IN THE SUPREME COURT OF OHIO

THE OHIO ORGANIZING
COLLABORATIVE, *et al.*,

    Petitioners,

    v.

OHIO REDISTRICTING
COMMISSION, *et al.*,

    Respondents.

Case No. 2021-1210

APPORTIONMENT CASE

Filed pursuant to S.Ct.Prac.R. 14.03(A)
and Section 9 of Article XI of the Ohio
Constitution to challenge a plan of
apportionment promulgated pursuant to
Article XI.

OBJECTIONS AND REQUEST FOR REMEDIES

OF PETITIONERS THE OHIO ORGANIZING COLLABORATIVE, ET AL.

Alicia L. Bannon (PHV 25409-2022)
Yurij Rudensky (PHV 25422-2022)
Harry Isaiah Black (PHV 25544-2022)
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel: (646) 292-8310
Fax: (212) 463-7308
alicia.bannon@nyu.edu

Brian A. Sutherland (PHV 25406-2022)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Tel: (415) 543-8700
Fax: (415) 391-8269
bsutherland@reedsmith.com

Peter M. Ellis (0070264)
   Counsel of Record
M. Patrick Yingling (PHV 10145-2022)
REED SMITH LLP
10 South Wacker Drive, 40th Floor
Chicago, IL 60606
Tel: (312) 207-1000
Fax: (312) 207-6400
pellis@reedsmith.com

Attorneys for Petitioners
The Ohio Organizing Collaborative, et al.

(listing of counsel for petitioners continued on next page)

Ben R. Fliegel (PHV 25411-2022)
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
Tel: (213) 457-8000
Fax: (213) 457-8080
bfliegel@reedsmith.com

Brad A. Funari (PHV 3139-2022)
Danielle L. Stewart (0084086)
Reed Smith Centre
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: (412) 288-4583
Fax: (412) 288-3063
bfunari@reedsmith.com
dstewart@reedsmith.com

Attorneys for Petitioners
The Ohio Organizing Collaborative, et al.

(counsel for respondents listed on next page)

Counsel for Respondents

C. Benjamin Cooper (0093103)
  Counsel of Record
Charles H. Cooper, Jr. (0037295)
Chelsea C. Weaver (0096850)
COOPER & ELLIOTT, LLC
305 West Nationwide Boulevard
Columbus, Ohio 43215
Tel: (614) 481-6000
Fax: (614) 481-6001
benc@cooperelliott.com
chipc@cooperelliott.com
chelseaw@cooperelliott.com

Special Counsel for Respondents
Senator Vernon Sykes and
House Minority Leader C. Allison Russo

Erik J. Clark (0078732)
  Counsel of Record
Ashley Merino (0096853)
ORGAN LAW LLP
1330 Dublin Road
Columbus, Ohio 43215
Tel: (614) 481-0900
Fax: (614) 481-0904
ejclark@organlegal.com
amerino@organlegal.com

Counsel for Respondent
Ohio Redistricting Commission

Counsel for Respondents
(Cont.)

W. Stuart Dornette (0002955)
Beth A. Bryan (0082076)
Philip D. Williamson (0097174)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut St., Suite 1800
Cincinnati, Ohio 45202-3957
Tel: (513) 381-2838
Fax: (513) 381-0205
dornette@taftlaw.com
bryan@taftlaw.com
pwilliamson@taftlaw.com

Phillip J. Strach
Thomas A. Farr
John E. Branch, III
Alyssa M. Riggins
Greg McGuire
NELSON MULLINS RILEY &
SCARBOROUGH LLP
4140 Parklake Ave., Suite 200
Raleigh, North Carolina 27612
Tel: (919) 329-3812
Fax: (919) 329-3799
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
greg.mcguire@nelsonmullins.com

Counsel for Respondents
Senate President Matt Huffman and
House Speaker Robert Cupp

OHIO ATTORNEY GENERAL
Bridget C. Coontz (0072919)
    Counsel of Record
Julie M. Pfeiffer (0069762)
Michael A. Walton (0092201)
    Assistant Attorneys General
Michael J. Hendershot (0081842)
    Deputy Solicitor
30 E. Broad Street, 16th Floor
Columbus, OH 43215
Tel: (614) 466-2872
Fax: (614) 728-7592
bridget.coontz@ohioago.gov
julie.pfeiffer@ohioago.gov
michael.walton@ohioago.gov
michael.hendershot@ohioago.gov

Counsel for Respondents
Secretary of State Frank LaRose, and
Auditor Keith Faber

John W. Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 365-9900
zeiger@litohio.com
little@litohio.com
hogan@litohio.com

Counsel for Respondent
Governor Mike DeWine

Counsel for *Amici Curiae*

Subodh Chandra (0069233)
Donald Screen (0044070)
 Counsel of Record
THE CHANDRA LAW FIRM LLC
The Chandra Law Building
1265 West 6th Street
Cleveland, Ohio 44113
Tel: (216) 578-1700
subodh.chandra@chandralaw.com
donald.screen@chandralaw.com

Janette McCarthy Wallace (0066257)
Anthony P. Ashton*
Anna Kathryn Barnes*
NAACP
Office of the General Counsel
4805 Mount Hope Drive
Baltimore, MD 21215
Tel.: (410) 580-5777
jlouard@naacpnet.org
aashton@naacpnet.org
abarnes@naacpnet.org

Jon Greenbaum*
Ezra D. Rosenberg*
Pooja Chaudhuri*
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1500 K Street, N.W., Ste. 900
Washington, D.C. 20005
Tel.: (202) 662-8600
jgreenbaum@lawyerscommittee.org
erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org

