

**IN THE SUPREME COURT OF OHIO**

**Bria Bennett, et al.,**

**Petitioners,**

**v.**

**Ohio Redistricting Commission, et al.,**

**Respondents.**

**Case No. 2021-1198**

Original Action Filed Pursuant to Ohio  
Constitution, Article XI, Section 9(A)

*[Apportionment Case Pursuant to S.  
Ct. Prac. R. 14.03]*

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**PETITIONERS' OBJECTIONS TO THE ALREADY-INVALIDATED FEBRUARY 24,  
2022 PLAN, RE-ADOPTED ON MAY 5, 2022, AND REQUEST FOR IMMEDIATE  
RELIEF**

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## INTRODUCTION

The Ohio Redistricting Commission (the “Commission”) has knowingly adopted and submitted to the Court a plan (the “Third Plan”) that violates the Ohio Constitution. Everyone knows that the Third Plan violates the Ohio Constitution *because this Court has already found that it does*. The Commission simply repassed a plan already rejected by this Court. The Commission thus styled its filing as a “Notice of Resubmission” of the unconstitutional Third Plan. *See* Respondents’ May 6, 2022 Notice of Resubmission of the Commission’s February 24, 2022 General-Assembly Plan (“Respondents’ Notice”). Petitioners respectfully submit that the Court should summarily reject the Third Plan on the same grounds that the Court previously rejected it: it still violates Article XI, Section 6(A) and (B) of the Ohio Constitution. Allowing a more protracted briefing schedule on the constitutionality of the Third Plan—where this Court has already passed on that exact question—would serve no purpose other than to give the Commission what it hoped to achieve: delay. The Court does not need multiple briefs from the parties to determine that the unconstitutional Third Plan is still unconstitutional. The Court should respond not by engaging further in this dance, but by taking immediate measures to ensure the adoption of a constitutional General Assembly plan.

**I. The Court should again invalidate the Third Plan, which the Commission re-adopted in defiance of this Court’s orders and the Ohio Constitution.**

There is no dispute that the plan submitted today is the same plan that was previously adopted by the Commission on February 24, 2022 (the “Third Plan”) and invalidated by this Court on March 16, 2022 for violating Article XI, Section 6(A) and 6(B) of the Ohio Constitution. *League of Women Voters of Ohio v. Ohio Redistricting Comm.* (“*LWV III*”), Slip Opinion No. 2022-Ohio-789. This is evident from the motion ultimately approved by the Commission on May 5, which was to “*resubmit* the February 24, 2022 Commission-approved plan only for use in the

2022 election.”<sup>1</sup> And it is further apparent from Respondents’ “Notice of Resubmission of the Commission’s February 24, 2022 General-Assembly Plan” filed with the Court today.

The Court invalidated the Third Plan “in its entirety” and ordered the Commission to adopt “an *entirely new* General Assembly-district plan that conforms with the Ohio Constitution, including Article XI, Sections 6(A) and 6(B) as [the Court] ha[d] explained those provisions in each of [its] decisions in these cases.” *Id.* ¶ 44 (emphasis added); *see also League of Women Voters of Ohio v. Ohio Redistricting Comm.* (“*LWV IV*”), Slip Opinion No. 2022-Ohio-1235 ¶ 78 (invalidating the Fourth Plan and again “order[ing] the commission . . . to draft and adopt an *entirely new* General Assembly–district plan that meets the requirements of the Ohio Constitution, including Article XI, Sections 6(A) and 6(B) as we have explained those provisions in each of [its] four decisions in these cases.” (emphasis added)); *id.* ¶ 55 (“[T]he [Fourth Plan] has not materially changed from the invalidated [Third Plan].”).

Because the plan at issue is the same one invalidated in *LWV III*, Petitioners “resubmit” their same objections to the plan for the same reasons based upon the same evidence presented in support of their objections submitted on February 28. *See* Pet’r’s Objections to General Assembly District Plan Adopted on Feb. 24, 2022, *Bennett v. Ohio Redistricting Comm.*, Case No. 2021-1198 (Feb. 28, 2022). As this Court has already held, the Third Plan violates the anti-gerrymandering provisions of Article XI because it gives a disproportionate advantage to the Republican Party and was drawn with the intent to unduly favor the Republican Party and disfavor the Democratic Party. *LWV III* at ¶ 24, 38, 42.

