcement of Commission Meeting* (Feb. 17, 2022), <https://redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-february-17-2022-156/agenda.pdf>. During interviews

with the press, Speaker Cupp said he did not know if Republicans would introduce a proposal of their own at that meeting. Josh Rultenberg, Twitter (@JoshRultNews) (Feb. 15, 2022, 12:51 PM), <https://twitter.com/joshrultnews/status/1491518880761757704?s=21>.

The Commission convened for its first and only meeting following the Court's February 7 order on February 17, the court-ordered deadline for adopting a new plan. The Ohio Channel, *Meeting of the Ohio Redistricting Commission* (Feb. 17, 2022), <https://ohiochannel.org/video/ohio-redistricting-commission-2-17-2022>. The Democratic Commissioners promptly introduced a proposal, which they had publicly released on February 9. *Id.* Next, Republicans Auditor Faber and Senate President Huffman articulated objections to the plan and the Commission voted down the proposal on a 5-2 party line vote. *Id.* Democratic House Minority Leader Allison Russo then made a motion that the Commissioners put their constitutional objections to the plan in writing, a motion that was similarly voted down 5-2. *Id.* After that, Republican Commissioners announced that they had no plan to propose and that the Commission was therefore at an impasse. *Id.*

The morning after disregarding the Ohio Supreme Court's February 17 deadline, the Commission filed a "notice of impasse" in the Ohio Supreme Court, declaring that the Commission was unable to approve a plan by the court-appointed deadline. Shortly thereafter, the Bennett Petitioners filed a motion for an order to the Commission to show cause why it had not complied with the court's order. Later that day, the Ohio Supreme Court sua sponte issued an order for the Commission and its members to show cause why they "should not be found in contempt for failure to comply with this court's February 7, 2022 order." The response to the show-cause order is due at noon on February 23. At a meeting today concerning congressional redistricting, the Commission discussed scheduling a meeting as soon as tomorrow (February 23) to consider

adopting a General Assembly plan.

III. This Litigation

This action was filed on the morning of Friday, February 18, 2022, even before the Commission filed its “notice of impasse.” The complaint alleges that the state process for drafting General Assembly maps is unlikely to come to a “resolution” prior to the scheduled primary election date of May 3, 2022. Compl. ¶¶ 57-62; *see also* Pls.’ First Amended Compl. ¶¶ 59-64.³ The complaint alleges that failure to adopt a plan prior to May 3 will mean that Ohio must either use the previous enacted state House and Senate maps adopted in 2011 (which the complaint alleges are malapportioned) or no maps at all. The complaint alleges denial of the right to vote and violation of the one-person-one-vote principle, both under the Fourteenth Amendment, and violation of their right to freely associate, under the First Amendment. The complaint requests a permanent injunction against use of the 2011 General Assembly plan. Along with their complaint, the Gonidakis Plaintiffs simultaneously filed a Motion for a Preliminary Injunction requesting this Court adopt the Second Commission plan. That is to say, the Gonidakis Plaintiffs request that this Court order the implementation of the General Assembly plan struck down by the Ohio Supreme Court as unconstitutional under Article XI just two weeks ago.

ARGUMENT

I. The Bennett Petitioners are entitled to intervene as of right.

The Bennett Petitioners are entitled to intervene as a matter of right in this case. Under Rule 24(a) of the Federal Rules of Civil Procedure, a court must “on timely motion . . . permit anyone to intervene” where the person “claims an interest relating to the property or transaction

³ Plaintiffs filed a First Amended Complaint earlier today, February 22, 2022. Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief, ECF No. 8 (Feb. 21, 2022). The portions described above appear in both the initial and First Amended Complaint.

that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Under this rule, accordingly, intervention as of right is appropriate where: "(1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest may be impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest." *Alsaada v. City of Columbus*, No. 2:20-cv-3431, 2021 WL 1720999, at *1-2 (S.D. Ohio Apr. 30, 2021) (quoting *Coal. To Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779, 780 (6th Cir. 2007)). For the reasons stated below, each of these conditions are satisfied here.

First, the Bennett Petitioners' application is timely. The Bennett Petitioners file this motion on the first business day after the complaint in this action was filed. Allowing intervention at this early stage, therefore, will not delay the proceedings or prejudice the Plaintiffs or the Defendant.

Second, the Bennett Petitioners have a substantial interest in the subject matter of this case. The U.S. Court of Appeals for the Sixth Circuit subscribes to a "rather expansive notion of the interest sufficient to invoke intervention of right." *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("'[I]nterest' is to be construed liberally."). No specific legal or equitable interest is required, *see Grutter*, 188 F.3d at 398, and even "close cases" should be "resolved in favor of recognizing an interest under Rule 24(a)," *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997).

When an action is brought that, if successful, could alter a favorable judgment secured by a proposed intervenor, that intervenor has a substantial interest in the action. *See Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990) (holding that district court was required to grant

intervention in a case challenging a fire department's use of affirmative action, where fire department implemented affirmative action program as part of a consent decree to which proposed intervenors were a party). Here, the Bennett Petitioners have an interest in protecting the favorable judgment that they secured from the Ohio Supreme Court. In a separate proceeding before that court, the Bennett Petitioners successfully challenged General Assembly plans approved by the Commission on two separate occasions. In both instances, the court concluded that the plan approved by the Commission was invalid under the Article XI and that the Commission was required to draw a new plan. In the second instance, the Ohio Supreme Court struck down the precise plan now proffered by the Gonidakis Plaintiffs in this case as a remedial plan that this Court can implement should the Gonidakis Plaintiffs' claims succeed.

The Bennett Petitioners also have an interest in ensuring that, in the event this Court ultimately decides it must adopt a remedial plan—something the Bennett Petitioners oppose at the present juncture—any remedial plan it adopts complies with state and federal law. As outlined in the Bennett Petitioners' proposed complaint, Ohio's prior General Assembly plan is now malapportioned and cannot be used in upcoming elections. The proper forum for claims regarding Ohio's redistricting process is the Ohio Supreme Court. *See Emison*, 507 U.S. at 34. Nonetheless, in the event this Court ultimately decides to order the implementation of a new General Assembly plan, it is important that such plan does not run afoul of either federal law *or* state law (as construed by the Ohio Supreme Court).

Third, the Bennett Petitioners' interest in protecting their state-court judgment will be impaired if this litigation goes forward without their participation. Under the third intervention prong, a "would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Miller*, 103 F.3d at 1247. This burden is "minimal," and can be

satisfied if a determination in the action may result in “potential stare decisis effects.” *Id.*; *see also Citizens for Balanced Use v. Mont. Wilderness Ass’n*, 647 F.3d 893, 900 (9th Cir. 2011) (“[I]ntervention of right does not require an absolute certainty that a party’s interest will be impaired”). As described above, if the Gonidakis Plaintiffs’ requested relief is granted, the Court will order implementation of maps that violate the Ohio Constitution, and which the Bennett Petitioners (successfully) objected to in the Ohio Supreme Court.