*Not Admitted to the State Bar of Ohio

*Counsel for Amicus Curiae The Ohio
State Conference of the NAACP*

Stephanie Marie Chmiel (0087555)
Mary Elizabeth Csarny (0097682)
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Tel.: (614) 469-3247
Fax: (614) 469-3361
stephanie.chmiel@thompsonhine.com
mary.csarny@thompsonhine.com

Counsel for Amicus Curiae David Niven

Andrew William Garth (0088905)
 City Solicitor
Emily Smart Woerner (0089349)
 Deputy City Solicitor
Shannon Doyle Price (0100744)
 Assistant City Solicitor
CITY OF CINCINNATI
801 Plum Street, Room 214
Cincinnati, Ohio 45202
Tel.: (513) 352-3307
Fax: (513) 352-1515
emily.woerner@cincinnati-oh.gov
shannon.price@cincinnati-oh.gov

*Counsel for Amicus Curiae City of
Cincinnati*

Donald C. Brey (0021965)
Ryan C. Spitzer (0093515)
ISAAC WILES & BURKHOLDER, LLC
Two Miranova Place, Suite 700
Columbus, Ohio 43215-5098
Tel.: (614) 221-2121
Facsimile: 614-365-9516
dbrey@isaacwiles.com

Counsel for Amicus Curiae Renew Ohio

TABLE OF CONTENTS

INTRODUCTION

This Court ordered the Ohio Redistricting Commission to reconvene, 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), by March 28, 2022. The Commission indisputably has not complied with the Court's order. In its Section 8(C)(2) statement, the Commission acknowledged that the plan it enacted on March 28, 2022 is a "modification" of the previously invalidated February 24, 2022 plan. In fact, it is nearly identical: To create the March 28 plan, the majority's mapmaker tweaked a few lines to move 451 out of 276,478 census blocks, or 0.0016 percent of census blocks in Ohio. Following these alterations, only 0.265 percent of the population changed districts from the invalidated plan to the enacted plan. Because the March 28 plan (also referred to as the "Third Revised Plan") is not materially different from the February 24 plan (also referred to as the "Second Revised Plan"), it is unconstitutional for all the same reasons. This Court should hold that the Third Revised Plan is invalid under Ohio law.

If this Court holds that the Third Revised Plan is invalid and unconstitutional, as it should, then Ohio will be left, once again, without a General Assembly district plan based on 2020 census data. In its prior rulings, the Court has ordered the Commission to draft a new plan. But at this late stage, the Commission likely does not have enough time to draft a new plan for the 2022 election. Nor can we expect good faith on the Commission's part. Conducting an election under the 2011 district plan enacted by the then-existing Apportionment Board is not an answer; such an election would violate Ohio voters' federal right to vote in districts with equal population. Conducting no election is not an answer either. Accordingly, almost inevitably at this point, a court will order the implementation of a district plan as a matter of *federal* law. Under the Supremacy Clause, this Court has the power and duty to remedy violations of federal law

arising in the course of these proceedings. To remedy the violation of federal law—the absence of a valid district plan based on 2020 census data—caused by the Commission's willful failure to enact a valid plan, this Court should order the implementation of a plan for the 2022 elections that complies with both federal and state law. Additionally, it should order the Commission to draft a new plan, but for the 2024 election cycle. And it should hold a contempt hearing and impose sanctions as necessary to secure compliance with its orders.

BACKGROUND

On Wednesday, March 16, 2022, this Court explained that "[i]n all three of [its] opinions," it had "identified a flawed process in which the General Assembly-district plan adopted by the commission has been the product of just one political party." *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-789 ("*League III*") at ¶ 31. These processes constituted evidence of a plan drawn "primarily to favor or disfavor a political party" in violation of Article XI, Section 6(A) of the Ohio Constitution. *Id.* at ¶¶ 24-32. The Court stated that the "commission should retain an independent map drawer—who answers to all commission members, not only to the Republican legislative leaders—to draft a plan through a transparent process." *Id.* at ¶ 30. The Court further ordered that "drafting should occur in public and the commissioners should convene frequent meetings to demonstrate their bipartisan efforts to reach a constitutional plan within the time set by this court." *Id.* at ¶ 44.

On Saturday, March 19, the Commission convened to adopt a compliant plan. (OOC 1 [3/19/22 Hrg Tr.])[1] The Commission discussed hiring independent map drawing consultants—

---

[1] Citation to "OOC __" pages refer to the Bates-stamped pages of the appendix of exhibits attached to Affidavit of Brian A. Sutherland, submitted herewith.

one chosen by each caucus—and what their role would be in the process. (OOC 18-21 [Hrg Tr. 1:17:37-1:32:08])

On Monday, March 21, the Commission assembled again. (OOC 24 [3/21/22 Hrg Tr.]) To enable the preparation of a new plan, the Commission retained two consultants—Dr. Douglas Johnson, from the National Demographics Corporation, and Dr. Michael McDonald, from the University of Florida. (OOC 24-25 [Hrg Tr. 00:53-04:55]) The independent map drawers would draft a new plan for the Commission's consideration, with the assistance of the Commissioners' staff. (OOC 27-28 [Hrg Tr. 13:19-18:53])

On Tuesday, March 22, the Commission met to discuss the week's schedule. (OOC 39 [3/22/22 Hrg Tr. 00:43-01:31]) The Commission planned to meet every day during the rest of the week to track the progress of the independent map drawers and receive public input. (OOC 40-41 [Hrg Tr. 03:23-08:45]) The Commission published a daily schedule of public meetings of the independent map drawers. (OOC 42-43 [Hrg Tr. 12:59-14:12]) The Commission also heard from and hired mediators, made available by the U.S. Court of Appeals for the Sixth Circuit, to help resolve disputes as they arose. (OOC 43-50 [Hrg Tr. 14:12-44:31]) On Wednesday, March 23, the Commission heard from the independent map drawers (OOC 54-87 [3/23/22 Hrg Tr.]) and adopted 24 detailed instructions to guide the work of the independent map drawers (OOC 88-89 [Ground Rules for Map Drawers – As Adopted on 3.23.2022])

On Thursday, March 24, the independent map drawers began their work.[2] They met in room 116 of the Statehouse and used two computers to draw the maps. (OOC 89 [¶ 19])

---

[2] Video recordings of the independent mapmakers working on maps are archived by date at the Ohio Channel, https://ohiochannel.org/collections/ohio-redistricting-commission.