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<sup>1</sup> *See* Ohio Channel, Ohio Redistricting Comm. - May 5, 2022 Meeting, at 25:35, available at <https://ohiochannel.org/video/ohio-redistricting-commission-5-5-2022> (last accessed May 6, 2022).

In its rush to re-adopt a plan already invalidated by the Court, the Commission has compounded its disregard for the Ohio Constitution by committing another constitutional violation. The re-adopted Third Plan received four votes in its favor, none of which came from Commissioners from the minority party. As such, the Commission was required to adopt a statement, pursuant to Article XI, Section 8(C)(2), explaining how its latest plan complies with the requirements of Section 6(B). The majority Commissioners, unable to defend the indefensible, failed to do even that. To be sure, Secretary LaRose read a statement into the record that outlined the relevant statutory election-related deadlines,<sup>2</sup> but this statement did not address any of the factors required by Section 8(C)(2). The Commission does not dispute that the Third Plan was invalidated by the Court or that it has an obligation to adopt a constitutional plan pursuant to this Court's order. The majority Commissioners simply do not care about complying with the law.

Adding further insult to injury, the Commission committed another constitutional violation by purporting to re-adopt the Third Plan *only for the 2022 election cycle*. See Respondents' Notice at \*1 ("Senator McColley moved the Commission to resubmit the February 24, 2022 plan only for use in the 2022 election . . . . The Commission voted 4-3 to approve Senator McColley's motion."). Under Article XI, Section 8(B)-(C), the Commission can adopt either a 10-year plan or a four-year plan. Nothing authorizes the Commission to adopt a plan for use in only one election. Yet, that is just what the Commission attempted to do in clear violation of Article XI and clear defiance of this Court's orders to adopt a constitutionally compliant map.

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<sup>2</sup> A copy of this statement is available on the Ohio Redistricting Commission's website at <https://redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-5-2022-316/statement-to-commission-by-secretary-larose-2022-5-05.pdf> (last accessed May 6, 2022).

Petitioners respectfully request that this Court invalidate the re-adopted Third Plan under Article XI of the Ohio Constitution, as it did in its order on March 16, and that it do so immediately so as not to reward the Commission’s delay tactics.

**II. The Court should take immediate steps to compel the Commission to comply with its constitutional duty and take other measures as necessary to ensure the adoption of a constitutional General Assembly plan.**

The events of the last month have served as a capstone on the Commission’s approach to this entire General Assembly redistricting process. It originally claimed that Article XI, Section 6 was “aspirational” and the Commission could ignore it at will. *League of Women Voters of Ohio v. Ohio Redistricting Comm.* (“*LWV I*”), Slip Opinion No. 2022-Ohio-65, ¶¶ 82-83. When the Court held otherwise, the Commission merely modified its original unconstitutional plan in a manner that still systematically favored the Republican Party. *League of Women Voters of Ohio v. Ohio Redistricting Comm.* (“*LWV II*”), Slip Opinion No. 2022-Ohio-342, ¶¶ 3, 49, 61, 63. When the Court held that Section 6 meant what it said and had real teeth, the Commission declared itself at impasse and refused to pass a new plan. Notice of Impasse of Resp’t the Ohio Redistricting Comm., *Bennett v. Ohio Redistricting Comm.*, Case No. 2021-1198 (Feb. 18, 2022). Under the threat of contempt, the Commission then adopted a new plan, albeit one that was rigged to favor the Republican Party. *LWV III* at ¶¶ 2, 33-34, 42. When the Court rejected that gambit as well, the Commission then adopted a plan that was “materially identical” to a previously invalidated plan and was unconstitutional for all of the same reasons. *LWV IV* at ¶¶ 50, 2, 46, 49. And now it has re-adopted a previously invalidated plan *in its entirety*. Clearly the Commission is stalling in the hopes that the federal courts will countenance what this Court will not—use of a plan that violates the Ohio Constitution. The Commission is no longer even pretending that it will comply with this Court’s orders.