Fourth, neither the Gonidakis Plaintiffs nor the Defendant can adequately protect the Bennett Petitioners’ interest in this action. Proposed intervenors carry a minimal burden to show that the existing parties to this litigation inadequately represent their interests. *Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000). A potential intervenor “need not provide that the [existing parties’] representation will in fact be inadequate, but only that it ‘may be’ inadequate. *Id.* (citations omitted); *see also Davis v. Lifetime Capital, Inc.*, 560 F. App’x 477, 495 (6th Cir. 2014) (“The proposed intervenor need only show that there is a potential for inadequate representation.”) (citation omitted). Again, the Gonidakis Plaintiffs seek the adoption of a General Assembly Plan that violates the Ohio Constitution, as the Bennett Petitioners have already successfully argued in the Ohio Supreme Court. And the Gonidakis Plaintiffs are directly or indirectly acting as a stalking horse for the Commission, who adopted that unconstitutional plan to begin with, and thereafter refused to pass a constitutional plan to replace it.

II. In the alternative, the Bennett Petitioners should be permitted to intervene based on common questions of law and fact.

Even if the Bennett Petitioners were not entitled to intervene as a matter of right, they are nonetheless entitled to intervene under Fed. R. Civ. P. 24’s permissive intervention provision. Under Fed. R. Civ. P. 24(b), the Bennett Petitioners may intervene in this action if they have “a

claim or defense that shares with the main action a common question of law or fact.” Further, “[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” This rule is to be construed liberally, and it excludes many of the requirements of intervention as of right. *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 294 (6th Cir. 1983). Here, the Bennett Petitioners have raised claims that share questions of fact and law with the action filed by the Gonidakis Plaintiffs, and Plaintiffs’ adjudication of their rights would not be delayed or prejudiced by Bennett Petitioners’ intervention, much less unduly so.

The Bennett Petitioners raise common questions of law and fact with the Gonidakis Plaintiffs in this action. First, the Bennett Petitioners’ complaint alleges that the prior General Assembly plan is malapportioned and therefore cannot be used in the upcoming election. Second, the Bennett Petitioners’ complaint makes factual allegations with respect to a central question raised by Plaintiffs’ complaint: namely, whether the state court proceedings have reached impasse. In their complaint, the Bennett Petitioners contend that no impasse has been reached, and that the ongoing state redistricting process may still produce a General Assembly plan that can be used in the upcoming election, and thus that this Court must defer to those proceedings. Finally, the Gonidakis Plaintiffs and the Bennett Petitioners raise a common question of law as to what the appropriate remedy should be in this case. While the Gonidakis Plaintiffs contend that this Court should step in immediately and order the adoption of the Second Commission Plan, the Bennett Petitioners argue that this Court should abstain pending resolution of this matter in state court and, in the event it ultimately acts, it must adopt a plan that complies with state and federal law, not the Second Commission Plan. A three-judge court in a case concerning redistricting in Wisconsin recently allowed permissive intervention by private parties in similar circumstances. *See Hunter*

v. Bostelmann, Nos. 21-cv-512, 21-cv-534, 2021 WL 4206654, at *1 (W.D. Wis. Sept. 16, 2021) (allowing permissive intervention where intervenor-plaintiffs raised claims that were “virtually identical” to those raised by plaintiffs, had filed a petition for an original action in the Wisconsin Supreme Court concerning the state’s redistricting maps, and sought a stay of federal proceedings pending disposition of the state supreme court case).

There is no discernible prejudice or delay that would result in granting the Bennett Petitioners permission to intervene in this matter. In fact, it would cause significant prejudice and delay to deny the Bennett Petitioners permission to intervene. This action concerns a single redistricting process that is already the subject of pending state court litigation. Failure to allow parties with an interest in the outcome of that process the opportunity to intervene will likely result in simultaneous and piecemeal litigation. It will also deny the Bennett Petitioners an opportunity to appeal a ruling contrary to their interests, including an order implementing the adoption of the Second Commission Plan. Plaintiffs, on the other hand, will in no way be delayed or prejudiced in allowing intervention.

CONCLUSION

For the reasons set forth above, the Bennett Petitioners respectfully request that this Court enter an order granting its Motion to Intervene in this proceeding and directing that their pleadings in intervention accordingly be filed.

Respectfully submitted,

s/ Donald J. McTigue

Donald J. McTigue* (OH 0022849)

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** Motions for admission pro hac vice
forthcoming

Counsel for Bennett Petitioners

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 22nd Day of February, 2022.

s/ Donald J. McTigue
Donald J. McTigue (OH 0022849)

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Exhibit A

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**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

MICHAEL GONIDAKIS, MARY PARKER,
MARGARET CONDITT, BETH
VANDERKOOI, LINDA SMITH, DELBERT
DUDUIT, THOMAS W. KIDD JR., and
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Plaintiffs,

BRIA BENNETT, REGINA C. ADAMS,
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Intervenor-Plaintiffs,

v.

FRANK LAROSE, in his capacity as Ohio
Secretary of State,

Defendant.

Case No. 2:22-cv-00773

Judge Algenon L. Marbley

Magistrate Judge Elizabeth Preston Deavers

[Three-Judge District Court Requested]¹

[PROPOSED] COMPLAINT

1. Plaintiffs Bria Bennett, Regina C. Adams, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Meryl Neiman, Holly Oyster, Constance Rubin, and Everett Totty (“Bennett Petitioners”), by and through their undersigned counsel, file this Complaint for Injunctive and Declaratory Relief against Defendant Frank LaRose, in his official capacity as Ohio Secretary of State.

2. In 2015, Ohio voters approved Issue 1, a ballot measure amending Article XI of the Ohio Constitution and changing the way Ohio draws state legislative districts.

¹ While the claims at issue in this case would require a three-judge court to adjudicate, convening a three-judge court would be premature at this stage, because this case should be stayed for the reasons given in the Bennett Petitioners' contemporaneously filed Motion to Stay and Abstain. The Bennett Petitioners therefore do *not* request that a three-judge court be appointed at this time.

3. Under the new amendments, maps are drawn by the bipartisan Ohio Redistricting Commission (the “Commission”) and are subject to new and more rigorous requirements, including that the Commission “shall attempt” to draw a General Assembly plan that complies with the following standards: “(A) No general assembly district plan shall be drawn primarily to favor or disfavor a political party;” and “(B) The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.” Ohio Const. Art. XI § 6.

4. The 2015 amendments provide “[t]he supreme court of Ohio” with “exclusive, original jurisdiction in all cases arising under” Ohio Const Art. XI § 9(A).

5. In 2021, the United States Census Bureau released new census data. The Commission, for the first time, was tasked with drawing new General Assembly districts. In September, the Commission, presently controlled by a supermajority of Republicans, passed grossly gerrymandered maps on a 5-2 party-line vote.

6. Several groups of petitioners, including the Bennett Petitioners, sued the Commission and its members in the Ohio Supreme Court, alleging that the maps it approved violated the Ohio Constitution. Ever since, the Ohio Supreme Court—in the exercise of its exclusive jurisdiction—has closely and expeditiously driven the case forward.