Designated staff of the Commissioners provided feedback to the independent map drawers in real time and fielded questions about Ohio's geography. That evening, the independent map drawers briefed the Commission on their progress and sought guidance on some outstanding questions.[3] At the end of the meeting, Senator Sykes remarked that "this is … historic … to have this type of openness" and that "we are making progress."[4]

On Friday, March 25, the map drawers informed the Commission that they made even more progress and had successfully drafted their proposals for districts in Ohio's largest counties—Cuyahoga, Franklin, Hamilton, and Summit—and were steadily making progress on Montgomery County.[5] The independent map drawers also presented on their computer screens the two proposals they had drafted and then walked the Commission through the completed counties. Dr. Johnson noted that the representatives of the Commissioners, who had been in the map drawing room to answer questions, had informed the map drawers about "lessons learned" from the past map drawing exercises.[6]

---

[3] *See* The Ohio Channel, Ohio Redistricting Commission, 3-24-2022, https://ohiochannel.org/video/ohio-redistricting-commission-3-24-2022. The transcript of the March 24 meeting was not available on the Commission website at the time of this filing.

[4] *See id.* at 49:32-50:00.

[5] *See* The Ohio Channel, Ohio Redistricting Commission, 3-25-2022, https://ohiochannel.org/video/ohio-redistricting-commission-3-25-2022. The transcript of the March 24 meeting was not available on the Commission website at the time of this filing.

[6] *See id.* at 31:23-31:36.

By Saturday, March 26, each independent map drawer had a House map to present.[7] Both

maps achieved proportionality—45 Democratic-leaning districts and 54 Republican-leaning

districts. (OOC 91-92 [3/26/22 Hrg Tr. at 30:09-34:18]) The independent map drawers reported

that their respective maps did not have many significant differences. (OOC 93 [Hrg Tr. 35:39-

38:00]) Senate President Huffman then asked the map drawers to refrain from grouping

incumbent senators together in the same district, while Senator Sykes and Leader Russo argued

that protecting incumbents was not a permissible goal under this Court's rulings. (OOC 94-96

[3/26/22 Hrg Tr. at 41:31-54:31]) The Commission ultimately decided to reserve the incumbency

issue for mediation outside of the formal Commission hearing. (OOC 98-99 [Hrg Tr. at 59:57-

1:06:02]) Later, the Commission instructed the map drawers to consider residence of non-term-

limited House and Senate incumbents and avoid pairing them together. (OOC 115)

On Sunday, March 27, the independent map drawers reported having independently

completed Senate and House maps.[8] Dr. McDonald reported that the mapmakers had a large

amount of agreement, but had a lingering area of uncertainty and disagreement for the

Commission to resolve concerning the relationship between compactness and partisan symmetry

in the situation where a map has only a few competitive districts that are classified as

Democratic-leaning or Republican-leaning, *e.g.*, two, three, or four districts.[9] The commissioners

---

[7] *See* Ohio Redistricting Commission, Commission Meetings (March 26, 2202),
https://redistricting.ohio.gov/meetings.

[8] *See* The Ohio Channel, Ohio Redistricting Commission, 3-27-2022,
https://ohiochannel.org/video/ohio-redistricting-commission-3-27-2022. The transcript of the
March 27 meeting was not available on the Commission website at the time of this filing.

[9] *See id.* at 1:40-10:50.

and mapmakers discussed possible approaches for drawing districts within various populous counties to give further guidance to the mapmakers.

On Monday, March 28, the Commission convened at about 11 a.m. The independent map drawers explained that they had merged their plans into one plan and started "cleanup" of village, city, and township splits. (OOC 116-17 [3/28/22 Hrg Tr., Part 1 at 1:31-4:00]) The independent map drawers stated that they would proceed that afternoon to consider incumbent data as directed by the Commission and invited feedback from the Commissioners or their staff. (OOC 118-21 [Hrg Tr. 8:09-18:09]) When the Commission reconvened at about 4:30 p.m., the independent map drawers reported that they were nearly finished considering incumbent addresses in the House map but had not yet had time to do so in the Senate map. (OOC 122 [3/28/22 Hrg Tr., Part 2 at 00:10-02:22]) They stated that their work would continue and that a complete Senate map would be available later in the day. (OOC 122 [3/28/22 Hrg Tr., Part 2 at 02:22-03:16])

That's when things went off the rails. Senate President Huffman moved to draft changes to the plan enacted by the Commission on February 24, *i.e.*, the Commission's Second Revised Plan that this Court invalidated as unconstitutional. (OOC 133 [3/28/22 Hrg. Tr., Part 2 at 43:41-50:08]) President Huffman stated, "I think we need a failsafe" and "I think we need something else for the Commission to be able to vote on." (OOC 133 [43:41-50:08]) Senator Sykes and Leader Russo both objected. (OOC 133-35 [50:08-55:36]) Secretary LaRose offered that using the unconstitutional plan as a starting point would be helpful to him because, as a "practical" matter, "if there is a desire to look at the February 24th map and modify off of that, the fewer changes made would be the sooner that we could implement it as far as reprogramming voter registration systems at County Board of Elections and that kind of thing." (OOC 134 [53:24-