Unfortunately, this may be this Court’s final opportunity to give effect to Article XI and

the will of Ohio voters during the 2022 elections. A three-judge federal court has now ordered that the Commission's Third Plan will be used in a court-ordered August 2, 2022 primary election unless a lawful plan is adopted by May 28 and Ohio's election-related deadlines are changed. *See Order Granting Sec. Mot. for P.I., Gonidakis v. LaRose*, Case No. 2:22-cv-00773, Dkt. No. 196 at 58 (S.D. Ohio April 20, 2022).<sup>3</sup> The majority Commissioners have done everything in their power—including re-adopting a plan that this Court has already declared unconstitutional—to stall Commission processes until May 28 for that very reason.

Respondents have repeatedly demonstrated that they are unwilling to comply with the Ohio Constitution and this Court's orders and openly express their intent to flout them. They are counting on federal court intervention to secure the use of an unconstitutional, Republican gerrymandered General Assembly plan during the 2022 elections. *See id.* Given these circumstances, the Bennett Petitioners respectfully submit that this Court should not only invalidate the re-adopted Third Plan without delay but also take immediate measures to compel the Commission to at long last do its job and pass a constitutionally compliant plan.

First, the Court should order that the Commission submit a new plan under threat of sanction. Specifically, it should require Respondents to begin meeting as a Commission starting on Tuesday, May 10, and require that the Commission adopt a new plan by Friday, May 13. As to the sanctions in question, the Court could hold the Commission and/or its members in contempt, as requested in the *League of Women Voters* Petitioners' pending motion to show cause, and as will be further set out in Petitioners' own forthcoming motion to show cause. The Court could also

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<sup>3</sup> The General Assembly primary election had been scheduled for May 3, 2022. The General Assembly has taken no action to reset that primary. The three-judge federal court indicated in the above-referenced order that in addition to ordering use of the Third Plan, it will order the state to hold a primary election on August 2, 2022.

conditionally award Petitioners' attorneys' fees pursuant to a finding of bad faith and/or under R.C. 2323.51, as to all fees incurred in this litigation subsequent to the Court's initial January 12 opinion in this matter. The Court can also make clear that any contempt could be purged or conditional fee award rescinded if the Commission adopts a plan no later than May 13 that is either unchallenged by Petitioners or found to be valid by this Court.

Second, if the Commission still won't act—if it persists in its extrajudicial refusal to carry out its constitutionally prescribed function—then the Court should give effect to Article XI to the maximum degree possible by ordering implementation of a plan itself.

This Court declined to order the adoption of a General Assembly plan in its April 14 order. *LWV IV* at ¶ 71. The Court held that it generally “[l]acked the constitutional authority to grant that relief” due to Article XI, Section 9(D)(1) and (2). *Id.* at ¶ 64. As to Petitioners’ arguments that Section 9(D) “must bend” given the unique circumstances of this case, the Court noted that Petitioners “offer[ed] weak legal support” and stated that “[a]ny suggestion that the federal court could—much less that it should--set an August 2 primary-election date as a remedy in the federal-court litigation strikes [the Court] as a dubious proposition at best.” *Id.* at ¶ 69. The Court declined to “disregard Section 9(D) simply to avoid the possibility that a federal court [might] take action under federal law.” *Id.* ¶ 65. The Court reasoned that “as a matter of comity, a federal court imposing a remedy under federal law would be mindful of the reality that [this Court has] declared that all four maps adopted by the commission violate the Ohio Constitution.” *Id.*

Petitioners, of course, agree that Section 9(D) generally precludes the Court from adopting a particular map or ordering that the Commission do so. Petitioners acknowledge the Court's prior resolution of this issue in *LWV IV* given the record then presented. Petitioners respectfully submit, however, that the situation has now changed, such that the Court should reconsider Petitioners'

requested remedy. The federal court has now stated that *it will order that an August 2 primary be held under the unconstitutional Third Plan* unless a new plan is in place and election-related dates are changed by May 28. *See* Order Granting Sec. Mot. for P.I., *Gonidakis v. LaRose*, Case No. 2:22-cv-00773, Dkt. No. 196 at 58 (S.D. Ohio April 20, 2022). In ordering the use of a plan this Court had rejected, the federal court suggested that it substantively disagrees with this Court’s authoritative interpretation of the Ohio Constitution. *See id.* at 51 (“[T]he Commission’s maps were rejected under a strict proportionality test that cannot be easily found in the text of Ohio’s Constitution.”).