7. Following discovery and briefing conducted on a highly expedited schedule, the Ohio Supreme Court issued a 56-page opinion (not including concurrences and dissents) on January 12, 2022 striking the maps down, and ordering the Commission to draw new, constitutionally-compliant maps within 10 days. Prior to this opinion, the Ohio Supreme Court had not had occasion to interpret Article XI. In its January 12 opinion, the Ohio Supreme Court

resolved several points of interpretative disputes between the parties, providing clear, detailed guidance on the applicable standards under Article XI.

8. On January 22, the Commission adopted a new General Assembly plan, which made only cosmetic improvements to the partisan composition of districts, and still failed to comply with the Ohio Constitution. The Bennett Petitioners promptly objected to the new maps and the Ohio Supreme Court struck down the maps less than two weeks later, once again ordering the Commission to draw maps that complied with the Ohio Constitution and the Ohio Supreme Court's orders.

9. The Ohio Supreme Court again gave 10 days for the Commission to draw a compliant plan but, this time, the Commission responded by sitting on its hands. While the Democratic members of the Commission brought forward a new proposal, the Republican Commissioners proposed nothing at all. On the day of the court-mandated deadline to adopt new maps, the Commission convened, voted the Democratic proposal down, and adjourned without adopting a new plan. In other words, the Commission declared its intention to violate an order of the Ohio Supreme Court.

10. The next day, in response to the Commission's declaration that it had no intention of complying with the court's latest order, the Ohio Supreme Court issued a new order, this time for the Commissioners to show cause why they should not be held in contempt for failing to comply with the court's order. The Commissioners' briefing is due tomorrow, February 23, at noon.

11. In an apparent response to the Ohio Supreme Court's show cause order, during a Commission meeting held today, the Commission discussed scheduling an additional meeting, as soon as tomorrow, February 23, to discuss further work on the General Assembly plan.

12. The Ohio Supreme Court thus continues to actively manage ongoing litigation to secure compliance with its orders and ensure that the Commission adopts a new General Assembly plan in compliance with the Ohio Constitution. Further, based on its latest meeting, it appears that the Commission is now reconsidering its decision to refuse to adopt a new General Assembly plan.

13. Nonetheless, before the Ohio Supreme Court even had a chance to react to the Commission missing its deadline, a group of Plaintiffs (“Gonidakis Plaintiffs”) instituted this action, declaring that the Ohio state legislative redistricting process had reached an “impasse,” and arguing that use of either (1) the state legislative maps approved by the Ohio Apportionment Board (the Commission’s predecessor) in 2011 or (2) no maps at all, would violate their rights under the First and Fourteenth Amendments of the United States Constitution.

14. As relief, the Gonidakis Plaintiffs ask this Court to commit an extraordinary intrusion into Ohio’s redistricting process, by wresting that process from the Ohio Supreme Court and ordering the adoption of Commission maps already rejected by that court in the exercise of its exclusive jurisdiction under Article XI.

15. There can be no doubt that use of either the 2011 state legislative maps (which would mean malapportioned districts) or no maps at all (which would mean no elections) would violate the Bennett Petitioners’ constitutional rights. However, the Gonidakis Plaintiffs have come to the wrong forum at the wrong time.

16. In our federal system of government, where the state apparatus—whether through its courts, legislature, or a redistricting commission—is still in the process of drawing new state legislative or congressional districts for citizens of the state to live under, there is only one instruction for federal courts: step back and wait. *See Grove v. Emison*, 507 U.S. 25, 34 (1993) (“[T]he Constitution leaves with the States primary responsibility for apportionment of their

federal congressional and state legislative districts Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.”). The Ohio Supreme Court’s latest order, as well as the Commission’s subsequent action in response to that order, makes clear that the wheel of state legislative redistricting is still spinning in Ohio. This case should therefore be stayed pending proceedings before the Ohio Supreme Court and the Commission.

17. Nonetheless, this action has now been prematurely brought; and for the express purpose of attempting to undo the victory the Bennett Petitioners have won before the Ohio Supreme Court. In the event this Court determines that federal proceedings in relation to state legislative redistricting in Ohio should proceed—and it should not do so now—it should declare the prior state legislative plan approved in 2011 invalid and enjoin its use. As a remedy, it should order the use of a plan that is lawful under both state and federal law. That is to say, the Court should refuse the Gonidakis Plaintiffs’ invitation to use a plan that the Ohio Supreme Court has already struck down as violative of Ohio’s Constitution.

I. JURISDICTION AND VENUE

18. Plaintiffs bring this action under 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the United States Constitution. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States and involve the assertion of a deprivation, under color of state law, of a right under the Constitution of the United States. This Court has the authority to enter a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202, and authority to enter injunctive relief under Federal Rule of Civil Procedure 65.

19. This Court has personal jurisdiction over the Defendant, who is sued in his official capacity and resides within this state.

20. Venue in this district is proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims in this case occurred in this judicial district.

II. PARTIES

A. Plaintiffs

21. Plaintiff-Intervenors are Ohio voters who live in districts that are malapportioned under the General Assembly plan approved by the Ohio Apportionment Board in 2011 (the “2011 Plan”).

22. Plaintiff-Intervenor Meryl Neiman lives at 2115 Clifton Ave., Columbus, OH 43209, which is in Ohio House District 18 and Ohio Senate District 15 in the 2011 Plan. Based on 2020 census data, both Ohio House District 18 and Ohio Senate District 15 are overpopulated by more than 5%.

23. Plaintiff-Intervenor Regina Adams lives at 14360 Rockside Rd., Maple Heights, OH 44137, which is in Ohio House District 12 and Ohio Senate District 25 in the 2011 Plan.

24. Plaintiff-Intervenor Bria Bennett lives at 795 Lane West Rd. SW, Warren, OH 44481, which is in Ohio House District 64 and Ohio Senate District 32 in the 2011 Plan.

25. Plaintiff-Intervenor Kathleen M. Brinkman lives at 400 Pike St. Unit 809, Cincinnati, OH 45202, which is in Ohio House District 32 and Ohio Senate District 9 in the 2011 Plan.

26. Plaintiff-Intervenor Martha Clark lives at 4439 Filbrun Ln., Trotwood, OH 45426, which is in Ohio House District 43 and Ohio Senate District 5 in the 2011 Plan.

27. Plaintiff-Intervenor Susanne L. Dyke lives at 2558 Guilford Rd., Cleveland Heights, OH 44118, which is in Ohio House District 9 and Ohio Senate District 21 in the 2011 Plan.

28. Plaintiff-Intervenor Holly Oyster lives at 21370 Harrisburg Westville Rd., Alliance, OH 44601, which is in Ohio House District 59 and Ohio Senate District 33 in the 2011 Plan.

29. Plaintiff-Intervenor Constance Rubin lives at 3088 Whitewood St. NW, North Canton, OH 44720, which is in Ohio House District 50 and Ohio Senate District 29 in the 2011 Plan.

30. Plaintiff-Intervenor Everett Totty lives at 145 S. St. Clair St. Unit 28, Toledo, OH 43604, which is in Ohio House District 44 and Ohio Senate District 11 in the 2011 Plan.