54:34] Senator Sykes argued that "to distract the staff and map drawers and to divert to some other task is ridiculous … [and] contrary to the directive, the spirit and the direction of the court." (OOC 134 [50:16-51:35]) Leader Russo argued that, under this Court's orders, the Commission should not use an unconstitutional plan as a starting point for enacting a new plan. (OOC 135 [54:34-55:36])

The Commission approved, on a 5-2 party-line vote, Senate President Huffman's motion to use the unconstitutional Second Revised Plan as a starting point and to draft changes to that plan. (OOC 138 [3/28/22 Hrg Tr., Part 3 at 07:32-08:06]) During the next several hours, Dr. Johnson continued to work on the independent map drawers' maps on camera for the public to see.[10] Meanwhile, the only Republican staff consultant available to assist with map drawing, Blake Springhetti, stopped providing guidance to Dr. Johnson and instead imported the invalidated Second Revised Plan into one of the working computers and made changes for about 45 minutes. (OOC 142-45 [3/28/22 Hrg Tr., Part 4 at 18:39-30:59])

At about 9:30 p.m., Dr. Johnson reported to the Commission that he had completed final adjustments to a House map and needed about 45 minutes to complete the Senate map. (OOC 139 [3/28/22 Hrg Tr., Part 4 at 00:22-03:02]) Although Dr. Johnson had reported that he was nearly finished, Senate President Huffman argued that the Commission should "move on" to consider the revised version of the Republican caucus map drawer's plan. (OOC 141 [10:17-11:04]) Speaker Cupp moved to adopt the plan, which he had labeled the "3-28 Cupp plan"

---

[10] *See* Ohio Redistricting Commission – Workroom – 3-28-2022 – 3:00pm-11:00pm, https://bit.ly/36Dk6wA; Ohio Redistricting Commission – Workroom – 3-28-2022 – 11:00pm-11:59pm, https://bit.ly/3wXK2NY. Dr. McDonald departed Columbus at about 5:00 p.m. on March 28 due to a prior academic commitment.

(hereafter, the "Third Revised Plan"). (OOC 141-142 [13:40-14:51])[11] Speaker Cupp argued that "this was the best that could be done in the time allotted by the Supreme Court . . . We have followed the Supreme Court's direction . . . and they have led us to this moment." (OOC 142 [17:18-18:34]) The Commission adopt the Third Revised Plan on a 4-3 vote, and the Commission recessed to consider Section 8(C)(2) Statements. (OOC 151-52 [54:03-54:34])

During the recess, Dr. Johnson completed the independent map drawers' plan and posted the plan to the Commission's website.[12] When the Commission reconvened at about 11:00 p.m., Senator Sykes moved for the Commission to replace the Third Revised Plan by instead adopting the independent mapmakers' plan. (OOC 153-156 [3/28/22 Hrg Tr., Part 5 at 01:13-08:03]) Senator Sykes noted that the independent plan achieved proportionality, and Leader Russo noted that the plan was significantly more symmetrical than the Third Revised Plan because it had only three House Democratic-leaning and three House Republican-leaning seats falling within the 50-52% range, and only two Senate Democratic-leaning and no Senate Republican-leaning seats falling within that range. (OOC 154 [02:16-4:38]) The Commission rejected the independent mapmakers' plan by 5-2 party-line vote. (OOC 158-59 [21:11-21:45])

The Commission then adopted the Section 8(C)(2) Statement drafted by the Republican commissioners. (OOC 162) Despite this Court's order to draw an entirely new plan, the Statement confesses that "on the final evening of March 28, 2022, the Commission instructed

---

[11] The transcript available on the Commission's website erroneously attributes the motion to Senator Sykes. As the rest of the transcript and this litigation makes clear, Speaker Cupp made the motion.

[12] The Johnson/McDonald Plan is available on the Commission's website and labeled "Johnson McDonald Independent Plan 328 Final," https://redistricting.ohio.gov/maps. The Johnson/McDonald maps and data are also available at OOC 168-173.

Commission member staff to prepare, with the assistance of the independent mapdrawers, a modification of the plan adopted by the Commission on February 24, 2022 … that more closely complies with the Court's orders …." (OOC 163) The minority of the Commission also filed a report, which stated that the Third Revised Plan was "a nearly identical gerrymander to the plan overturned by the Supreme Court of Ohio just 12 days ago." (OOC 167)

OBJECTIONS

I. The March 28 Plan Violates Section 6(A)

Article XI, Section 6(A) of the Ohio Constitution provides that the Commission shall attempt to meet the standard that "[n]o general assembly district plan shall be drawn primarily to favor or disfavor a political party." Section 6(A) "requires this court to discern the map drawers' intent." *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-65 ("*League I*") at ¶ 116; *League III* at ¶ 24. As was the case three times before, the evidence shows beyond a reasonable doubt that the main goal of the individuals who drafted the Third Revised Plan was to favor the Republican Party and disfavor the Democratic Party.

To start, the evidence shows again that the Commission did not follow the process that Article XI requires. "*The commission shall draft* the proposed plan." Ohio Constitution, Article XI, Section 1(C) (emphasis added). In its March 16 opinion, this Court recognized that "[i]n all three of our opinions in these cases, we have identified a flawed process in which the General Assembly–district plan adopted by the commission has been the product of just one political party[,]" and stated that "we expect the commission to abide by its Article XI duty to draft a plan, not to simply adopt one drafted by legislative staff at the direction of members of one political party[.]" *League III* at ¶ 31. The Court thus concluded by ordering "that *the commission* draft and

adopt an entirely new General Assembly–district plan that conforms with the Ohio Constitution" and stated that "[t]o promote transparency and increase public trust, the drafting should occur in public and the commissioners should convene frequent meetings to demonstrate their bipartisan efforts to reach a constitutional plan within the time set by this court." *Id.* at ¶ 44.