Given these unique circumstances, the Court should now hold that it has authority to order the implementation of a General Assembly plan, as a matter of constitutional interpretation. “[I]n construing the Constitution,” this Court “appl[ies] the same rules of construction [for] construing statutes.” *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16. Because “[t]he court’s paramount concern in statutory construction is the legislative intent in the statute’s enactment,” *Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814, ¶ 13, in the constitutional context the court looks to the “intent of the electorate in adopting the article,” *id.*, and the “intent of the framers,” *Toledo City Sch. Dist. Bd. of Edu.* at ¶ 16.

“This court in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict.” *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 643 N.E.2d 1129, 1131 (1994). “When statutes are in conflict, a court ‘must resort to statutory interpretation and construe the statutes so as to give effect to the legislature’s intent.’” *State v. Pribble*, 158 Ohio St.3d 490, 2019-Ohio-4808, 145 N.E.3d 259, ¶ 12 (quoting *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943

N.E.2d 552, ¶ 24). Furthermore, “in the judicial interpretation of potentially conflicting laws,” one “statutory rule[] of construction [that] must be considered” is the presumption that a “just and reasonable result is intended.” *Johnson’s Mkts., Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35-36, 567 N.E.2d 1018 (1991) (quoting R.C. 1.47).

Under present circumstances, Section 9(D)’s prohibition of this Court ordering a plan is in direct conflict with multiple other, no less important, provisions of the Ohio Constitution. Article XI, Section 9(A) assigns this Court “exclusive, original jurisdiction in all cases arising under” Article XI. The majority Commissioners have repeatedly defied that constitutional grant of jurisdiction by failing to adopt a plan in accordance with Article XI, Sections 6 and 9(B). In doing so, they have encroached upon the judiciary and aggrandized themselves by determining the constitutionality of their own actions and effectively nullifying judgments of this Court. *See State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 51 quoting *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (warning against the “encroachment and aggrandizement of one branch at the expense of the other”) It is settled law that, under the separation of powers doctrine, “[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers.” *Id.* at ¶ 45 quoting *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 421, 423 N.E.2d 80 (1981)); *see also State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 134, 729 N.E.2d 359 (2000) (explaining that the separation of powers doctrine “is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government”). In these unique circumstances, Section 9(D) is in direct conflict with Section 9(A).

Allowing the 2022 primary election to be conducted using the unconstitutional Third Plan would effectively allow the Commission to “annul, reverse, or modify a judgment [that this Court has] already rendered.” *See Bodyke* at ¶ 55 (citation omitted). This situation is akin to one in which a legislative body has repeatedly re-enacted a law that this Court has already held unconstitutional. *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 467, 715 N.E. 1062 (1999) (“[T]he judicial branch is the final arbiter in interpreting the constitution and . . . the General Assembly may not enter upon the judicial business of settling the constitutionality of its own laws, *disregard a Supreme Court decision on the subject, reenact legislation previously declared violative of the Constitution*, or in any other way exercise, direct, control, or encroach upon the judicial power.” (emphasis added)); *id.* at 506 (“[T]here is a marked difference between the initial enactment of a statute where its constitutionality is questionable and an attempt to nullify this court’s opinions which have interpreted the constitutionality of a statute.”); *see also id.* at 478 (“[N]o member of this court can, consistent with his or her oath of office, find that the General Assembly has operated within the boundaries of its constitutional authority by brushing aside a mandate of this court on constitutional issues as if it were no consequence. Indeed, the very notion of it threatens the judiciary as an independent branch of government and tears at the fabric of our Constitution.”).

Likewise, Section 9(D) is now in irreconcilable conflict with Article IV, Section 1 of the Ohio Constitution, which vests the “judicial power of the state” in Ohio courts, and Article I, Section 16, which provides that “every person . . . shall have remedy by due course of law” for injuries. *See also* R.C. 1.11 (“Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice”). Allowing

the Commission to secure use of an unconstitutional plan during the 2022 election cycle deprives Petitioners and all Ohio voters of a remedy for violations of Article XI.

Finally, where the Commission flatly refuses to comply with the substantive provisions of Article XI, including Section 6 and 8, Section 9(D) is in irreconcilable conflict with those provisions as well.<sup>4</sup> Elevating Section 9(D) over the remainder of Article XI would, in these circumstances, likewise nullify the judicial power and deny Ohioans a remedy for their injuries.