31. According to 2020 census data, under the 2011 Plan, Plaintiff-Intervenors' districts, including House Districts 18, 44, 50, and 64, and Senate Districts 5, 9, 11, 15, 21, 25, 29, 32, and 33, are malapportioned.

B. Defendant

32. Defendant Secretary of State Frank LaRose is the Ohio Secretary of State and is the chief election officer in Ohio responsible for overseeing election administration pursuant to Ohio Rev. Code Ann. § 3501.04. He is sued in his official capacity.

III. FACTUAL BACKGROUND

A. This was Ohio's first redistricting cycle under new amendments designed to ensure fairness, bipartisanship, and transparency in drawing General Assembly maps.

33. In 2015, Ohio voters overwhelmingly approved Issue 1, a ballot initiative to fundamentally alter the way the state redraws state legislative districts following each census.

34. This was achieved by adding several amendments to Article XI of the Ohio Constitution, the provision that has governed redistricting of the Ohio General Assembly since the 19th century.

35. In previous cycles, Ohio's process for drawing new district lines for its General Assembly was plagued by a lack of bipartisanship and transparency and almost always resulted in severely gerrymandered maps that favored one party over the other.

36. Issue 1 was meant to upend this status quo entirely. A few of its key reforms included the establishment of a seven-member bipartisan Ohio Redistricting Commission (the "Commission") composed of the Governor, Secretary of State, Auditor of State, and appointees of the majority and minority leadership from both chambers of the General Assembly. Ohio Const. Art. XI § 1(A). Absent buy-in from members of both parties, the Commission would be unable to approve maps that lasted for more than two elections. *Id.* at § 1(B)(3).

37. Additionally, similar to previous iterations of Article XI, the new provisions included strict rules on when and how certain counties, cities, and townships could be split between districts. *Id.* at § 3. For example (subject to a narrow exception), Section 3(D)(3) states that "not more than one municipal corporation or township may be split per representative district."

38. Perhaps most importantly, Article XI imposed strict anti-gerrymandering requirements on any plan approved by the Commission. Under Article XI Section 6, the Commission is required to attempt to comply with the following requirements:

- (A) No general assembly district plan shall be drawn primarily to favor or disfavor a political party.
- (B) The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.
- (C) General assembly districts shall be compact.

39. Section 6 also provides that "Nothing in this section permits the commission to violate the district standards described in Section 2, 3, 4, 5, or 7 of this article."

40. The new amendments took effect on January 1, 2021, and apply to the redrawing of General Assembly districts following the 2020 Census.

B. Despite the new amendments, the Commission adopted a partisan gerrymander.

41. The redistricting cycle kicked off in August 2021 with the swearing in of the Commissioners. As required under the Ohio Constitution, the Commission included the Governor Mike DeWine, the Auditor Keith Faber, and the Secretary of State Frank LaRose. Three of the four legislative leaders from both major parties in the two houses of the General Assembly—Speaker Bob Cupp, Senate President Matt Huffman, and House Minority Leader Emilia Sykes—appointed themselves to the Commission. Senate Minority Leader Kenny Yuko appointed Senator Vernon Sykes to the Commission.

42. The Commission process that took place in late summer 2021 did not live up to the letter or spirit of Issue 1. The two Republican legislators on the Commission rushed through maps with little consultation from the Democratic Commissioners (or, for that matter, the three statewide elected officials). The maps that the Republican legislative members proposed were drawn by Republican legislative staffers out of public view and at the direction of the Republican leaders themselves.

43. In the early hours of September 16, 2021, the Commission voted to adopt a set of maps proposed by the Republican legislative members of the Commission (the “First Commission Plan”).

44. The First Commission Plan was heavily biased toward Republicans. Despite the fact that Republicans receive, on average, 54% of the vote in statewide elections in Ohio, Republicans were nearly certain to maintain supermajorities in both chambers under the First Commission Plan.

C. The Bennett Petitioners successfully challenged the First Commission Plan in the Ohio Supreme Court.

45. On September 24, 2021, barely more than a week after the Commission adopted the First Commission plan, the Bennett Petitioners brought suit in the Ohio Supreme Court,² naming as defendants the Commission and each of its individual members in their official capacities. The complaint argued that the First Commission Plan constituted an excessive partisan gerrymander and violated Sections 6(A) and 6(B) of the Ohio Constitution.³

46. On September 29, the Ohio Supreme Court issued a briefing schedule for three cases that all challenged the First Commission Plan. Under the court's schedule, all evidence was to be submitted to the court on October 22, petitioners would file merits briefs on October 29, respondents would file their merits briefs on November 5, and petitioners would file their reply brief on November 10.

47. The parties thereafter conducted discovery, completing document, written and witness discovery on the timeframe articulated by the court. On October 22, consistent with the court's order, the parties submitted evidence in support of their claims, including expert reports. The parties then filed their merits briefs on schedule and the case was fully briefed by November 10. The court heard arguments in all three cases on December 8.

48. On January 12, 2022, a little more than a month after the case was fully submitted, the Ohio Supreme Court issued an opinion declaring the First Commission Plan invalid. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, __ Ohio St.3d __, 2022-Ohio-65, 2022 WL 110261, at *1 (Ohio Jan. 12, 2022). In its opinion, the court held that the plan violated both Section

² Under Ohio Const., Art. XI, § 9(A), the Ohio Supreme Court has original jurisdiction in cases brought under Article XI.

³ Two other sets of petitioners also challenged the First Commission Plan in the Ohio Supreme Court. The day before the Bennett Plaintiffs filed their complaint, the League of Women Voters, together with several other organizational and individual plaintiffs, brought suit. Three days after the Bennett Plaintiffs filed, the Ohio Organizing Collaborative, also with several other organizational and individual plaintiffs, filed suit as well.

6(A) and 6(B) of Article XI. *Id.* The court therefore ordered the Commission to reconvene and draw a new plan that complied with the court’s opinion within the next ten days. *Id.* It also ordered that petitioners submit objections, if any, to the plan, within three days of the plan’s adoption. *Id.* at *29.

D. The Commission’s second plan was also a partisan gerrymander, and the Ohio Supreme Court struck down that plan as well.

49. Following the Ohio Supreme Court’s order striking down the First Commission Plan, the Commission reconvened to pass a new plan, pursuant to the court’s order.

50. While the Commission’s Republican majority made a few small adjustments to the process, the theme of the new Commission proceedings was largely “more of the same.” Again, a Republican proposal was introduced with little notice to the public or other members on the Commission—this time with no opportunity for public participation at all—and the Commission once again adopted a Republican proposal along party lines on January 22, 2022 (the “Second Commission Plan”).