In the days following this Court's March 16 opinion, the Commission appeared willing to follow this Court's orders. The Commission hired independent map drawers, who by all appearances immediately began to work diligently, cooperatively, and openly. After conferring with the commissioners and their staffs, the independent map drawers had maps ready before the day of the deadline. But any hope that these efforts might lead to a compliant plan flamed out when the Commission accepted Senate President Huffman's eleventh-hour motion for the Republican caucus staffers to tweak the invalid Second Revised Plan and submit it to the Commission for adoption by the majority, once again.

The deeply flawed process led once again to a deeply flawed plan—one that is virtually identical to the plan this Court invalidated less than three weeks ago. (Declaration of Michael S. Latner, dated Apr. 1, 2022 ("Latner"), ¶ 7) In the March 16 opinion, this Court stated that while "the presence of toss-up districts in the plan is not alone the basis" for a determination that the plan violates Section 6(A), "[t]he remarkably one-sided distribution of toss-up districts is evidence of an intentionally biased map, and it leads to partisan asymmetry." *League III* at ¶ 33. "[W]hen a plan labels *every* 'competitive' or 'toss-up' district as a Democratic-leaning one, that is evidence of intent to favor the Republican Party." *Id.* at ¶ 34 (citing *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-342 ("*League II*") at ¶ 40).

The Commission has again adopted a plan in which a severely disproportionate number

of toss-up districts are labeled Democratic-leaning. The ultimate product this time around is a

plan that contains 17 Democratic-leaning toss-up seats in the House with a 50-52% partisan

share and *zero* Republicans in the same range, along with 6 Democratic-leaning Senate seats

falling between 50-52% and *zero* Republicans in the same range. (Latner ¶¶ 8-9) The estimated

margin of victory in these toss-up districts is so small, however, that to call them "Democratic-

leaning" is an overstatement, individually and in the aggregate, because the probability that

voters will elect a Democratic candidate is *almost* the same as the probability that voters will

elect a Republican candidate in these districts. (Latner ¶ 10) This Court has explained (multiple

times) that the Commission's approach is unacceptable.

In an unbiased map, one would expect the "lean" of toss-up districts to be randomly

distributed between the two parties, so that the parties would generally split these districts

roughly 50/50 over the course of elections due to ebbs and flows in voter support. Here,

however, the distribution is anything but random. (Latner ¶¶ 10, 17, 25-34) In the House map of

the Third Revised Plan, toss-up districts represent approximately one third of all districts that the

Commission deemed to favor Democrats. (Latner ¶ 8) Excluding toss-up districts, the House

map includes 54 Republican-leaning House districts and only 28 Democratic-leaning ones.

(Latner ¶ 8) The Senate map is just as extreme, with Democratic and Republican seat shares of

33 and 67 percent, respectively. (Latner ¶ 9) This is a highly unusual pattern—both in terms of

the number of toss-up districts and in their extreme one-sidedness—and is therefore indicative of

intent to favor or disfavor a political party. (Latner ¶¶ 17-18, 45) Alternative maps, including the

independent map drawers' plan and the third plan prepared by Dr. Jonathan Rodden in this

litigation (the "Rodden III Plan"), do not display such one-sidedness. (*Id.* ¶¶ 34, 45)

As one would expect, given its provenance, the Third Revised Plan does not cure the severe partisan asymmetry that petitioners and this Court have previously identified. A plan is symmetrical if the number of seats won by a party when it receives a given percentage of the statewide vote is the same for each party. *See League I* at ¶ 122. Conversely, a plan is asymmetrical if one party would win more seats than the other party would win with the same vote share. For all three of the plans previously adopted by the Commission, Dr. Latner showed that Democratic candidates could be expected to win significantly fewer seats than Republican candidates would win with the same vote share. *League I* at ¶ 122; *League II* at ¶ 42; *League III* at ¶ 33. Moreover, Ohio's natural geography did not explain the degree of asymmetry that he observed; instead, as Dr. Latner explained, the level of asymmetry he observed was the product of the Commission's intent to favor Republicans and disfavor Democrats. *League III* at ¶ 33.

The same is true again. As Dr. Latner shows in his affidavit attached to these objections, with 50 percent of the statewide vote, Democratic voters would expect to win approximately 44 percent of House and Senate seats. (Latner ¶¶ 31, 32) By contrast, Republicans would expect to win 53 percent of House and Senate seats with 50 percent of the statewide vote. (Latner ¶¶ 31, 32) Republicans also have more safe districts, where they earn 5 percent more than their statewide vote average (46) than do Democrats (35), indicating that Republican voters are allocated more efficiently than Democratic ones. (Latner ¶ 31)

The level of partisan asymmetry in the Third Revised Plan is statistically significant and unjustified, as demonstrated by the fact that other maps submitted to the Commission, including the independent map drawers' maps and Dr. Rodden's maps, exhibit considerably less partisan asymmetry. (Latner ¶ 34) Given that it was possible to adopt a plan without such severe partisan asymmetry, the Commission had an obligation to do so. *League I* at ¶ 88.

12

Because the majority has once again enacted a plan to favor Republicans at the expense of Democrats, the plan violates Section 6(A) of Article XI of the Ohio Constitution.

II. The March 28 Plan Violates Section 6(B)

Section 6(B) provides that "[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 Constitution, Article XI, Section 6(B). The Court explained in its February 7 opinion that the Commission must interpret and apply the term "favor" so that the proportion of districts whose voters favor each political party corresponds closely to statewide voter preferences. *League II* at ¶ 61. Thus, toss-up or competitive districts must either be excluded from the proportionality assessment or be allocated to each party in close proportion to its statewide vote share. *League II* at ¶ 62. This Court invalidated the Second Revised Plan, the one enacted on February 24, for these reasons. *League III* at ¶¶ 38-42.