The Court should hold that, as applied to these truly remarkable circumstances, created by months of increasingly lawless conduct by the Commission, Article XI, Section 9(D) is in irreconcilable conflict with the remainder of the Ohio Constitution and ought to be severed. Article XI, Section 10 specifically contemplates the invalidation of portions of Article XI, providing that “[t]he various provisions of this article are intended to be severable.”<sup>5</sup>

For similar reasons, this Court should order that a primary election be held under a new plan and modify election-related deadlines as necessary. Petitioners acknowledge that the Court has previously stated that the “authority for setting the date for a primary election belongs to the General Assembly,” pursuant to R.C. 3501.40 and 3501.01(E)(1). *LWV IV* at ¶ 69. But the

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<sup>4</sup> As explained above, the Third Plan violates Article XI, Section 6, as the Court has already held. *LWV III* at ¶ 2. Because the Third Plan was adopted without the support of any of the Commissioners belonging to the minority party, its renewed adoption without an explanatory statement by the majority Commissioners violates Article XI, Section 8(C)(2).

<sup>5</sup> See also *Bodyke* at ¶ 65 (“Three questions are to be answered before severance is appropriate: (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?” (citation omitted)). Here, there is no doubt that “the constitutional and unconstitutional parts [of Article XI are] capable of separation” without “the insertion of words or terms.” *Id.* And Section 9(D) is not “so connected with the general scope of the whole as to make it impossible to give effect to the apparent intent of the [framers] if [it] is stricken out.” *Id.*

application of those statutes in this context would violate the substantive guarantees of Article XI. *See In re D.B.*, 2011-Ohio-2671, 129 Ohio St.3d 104, 950 N.E.2d 528, ¶ 12 (“In an as-applied challenge, the challenger contends that application of the statute in the particular context . . . is unconstitutional.” (citation and internal quotation marks omitted)). The May 3, 2022 primary has occurred without General Assembly seats on the ballot, and the General Assembly has taken no action to set a new primary despite their clear constitutional duty to provide for the nomination of General Assembly candidates. *See* Ohio Constitution, Article V, Section 7 (“All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition *as provided by law.*” (emphasis added)). As things currently stand, Ohio’s legislature is refusing to allow Ohioans to vote for General Assembly offices. The prohibition in R.C. 3501.40 and 3501.01(E)(1) must give way to Ohioans’ right to a constitutional General Assembly Plan. *See LWV I* at ¶ 136 (“[T]he [2022] election cycle should not proceed with a General Assembly-district map that we have declared invalid . . .”); *see also Sheward*, 86 Ohio St.3d at 493 (“[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”).

Petitioners further note that Article IV, Section 2(B)(1)(f) of the Ohio Constitution “authorize[s] judgments in this court that are necessary to achieve closure and complete relief in actions pending before the court.” *State v. Steffen*, 70 Ohio St.3d 399, 407, 639 N.E.2d 67 (1994); *see also Burger v. City of Cleveland Heights*, 87 Ohio St.3d 188, 195-198, 718 N.E.2d 912 (1999) (Douglas, J. concurring) (explaining that Section 2(B)(1)(f) is available when the matters before the court are “unprecedented and extraordinary and are in need of closure and complete determination and relief”).

This Court should order the implementation of a constitutional General Assembly plan for a 2022 primary election, such as the Corrected Independent Map Drawers' Plan that was submitted to this Court on April 12, 2022. *See* Pet'r's Notice of Filing in Southern District of Ohio of Corrected Independent Map Drawers' Plan, *Bennett v. Ohio Redistricting Comm.*, Case No. 2021-1198 (Apr. 12, 2022). The Court should also adjust appropriate election-related deadlines and retain jurisdiction over the Commission's continued efforts to enact a valid plan for future election cycles. This outcome will do the least violence to Ohio's constitutional structure and framework for approving General Assembly districts at this late date.

### CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court invalidate the re-adopted Third Plan under Article XI of the Ohio Constitution, as it did in its order on March 16, and that it do so immediately so as not to reward the Commission's attempts at delay. The Court should take any other measures necessary in its view to ensure the adoption of a constitutional General Assembly plan.

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Respectfully submitted,

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