51. While the Second Commission Plan nominally included more “Democratic-leaning” seats than its predecessor, even the shallowest of examinations revealed that it remained an aggressive Republican gerrymander. First, the Commission used the unconstitutional First Commission Plan as the basis for the Second Commission Plan. Additionally, the proposal included a staggering number of House districts that fell between 50 and 51% Democratic according to partisan indices,⁴ while every single Republican seat was above 52%. The same was the case in the Senate, with all but one of the seats that fell in the 48 to 52% range leaning toward Democrats. This arrangement allowed Republicans to claim that the Democratic seat count was

⁴ Partisan indices are precinct-level results of statewide elections (or sometimes composites of several elections) that are aggregated to the level of districts within a given redistricting plan. This allows for an assessment of how parties are likely to perform under a map.

significantly higher than it was, because seats that barely lean toward one party or another are in fact toss-up seats, meaning that many nominally-Democratic seats in the plan would have likely been won by Republicans. And even with this smoke and mirrors trick, the plan still fell short of the partisan proportionality contemplated by Section 6(B).

52. On January 25, the Bennett Petitioners objected to the use of the Second Commission Plan as violative of not only Sections 6(A) and 6(B) of the Ohio Constitution, but also the line-drawing requirements of Section 3(D)(3) and several procedural requirements under Section 1.

53. Respondents filed their response to petitioners' objections on January 28. In conjunction with their response, Respondents submitted an affidavit from the map-drawer, Raymond DiRossi. In his affidavit, Mr. DiRossi conceded that the Second Commission Plan violates Section 3(D)(3) Article XI of the Ohio Constitution. The Second Commission Plan is what the Gonidakis Plaintiffs ask this Court to adopt.

54. On February 7, only 16 days after the adoption of the Second Commission Plan and ten days after briefing had been submitted in the case, the Ohio Supreme Court issued an opinion striking down the Second Commission Plan. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, __ Ohio St.3d __, 2022-Ohio-342, 2022 WL 354619, at *14 (Ohio Feb. 7, 2022). The court again held that the plan violated Sections 6(A) and 6(B) Article XI of the Ohio Constitution because the evidence showed that the plan was drawn in order to favor the Republican party and because the plan fell short of partisan proportionality, despite the fact that a more proportional plan could have been drawn. *Id.* at *11-13.

55. On a concluding note, the court pointed out that filing deadlines for candidates to run in primaries in upcoming General Assembly elections were soon approaching. *Id.* at *13.

However, the court wrote, “the General Assembly established the date of the primary election . . . and it has the authority to ease the pressure that the commission’s failure to adopt a constitutional redistricting plan has placed on the secretary of state and on county boards of elections by moving the primary election, should that action become necessary.” *Id.* at *14.

56. After striking down the Second Commission Plan, the Ohio Supreme Court ordered that

The Ohio Redistricting Commission shall be reconstituted and shall convene and draft and adopt an entirely new General Assembly-district plan that conforms with the Ohio Constitution, including Article XI, Sections 6(A) and 6(B). The commission shall adopt the new plan and file it with the secretary of state no later than February 17, 2022, and shall file a copy of that plan in this court by 9:00 a.m. on February 18, 2022. This court retains jurisdiction for the purpose of reviewing the new plan.

Order, *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 02/07/2022 Case Announcements #2, 2022-Ohio-349.

E. Following the Ohio Supreme Court’s February 7 Order, the Commission’s Republican majority sat on its hands.

57. Following the issuance of the Ohio Supreme Court’s February 7 order, the Republican Commissioners took no action and ignored Democratic Commissioners’ efforts to craft a new proposal that could be used as the basis for a third Commission plan.

58. On February 9, House Speaker (and Co-Chair of the Commission) Bob Cupp announced that the Commission was unlikely to meet that week to consider another round of General Assembly maps and that no schedule existed for adopting new maps. *See* Josh Rultenberg, Twitter (@JoshRultNews) (Feb. 9, 2022, 3:39 PM), <https://twitter.com/joshrultnews/status/1491512059153899520?s=21>.

59. That same day, Democratic Senator (and also Co-Chair of the Commission) Vernon Sykes sent a letter to Speaker Cupp urging him to reconvene the Commission as soon as possible

and directing Speaker Cupp to a Democratic General Assembly proposal that was submitted to the Ohio Supreme Court during the previous round of objections. *See* Josh Rultenberg, Twitter (@JoshRultNews) (Feb. 9, 2022, 4:06 PM), <https://twitter.com/joshrultnews/status/1491518880761757704?s=21>. That proposal was also submitted to the Commission on the same day as Sykes's letter. *See* Ohio Redistricting Comm'n, *General Assembly District Plans – Commission Member Sponsors*, available at <https://redistricting.ohio.gov/maps>.

60. On February 11, the Democratic members of the Commission, Vernon Sykes and House Minority Leader Allison Russo,⁵ held a press conference concerning their General Assembly proposal, submitted two days earlier. *See* Josh Rultenberg, Twitter (@JoshRultNews) (Feb. 11, 2022, 11:04 AM), <https://twitter.com/JoshRultNews/status/1492167785769746435>. At the press conference, Russo and Sykes urged the Commission to reconvene to pass new General Assembly maps. Sykes and Russo also encouraged members of the public or the Commission to submit feedback on their proposal so that it could be fine-tuned to ensure complete constitutional compliance.

61. As of February 14, spokespeople for the Democratic caucuses in both houses said they had not heard anything from the Republican side about when the Commission could meet or with any feedback about their proposals. *See* Josh Rultenberg, Twitter (@JoshRultNews) (Feb. 14, 2022, 10:17 AM), <https://twitter.com/JoshRultNews/status/1493243062746849281>.

62. Finally on February 15—two days before the court-appointed deadline for adopting new maps—Speaker Cupp announced that the Commission would meet on February 17, the

⁵ Emilia Sykes stepped down as Minority Leader shortly before the Commission reconvened to discuss new General Assembly maps following the court's order striking down the First Commission Plan. She was replaced by Leader Russo as both Minority Leader and as the House Minority's representative on the Commission.

deadline itself. He refused to say whether the Republican caucus would be introducing a plan. At that point, there had been no indication that anyone in the Republican caucus or their staffers was working on a new General Assembly proposal. *See* Josh Rultenberg, Twitter (@JoshRultNews) (Feb. 15, 2022, 12:51 PM), <https://twitter.com/JoshRultNews/status/1493644178626015239>.

63. The following day, during a press scrum, a member of the press mentioned to Speaker Cupp that the deadline for adopting new maps was the following day. In response, Cupp laughed and said, “You’re really set on these deadlines aren’t you?” The reporter responded, “It’s not me, it’s the Ohio Supreme Court.” Cupp promptly shot back, while laughing: “They are too.”

64. Shortly after noon that day, the Democratic Commissioners circulated an update of their General Assembly proposal from the previous week, which included a few small technical fixes to ensure compliance with Article XI’s line drawing requirements. The Democratic Commissioners requested feedback from their colleagues on the plan by 9 AM the next day.

65. The following day, the Commission convened. First, the Democrats submitted their updated proposal, which had been circulated the previous day. Leader Russo noted, in introducing the plan, that despite her request for feedback on the plan by 9 AM, she had received no such feedback from her colleagues, save for an email from Auditor Faber.

66. After the Democratic proposal was introduced, the Republican Commissioners expressed their objections to the proposal, making use of visual aids in the form of posters that staffers had clearly prepared in advance.