The Third Revised Plan enacted on March 28 is virtually identical to the Second Revised Plan and violates Section 6(B) of Article XI for the same reasons. (Latner ¶¶ 7, 23) Once again, "the quality and degree of favoritism in each party's allocated districts is grossly disparate." *League II* at ¶ 61. It's not even close. In order to win seats proportional to their statewide vote share under Section 6(B), Democrats would need to win every single toss-up district.

Excluding the toss-up districts, the House map of the Third Revised Plan yields respective Democratic and Republican seat shares of 34 and 66 percent. (Latner ¶ 16) This is no better than the performance they could reasonably expect under each of the previously adopted unconstitutional plans, which similarly were likely to result in the election of Republican

candidates in about 64.4 percent of all General Assembly districts. *League I* at ¶ 105; *League II* at ¶ 40; *League III* at ¶¶ 41-42. By contrast, none of the districts counted as "Republican-leaning" are toss-up districts. (Latner ¶¶ 19-20, Tables 3-4) In fact, if Republicans receive 56 percent of the statewide vote (an improvement of 2 percent from the proportionality benchmark), they can expect to win 72 percent of House districts—a veto-proof supermajority. (Latner ¶ 19) Conversely, if the Democrats improve by the same 2 percent statewide, they would see *no* seat increases, let alone attain a majority. (Latner ¶ 19)

The Senate map of the Third Revised Plan follows the same pattern. (Latner ¶ 20) The Senate map has 6 districts that barely lean Democratic and no corresponding Republican toss-up districts. (Latner ¶ 20) Both the number and partisan lean of these districts is designed to greatly benefit Republicans. Excluding the toss-up districts, the Senate map of the Third Revised Plan yields respective Democratic and Republican seat shares of 33 and 67 percent. (Latner ¶ 16) With a two-point swing in favor of Republicans (*i.e.*, with 56% of the statewide vote), Republicans would be expected to win a 73% supermajority of Senate seats. (Latner ¶ 20) By contrast, a two-point swing in favor of Democrats would make no difference at all, much less would it produce a 6-seat swing in their favor. (Latner ¶ 20)

As was the case last time around, *League III* at ¶ 33, this unusual pattern of district allocations suggests that the Commission again intended to use toss-up districts that are nominally Democratic-leaning to create an illusion of increased proportionality without producing a map that would produce proportionate outcomes. (Latner ¶ 24) That this was a deliberate choice by the Commission is underscored by the existence of alternative plans, including Johnson/McDonald and Rodden III, that achieve proportionality without relying on an unusually high number of Democratic-leaning toss-up districts. (Latner ¶ 24)

14

REMEDIES

**I.   To Remedy Imminent Violations of Federal Law, This Court Should
Direct the Secretary of State to Conduct the 2022 Primary Election
Under the Johnson/McDonald Plan**

As it has done thrice previously, *League I* ¶ 135; *League II* ¶ 67; *League III* ¶¶ 38-43, this

Court should declare that the plan enacted by the Ohio Redistricting Commission is invalid and

order it to enact a new one. And for the 2022 election cycle, the Court should go further. Because

of the Commission's intransigence and contempt for this Court's rulings, the circumstances of

this case have changed. At this late date, the Commission's actions threaten to deprive Ohioans

of the right to vote in districts that are properly apportioned by population under *federal* law. To

prevent an imminent violation of *federal* law, which would occur if no primary election occurred

or if the election were conducted under malapportioned maps, this Court should order the

Secretary of State to implement the Johnson/McDonald plan, which complies with both federal

and Ohio law. This Court has the power to issue such an order under federal law. *See Catlett v.

Catlett*, 55 Ohio App.3d 1, 3, 561 N.E.2d 948, 951 (1988) (noting that "unless Congress gives

the federal courts exclusive jurisdiction, state courts have both the power and duty to enforce

obligations arising under federal law"). Federal law is supreme and preempts any contrary

provision of Article XI. *See* U.S. Const., Art. VI, cl. 2.

**A.   This Court Has the Power to Remedy Violations of Federal Law Arising in
the Course of These Proceedings**

The Secretary of State's chief counsel, Amanda Grandjean, has testified that the State of

Ohio must have a final general assembly district plan in place by April 20, 2022, so that the

Secretary and county boards of elections can administer a primary election on August 2, 2022,

the last feasible date to conduct a primary election in this State. The three-judge district court in

Gonidakis v. LaRose has ordered the parties to file motions on April 6, 2022 (S.D. Ohio Case No. 22-cv-773, ECF No. 143, at PageID #3715); those motions will propose a remedy for violation of federal law that would occur if this Court declares the March 28 plan to be invalid and there is no plan to replace it by April 20. In other words, if neither the Commission nor this Court enacts or orders the implementation of a General Assembly district plan by April 20, then the federal court will do so, at least for the 2022 cycle.

Unless the Commission indicates in its response to these objections that it is willing to enact the Johnson/McDonald plan or a slightly-revised version of that plan (or this Court orders the Commission to adopt that approach), there is little probability that the Commission will enact a valid plan by April 20. Time has run out for the Commission to "draft and adopt an entirely new General Assembly–district plan that conforms with the Ohio Constitution." *League III* at ¶ 44. If the Court adjudicates these objections and the parties' motions for an order to show cause after hearing from respondents on April 4, then even a very swift opinion from this Court would not leave enough time for the Commission to draft a new plan and for petitioners and this Court to review it. Nor is there any reason to believe that the Commission would even try to draft a new plan that complies with the Ohio Constitution. It just demonstrated that it will not. In fact, by willfully causing Ohio's system to fail to produce valid maps, the Commission majority has demonstrated that it *wants* a *court* to order a plan under federal law. It just wants a *different* court to do so. The majority appears to be betting that only the three-judge district court in the Southern District of Ohio can order implementation of a plan for 2022. If so, it is mistaken. The source of authority to order a plan in this case is the United States Constitution, not any difference between federal and state courts.