67. After debate, the proposal was voted down 5-2, along party lines. Next, Leader Russo made a motion that all objections to the plan be put in writing. The Commission similarly voted this down on a 5-2 party-line vote.

68. Following the Commission's refusal to adopt the Democratic proposal, Republicans did not introduce a plan of their own. Instead, following remarks from the Commissioners, Speaker Cupp declared the Commission at an impasse and adjourned.

69. The Commission's court-appointed deadline came and went and no General Assembly plan was adopted.

F. The Ohio Supreme Court ordered the Commission to show cause why it should not be found in contempt for violating its February 7 Order.

70. The following morning, the Commission filed what it styled as a "notice of impasse" in the Ohio Supreme Court, stating that "a majority of the Commission has not been able to adopt a new plan, and the Commission is thus unable to file a copy of a new plan with this Court by the Court's deadline of 9:00 a.m. today." *Bennett v. Ohio Redistricting Commission*, Ohio Supreme Court Case No. 2021-1198, Notice of Impasse of Respondent the Ohio Redistricting Commission (Feb. 18, 2022).

71. In response, the Bennett Petitioners filed a motion requesting that the Ohio Supreme Court require the Commission to explain its failure to comply with the court's February 7 order. In the motion, the Bennett Petitioners suggested that "[i]f the Court finds that Respondents' explanation for why it did not adopt a constitutionally compliant plan as ordered by the Court is inadequate, then in addition to the Court directing Respondents to take further action to comply with the Court's order, the Court has additional tools to address the Commission's failure to comply." *Bennett v. Ohio Redistricting Commission*, Ohio Supreme Court Case No. 2021-1198, Petitioners' Motion to Require Respondents to Explain Their Failure to Comply with the Court's February 7, 2022 Order (Feb. 18, 2022). These tools included finding the Commission in contempt pursuant to Ohio Rev. Code Chapter 2705 and awarding attorneys' fees pursuant to Ohio Rev. Code § 2323.51.

72. Later that day, the Ohio Supreme Court sua sponte ordered “that respondents show cause by filing a response with the clerk of this court no later than 12:00 p.m. on February 23, 2022, why respondents should not be found in contempt for failure to comply with this court’s February 7, 2022 order.” *Bennett v. Ohio Redistricting Commission*, Ohio Supreme Court Case No. 2021-1198, Entry (Feb. 18, 2022).

73. The Commission met today, February 22. In addition to discussing the schedule for the Commission’s work on the separate process of drawing a remedial congressional districting plan, the Commission discussed scheduling an additional meeting, as soon as tomorrow, February 23, to discuss further work on the General Assembly plan.

74. State proceedings concerning the drawing of General Assembly districts are therefore ongoing, with an imminent deadline looming. The Commission has the power to draw a new General Assembly plan at any moment. Ohio’s redistricting process has not reached an “impasse”: The Commission has disregarded one deadline imposed by the Ohio Supreme Court, the court is taking immediate action to enforce its orders, and the Commission seems to be responding by scheduling further meetings to discuss the General Assembly plan.

G. Ohio cannot run the 2022 elections under the General Assembly maps enacted in 2011 because they are malapportioned.

75. In 2011, the Ohio Apportionment Board (the Commission’s predecessor) drew a General Assembly Plan that was based on the 2010 census data and the version of the Ohio Constitution that existed prior to the 2015 amendments.

76. As the 2020 census has shown, Ohio has seen significant population changes since 2010. The state’s population has grown by 2.3%, with growth concentrated largely in central Ohio.

77. As a result, the 2011 version of Ohio’s General Assembly districts have significant variations in population. The total deviation between districts is well in excess of 10%.

IV. CLAIMS FOR RELIEF

COUNT I: Violation of Equal Protection Under the First and Fourteenth Amendments of the United States Constitution and Violation of 42 U.S.C. § 1983 (*Malapportionment*)

78. Plaintiffs reallege and incorporate by reference the allegations above as though fully set forth herein.

79. Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution “seats in both houses of a bicameral state legislature must be apportioned on a population basis.” *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Under this principle, known as “one person, one vote,” state legislative districts must be roughly equal in population. *Evenwel v. Abbott*, 578 U.S. 54, 59-60. Where the total population deviation in a map—the difference between the largest and smallest district—is greater than 10%, the deviation is “presumptively impermissible.” *Id.* at 60.

80. The 2011 Plan’s maximum deviation in each chamber of the Ohio General Assembly is well in excess of 10%. It is therefore presumptively impermissible. Because no state interest can justify the population deviations in the 2011 Plan, it is invalid under the Equal Protection Clause.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter the following relief against the Defendant:

A. Stay this matter until the Commission has adopted a new redistricting plan for the General Assembly or it is clear that state processes, including Ohio Supreme Court proceedings, concerning the redrawing of General Assembly districts following the 2020 Census have concluded, pursuant to the abstention principle articulated in *Grove v. Emison*, 507 U.S. 25, 34 (1993).

B. If this matter is not resolved through Ohio's state legislative redistricting process:

1. Declare that the 2011 Plan for Ohio's General Assembly districts is malapportioned and therefore violative of the Fourteenth Amendment to the United States Constitution;
2. Permanently enjoin the Defendant from administering any elections under the 2011 Plan;
3. Implement a new plan for Ohio's General Assembly districts that complies with state and federal law;
4. Pursuant to Ohio Supreme Court Rule of Practice 9.01, certify to the Ohio Supreme Court the question of whether the plan or plans under consideration by this Court for Ohio's General Assembly districts complies with the Ohio Constitution.

C. Award Bennett Petitioners attorneys' fees and costs in this action;

D. Grant such other further relief as this Court deems just and proper.

DATED: February 22, 2022

Respectfully submitted,

/s Donald J. McTigue

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**Motions for admission pro hac vice
forthcoming

Counsel for Bennett Petitioners

Exhibit B

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

MICHAEL GONIDAKIS, MARY
PARKER, MARGARET CONDITT, BETH
VANDERKOOI, LINDA SMITH,
DELBERT DUDUIT, THOMAS W. KIDD
JR., DUCIA HAMM,

Plaintiffs,

BRIA BENNETT, REGINA C. ADAMS,
KATHLEEN M. BRINKMAN, MARTHA
CLARK, SUSANNE L. DYKE, MERYL
NEIMAN, HOLLY OYSTER,
CONSTANCE RUBIN, EVERETT TOTTY,

Intervenor-Plaintiffs,

v.

FRANK LAROSE, in his capacity as Ohio
Secretary of State

Defendant.

Case No. 2:22-cv-00773

Judge Algenon L. Marbley

Magistrate Judge Elizabeth Preston Deavers

**PROPOSED INTERVENOR-PLAINTIFFS BENNETT PETITIONERS'
MOTION TO ABSTAIN AND STAY**

Proposed Intervenor-Plaintiffs Bria Bennett, Regina C. Adams, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Meryl Neiman, Holly Oyster, Constance Rubin, and Everett Totty ("Bennett Petitioners") hereby move, pursuant to *Grove v. Emison*, 507 U.S. 25, 33 (1993), for the Court to abstain from and stay this lawsuit, to allow the Bennett Petitioners' pending Ohio Supreme Court proceedings regarding the drawing of Ohio General Assembly districts to proceed,

while retaining jurisdiction in case those proceedings, unexpectedly, do not ultimately lead to the creation of a constitutionally valid General Assembly district plan.¹

This Motion is supported by the attached Memorandum in Support.

Respectfully submitted,

s/ Donald J. McTigue

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Jyoti Jasrasaria**

¹ The Plaintiffs in this case have requested the convening of a three-judge district court. Compl. 85. Convening such a court would be premature, however, because the Bennett Petitioners fully expect the Ohio Supreme Court to oversee the successful completion of the redistricting process set out in Article I of the Ohio Constitution. A single judge has authority to address the justiciability of Plaintiffs' claims, and thus to determine whether they are presently appropriate for a federal court to address. *see* *Irro McM nus*, 577 U.S. 39, 44–45 (2015) (A three-judge court is not required where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts.) *Cit te Conf of CP McM ster*, No. 3:21-cv-03302, 2021 WL 5853172, at *5 (D.S.C. Dec. 9, 2021) (holding that claims based on alleged harms arising from the risk that redistricting will not be timely completed are not yet ripe for adjudication because the injury alleged remains speculative before the Legislature has a chance to act). As *McM ster* explained, a single-judge court may therefore stay impasse claims that are not yet ripe under *Irro e*, and retain jurisdiction over them through the duration of the stay. *Id* at *2, *5.

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** Motions for admission pro hac vice
forthcoming

*Counsel for Bennett
Petitioners*

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MEMORANDUM IN SUPPORT

The Court should stay this case to allow the Bennett Petitioners' pending Ohio Supreme Court proceedings involving the apportionment of the General Assembly to continue. "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Grove v. Emison*, 507 U.S. 25, 33 (1993). Federal court involvement in state legislative apportionment is a last resort. Its time has not yet come here.

BACKGROUND

I. The Ohio Redistricting Process

As a result of a 2015 constitutional amendment approved by Ohio voters, the Ohio Constitution provides a detailed process to govern General Assembly redistricting, under which the Ohio Redistricting Commission (the "Commission") must adopt a redistricting plan that complies with detailed constitutional criteria, subject to review by the Ohio Supreme Court. *See* Ohio Const. art. XI. Among other requirements, the Commission "shall attempt" to draw a General Assembly plan (a) that is not "drawn primarily to favor or disfavor a political party," and (b) in which "[t]he statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio." Ohio Const. art. XI, § 6. The Ohio Constitution further provides that "[t]he supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under" Article XI, and that if "any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid by an unappealed final order of a court of competent jurisdiction," then the Commission "shall be reconstituted" to "determine a general assembly district plan in conformity" with the Ohio Constitution. *Id.* art. XI, § 9(A), (B).

II. Procedural History

Following the release of 2020 census data last year, the Commission was tasked with drawing new General Assembly districts for the first time. That process is still ongoing. In September 2021, the Commission passed a redistricting plan by a 5-2 party line vote. The Bennett Petitioners, among others, sued the Commission and its members in the Ohio Supreme Court, alleging that the plan approved by the Commission violated the Ohio Constitution. *See League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, __ Ohio St.3d __, 2022-Ohio-65, 2022 WL 110261 (Ohio Jan. 12, 2022) (“*LWW I*”). After discovery and briefing on a highly expedited schedule, on January 12, 2022, the Ohio Supreme Court issued a 56-page opinion, with another 90 pages of concurrences and dissents, finding that the plan “significantly discriminates against Democratic voters to the advantage of Republican voters,” *id.*, 2022 WL 110261 at *25, in violation of the Ohio Constitution. The Court ordered the Commission to draw a new General Assembly district plan within ten days, and retained jurisdiction to consider objections to those maps. *Id.* at *28-29.

In response to the Ohio Supreme Court’s order, the Commission adopted a new General Assembly plan on January 22. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, __ Ohio St.3d __, 2022-Ohio-342, 2022 WL 354619, at *1 (Ohio Feb. 7, 2022) (“*LWW II*”). That plan, however, made only minor changes, and the Bennett Petitioners and others promptly objected to the new maps in the Ohio Supreme Court. *Id.* at *6-8. Less than two weeks later, on February 7, the Ohio Supreme Court struck down the new plan as well, again ordering the Commission to draw a plan that complies with the Ohio Constitution and the court’s orders within ten days. *Id.* at *14. This time, the Commission responded by sitting on its hands. While the Democratic members of the Commission brought forth a new proposal, the Republican Commissioners proposed nothing

at all: they simply voted the Democratic plan down and—despite the Ohio Supreme Court’s order—adjourned on February 17 without adopting a new plan. *See* Am. Compl. ¶¶ 54-56.

In response to this open defiance of its order, the Ohio Supreme Court on February 18 ordered the Commission and its members to show cause why they should not be held in contempt for violating the court’s order to propose a new, constitutionally valid plan. *See Bennett v. Ohio Redistricting Commission*, Ohio Supreme Court Case No. 2021-1198, 02/18/2022 *Case Announcements* #2, 2022-Ohio-498. The Commissioners’ response is due at noon tomorrow, February 23. *See id.* There is no reason to believe that the Ohio Supreme Court will be unable to secure compliance with its orders, which are expressly contemplated by the Ohio Constitution. *See* Ohio Const. art XI, § 9(B) (providing that if “any general assembly district plan made by the Ohio redistricting commission, or any district 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 commission shall be reconstituted . . . , convene, and ascertain and determine a general assembly district plan”). Indeed, in an apparent response to the Ohio Supreme Court’s show cause order, during a Commission meeting held today, February 22, the Commission discussed scheduling an additional meeting, as soon as tomorrow, February 23, to discuss further work on the General Assembly plan.

Plaintiffs in this action (the “Gonidakis Plaintiffs”) nevertheless instituted this suit on February 18, alleging that the Ohio state legislative redistricting process had reached “impasse,” and arguing that the use of either the state legislative plan approved in 2011 or no plan at all would violate their rights. Compl. ¶¶ 4, 6. The Gonidakis Plaintiffs ask this Court to inject itself into Ohio’s redistricting process, pushing aside and taking over for the Ohio Supreme Court and

ordering the adoption of a plan that the Ohio Supreme Court already rejected as a violation of the Ohio Constitution. *See id.*

ARGUMENT

The Bennett Petitioners' practical interests in this litigation are diametrically opposed to those of the Gonidakis Plaintiffs, who are seeking to undo the Bennett Petitioners' victory before the Ohio Supreme Court. The Bennett Petitioners agree with the Gonidakis Plaintiffs only to the following, extremely limited extent: given changes in the distribution of Ohio's population since 2011, the continued use of the 2011 General Assembly plan would involve malapportioned districts in violation of the United States Constitution, and a failure to hold elections at all would likewise violate Ohio voters' constitutional rights. But there is not yet any reason to conclude that either eventuality will occur, or is even remotely likely to occur. The Ohio Constitution provides a process for the drawing of General Assembly districts, substantial work has occurred under that process under the close supervision of the Ohio Supreme Court, and that process is still ongoing. This Court must defer to the Ohio Supreme Court and the ongoing process set out in the Ohio Constitution for the apportionment of state legislative districts.