Under the Supremacy Clause, federal law preempts state law when "when compliance with both state and federal law is impossible." *Mktg. Research Servs. v. PUC of Ohio*, 34 Ohio St.3d 52, 54, 517 N.E.2d 540, 542 (1987). Given the timing, this case now presents a situation in which federal and state law conflict. State law provides that "[n]o court shall order, in any circumstance, the implementation or enforcement of any general assembly district plan that has not been approved by the commission …." Ohio Constitution, Article XI, Section 9(D)(1). But contrary federal law provides that, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature *must* be apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S. Ct. 1362, 1385 (1964) (emphasis added); *see also Evenwel v. Abbott*, 578 U.S. 54, 59, 136 S. Ct. 1120, 1124 (2016). Under the federal constitution, "denial of constitutionally protected [voting] rights demands judicial protection." *Reynolds*, 377 U.S. at 566.

This Court has the power to enforce federal law as against contrary assertions that state law controls; it does so every time that it holds that federal law preempts an Ohio statute or constitutional provision. *See, e.g.*, *Jones Metal Prods. Co. v. Walker*, 29 Ohio St. 2d 173, 183, 281 N.E.2d 1, 9 (1972) (holding that Ohio law was unenforceable because it conflicted with contrary federal law). Moreover, the U.S. Supreme Court has said that "state courts are generally not free to refuse enforcement of the federal claim." *Martinez v. California*, 444 U.S. 277, 285, 100 S. Ct. 553, 559 (1980). The "federal claim" here arises as an objection to a course of action that the Commission undertook during litigation, and plainly relates to the ongoing redistricting proceedings over which this Court exercised original jurisdiction under Article XI and continues to exercise jurisdiction as necessary to enforce its orders. Accordingly, this Court should

determine whether petitioners' objection based on violation of federal law is valid and provide an appropriate remedy in this case.

B.   Conducting the 2022 Election for General Assembly Offices Under the 2011 District Plan Would Violate Federal Law and Ohio Law

State legislative districts must be roughly equal in population. The U.S. Supreme Court has established a standard for determining whether variation in population among districts deviates impermissibly from perfect equality, *i.e.*, the exact same population in every district in the State. It defines "maximum population deviation" to mean "the sum of the percentage deviations from perfect population equality of the most- and least-populated districts." *Evenwel*, 578 U.S. at 60 n.2. Thus, as the Court explained, "if the largest district is 4.5% overpopulated, and the smallest district is 2.3% underpopulated, the map's maximum population deviation is 6.8%." *Id.* Where the maximum population deviation in a map is greater than 10%, the deviation is presumptively impermissible. *See id.* at 60 ("Maximum deviations above 10% are presumptively impermissible."). The reasons for enforcing this rule are clear: when citizens live in significantly overpopulated districts, they are deprived of their constitutional right to "an equally effective voice in the election of members of [the] state legislature." *Reynolds*, 377 U.S. at 565. "[T]he weight of a citizen's vote cannot be made to depend on where he lives." *Id.* at 567.

The plan enacted by the Commission on March 28 is invalid and cannot stand. Thus, as of today, Ohio has no valid General Assembly district plan based on 2020 census data. Instead, what remains, at most, is the 2011 plan enacted by a different entity, under different law, under different conditions. Because of population shifts between 2011 and 2020, the maximum population deviation among House districts is 34.2% under the 2011 plan (Latner ¶ 39), a percentage far in excess of the presumptively unconstitutional 10%. Thus, the General Assembly

districts in the 2011 plan are malapportioned. (Latner ¶ 40) If utilized in the 2022 elections, the 2011 plan would violate the rights of Ohio voters who live in overpopulated districts, including the individual OOC petitioners and individual members of the organizational OOC petitioners. (Latner ¶ 40)

There is no legitimate state interest that could justify conducting an election under malapportioned districts in 2022. There are many different maps that comply with the equal population requirements of *Reynolds v. Sims*. Dr. Imai used a computer program to draw thousands of them. Dr. Rodden's plan likewise respected equal population principles. Even the Commission's enacted plans, while violating the Ohio Constitution, were not impermissibly malapportioned. The Commission has never asserted that it needs to draw malapportioned maps to vindicate some compelling state interest. Nor could it. Certainly, the Commission's willful refusal to comply with this Court's orders is not a legitimate reason to conduct the 2022 election under malapportioned maps that violate federal law.

There is more. Not only would conducting the 2022 election under the 2011 General Assembly district plan violate federal law, such an election would also violate Article XI of the Ohio Constitution. The then-existing Apportionment Board enacted the 2011 plan without the benefit of modern-day Article XI because voters overhauled Article XI in 2015 to curtail partisan gerrymandering. The 2011 plan that the Apportionment Board enacted was one of the most gerrymandered plans in the nation that year. *See* Affidavit and Expert Report of Michael S. Latner, ¶¶ 26, 58, submitted on October 22, 2021, with appendix of exhibits to affidavit of Danielle Stewart. Indeed, the 2015 amendments were designed to prevent a partisan plan like the 2011 one from ever being enacted again. Conducting an election under the 2011 plan would

nullify the 2015 amendments to the Ohio Constitution and this Court's three opinions construing

and applying the amendments to Article XI of the Ohio Constitution.