"In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Grove*, 507 U.S. at 33 (emphasis original). That is because "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts," such that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Id.* at 34 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Federal courts may intervene in the process only if there is "evidence that these state branches will fail timely to perform that duty." *Id.*; *see also, e.g., Thompson v. Smith*, 52 F. Supp.

2d 1364, 1367-68 (M.D. Ala. 1999) (explaining that the federal court had “stayed our hand until the state court system had fully addressed the claims being pursued” by state-court plaintiffs, and resuming proceedings only once “the Alabama Supreme Court has held that their claims are moot, and, as a result, the Alabama courts are now essentially closed to them”); *Rice v. Smith*, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997) (“[I]n the reapportionment context, when parallel State proceedings exist, the decision to refrain from hearing the litigant’s claims should be the routine course.”). “[T]he reasoning in *Grove* was based upon the principle of deference to state legislative and judicial bodies in the redistricting process,” and a requirement “that the federal courts must defer to the state judiciary unless the record contains evidence that the state court cannot or will not act in a timely manner.” *Archuleta v. City of Albuquerque, N.M.*, No. 11-cv-510, 2011 WL 13285433, at *2 (D.N.M. June 21, 2011).

There is no evidence that Ohio will be unable to carry out its constitutional duty to enact a new, constitutionally valid General Assembly plan. Active, highly expedited litigation is ongoing in front of the Ohio Supreme Court. That litigation has already resulted in the review of two proposed General Assembly plans. *See LWV I; LWV II*. And while the Commission has, for the moment, refused to do its constitutional duty to draw a new General Assembly plan that complies with the Ohio Constitution, the Ohio Supreme Court is actively addressing that refusal, with an order that the members of the Commission show cause by noon on Wednesday, February 23, why they should not be held in contempt, *see Bennett v. Ohio Redistricting Commission*, Ohio Supreme Court Case No. 2021-1198, 02/18/2022 Case Announcements #2, 2022-Ohio-498, and the Commission has just today discussed scheduling further meetings regarding a General Assembly plan. It would be premature, speculative, and a severe violation of comity and basic principles of federalism to assume that the Ohio Supreme Court will be unable to secure compliance with its

lawful orders. This Court should not countenance its use as an organ for the Commission, and voters aligned with it, to violate the Ohio Supreme Court's orders. That is what the Gonidakis Plaintiffs ask: for this Court to endorse a Commission plan that the Ohio Supreme Court would not.

Moreover, the Ohio Constitution's detailed redistricting provisions, and the existence of the Commission, make a true impasse requiring federal intervention far less likely than in many other states. In states where impasse has historically been reached, such as Wisconsin, redistricting is a purely legislative matter: after each census, "the legislature shall apportion and district anew the members of the senate and assembly." Wis. Const. art. 4, § 3. Because apportionment legislation in Wisconsin must pass both the senate and the assembly and is subject to veto by the governor, the Wisconsin government has repeatedly been unable to engage in apportionment where one party does not control the entire government, requiring judicial intervention. *See, e.g., Jensen v. Wisc. Elections Bd.*, 249 Wis. 2d 706, 711 (2002). The same has occurred in Minnesota. *See Hippert v. Ritchie*, No. A11-152 (Minn. Feb. 14, 2011). This legislative process makes impasse more likely, as legislators do not have an enforceable duty to enact particular redistricting maps, and governors do not have an enforceable duty not to veto them.

Ohio is now different. As the Ohio Supreme Court has emphasized, "the people of Ohio, by their overwhelming approval in 2015 of amendments to Article XI of the Ohio Constitution, entrusted" redistricting of the General Assembly "to a special body of limited duration and singular purpose: the Ohio Redistricting Commission." *LWV II*, 2022 WL 354619 at *10. Under Ohio law, members of the Commission "are charged with drawing a plan that inures to the benefit of not just one political party, not just one constituency, but of Ohio as a whole," and they "must be, in good faith, *commission members* first, setting aside their usual partisan modes." *Id.* Critically, this is a

legally enforceable duty: the Constitution *requires* the Commission to adopt a constitutional plan and provides that if a prior plan is ruled unconstitutional, “the commission *shall* be reconstituted as provided in Section 1 of this article, convene, and ascertain and determine a general assembly district plan in conformity with such provisions of this constitution as are then valid” Ohio Const. art. XI, § 9(B) (emphasis added). And the Ohio Supreme Court, by ordering members of the Commission to show cause why they should not be held in contempt for failing to adopt a lawful plan, has shown that it stands ready to enforce that duty. *See Bennett v. Ohio Redistricting Commission*, Ohio Supreme Court Case No. 2021-1198, 02/18/2022 *Case Announcements* #2, 2022-Ohio-498. Indeed, in an apparent response to the Ohio Supreme Court’s show cause order, during a Commission meeting held today, February 22, the Commission discussed scheduling an additional meeting, as soon as tomorrow, February 23, to discuss further work on the General Assembly plan.

This Court should not lightly assume that the Commission members will successfully defy the Ohio Supreme Court’s lawful orders, nor that that court will be unable to devise an effective remedy should defiance continue. Rather, this Court must allow the state process to play out. *Grove*, 507 U.S. at 33. There are still many months to go until Election Day,² and there is not yet any reason to believe that the Ohio state government cannot complete its task.

CONCLUSION

For the reasons set forth above, the Bennett Petitioners respectfully request that this Court enter an order granting its Motion to Abstain and Stay and staying this action pending the outcome of proceedings in the Ohio Supreme Court.

² Although the Ohio General Assembly has the authority to move the primary election date, and has contemplated doing so, it has thus far refused to do so.

Respectfully submitted,

s/ Donald J. McTigue

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** Motions for admission pro hac vice
forthcoming

Counsel for Bennett

Petitioners

CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 22nd Day of February, 2022.

/s/ Donald J. McTigue
Donald J. McTigue (OH 0022849)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

MICHAEL GONIDAKIS, et al.

Plaintiffs,

BRIA BENNETT, et al.

Intervenor-Plaintiffs,

v.

**FRANK LAROSE, in his capacity as
Ohio Secretary of State,**

Defendant.

Case No. 2:22-cv-773

Judge Algenon L. Marbley

Magistrate Judge Elizabeth Preston Deavers

[PROPOSED] ORDER

Bria Bennett, Regina C. Adams, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Meryl Neiman, Holly Oyster, Constance Rubin, and Everett Totty have moved to intervene as plaintiffs in this action. Because they have satisfied the requirements set forth in Rule 24, the Court grants their motion to intervene.

IT IS SO ORDERED.

DATED: _____

HON. ALGENON L MARBLEY
CHIEF UNITED STATES DISTRICT JUDGE