C. As a Remedy, This Court Should Order Implementation of a Plan That Complies with Both Federal and State Law for the 2022 Election

The Commission's contempt for the rule of law has left voters without a plan for the 2022

election cycle. In view of the Commission's manifest failures and willful refusal to enact a valid

plan, the task falls to this Court to uphold the law of the land, including federal law, and protect

the rights of Ohio voters. This Court may not order the adoption of a ten-year plan, or even a

four-year plan. But it can and must provide appropriate remedies for violations of federal and

state law in the case before it. That time has come. The question at this point is not *whether* a

court will order the implementation of a plan for 2022, but *which* court and *which* plan. This

Court is the ultimate arbiter of Ohio law, and Ohio districts for election to state office are an

Ohio matter. This Court should decide. That outcome would be fully consistent with federal

judicial doctrine, which provides that state courts should be given primacy in resolving

redistricting disputes, even when federal rights are at issue. *See Growe v. Emison*, 504 U.S. 25,

33 (1993) (discussing *Scott v. Germano*, 381 U.S. 407 (1965) (per curiam)).

When courts must draw a district map to remedy violations of federal equal protection

principles, they do so while endeavoring to respect and preserve state-law principles. As the U.S.

Supreme Court had held, when remedying violations of federal law, courts may not impose a

"court-ordered plan that reject[s] state policy choices more than [is] necessary to meet the

specific constitutional violations involved." *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (per

curiam). Rather, when courts order implement a remedial plan, they must "follow the policies

and preferences of the State, as expressed in statutory and constitutional provisions or in the

reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution." *White v. Weiser*, 412 U.S. 783, 795 (1973). And the Ohio Supreme Court, not the Ohio Redistricting Commission, is the branch of Ohio government that ultimately determines the "meaning of the Ohio Constitution." *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21.

Under these controlling remedial principles, this Court should order the implementation of a plan that complies with both federal and state law. A plan that this Court has invalidated does not comply with state law. That leaves other plans, such as the plan submitted in this litigation by Dr. Jonathan Rodden, or the plan submitted to the Commission on March 28 by Dr. Johnson and Dr. McDonald. Either the Rodden III plan or the Johnson/McDonald plan would adequately remedy the imminent violation of federal law that the Commission has caused. The OOC petitioners contend that the Johnson/McDonald plan is the plan that most closely reflects Ohio policy, and therefore is the best choice. This Court should order the implementation of the Johnson/McDonald plan for the 2022 General Assembly elections.

First, the Johnson/McDonald plan complies with the equal-population requirements of *Reynolds v. Sims*. (Latner ¶ 44; OOC 169-72) Thus, it remedies the equal protection violation that implementation of the 2011 district plan (or no district plan) would cause.

Second, the Johnson/McDonald plan was drawn in accordance with rules and guidance established by the Commission itself. (OOC 88-89) It represents the product of independent mapmakers acting as agents of the full Commission. As a result, it is the plan that comes closest to complying with the Court's order that the Commission draft and adopt an entirely new General Assembly district plan. *League III* at ¶ 44.

21

Third, the Johnson/McDonald plan appears to meet the requirements of Section 6 of Article XI of the Ohio Constitution. The independent mapmakers' analysis reportedly showed that the House map has 54 Republican-leaning districts and 45 Democratic-leaning districts, while the Senate map has 18 Republican-leaning districts and 15 Democratic-leaning districts. (OOC 154 [02:16-4:38]) And importantly, the Johnson/McDonald plan does not achieve proportionality by creating a large number of toss-up districts and then categorizing all of them as "Democratic-leaning." Instead, the Johnson/McDonald plan creates a roughly equal number Republican-leaning and Democratic-leaning toss-up districts. (OOC 154 [02:16-4:38]) This balanced allocation or categorization of toss-up districts means that their plan has districts that closely correspond with the statewide preferences of Ohio voters.

Finally, the Johnson-McDonald plan substantially complies with Section 3 of Article XI. Because of the short period of time the OOC petitioners had to analyze the Johnson/McDonald plan, we have not independently verified that their plan complies with all the complex line-drawing rules set forth in Section 3 of Article XI. But even if it has a few small violations, such as an extra township or municipal split or the like, it would remain the plan that most closely complies with Ohio law. As between a plan that flagrantly violates the anti-gerrymandering principles that voters enacted into law in 2015 and a plan that hypothetically splits a township or municipality, the Johnson/McDonald plan is the most faithful to Ohio law and this Court's rulings.

II.   **To Ensure That the Commission Enacts a Plan for 2024, This Court Should Schedule a Contempt Hearing and Impose Sanctions That Secure Compliance with This Court's Orders**

As noted, unless the Commission agrees to adopt a version of the Johnson/McDonald plan or this Court orders it to do so on an extremely accelerated timeline, the Commission does

not have time to draft a new plan for the 2022 General Assembly election. But that does not mean that the Commission's job is over. After a court orders implementation of a plan for the 2022 election, Ohio will still need a plan for 2024, and the Commission will not have enacted a valid plan for 2024. Accordingly, this Court should also order the Commission to reconvene and either adopt a version of the Johnson/McDonald plan or draft an entirely new General Assembly district plan for 2024 and subsequent election cycles, depending on whether it enacts a four-year plan or a bipartisan plan that can last until the next decennial redistricting under the Ohio Constitution. It should also retain jurisdiction to ensure that this process is seen through to completion.

To ensure that the Commission reconvenes and enacts a map for 2024 that complies with this Court's rulings, and depending on the outcome of the parties' motions for an order to show cause why respondents should not be held in contempt, this Court should conduct a contempt hearing and hold individual respondents in contempt of court as the evidence may warrant. As discussed above, the evidence will show that the majority commissioners willfully flouted this Court's orders to manufacture impasse and create an imminent violation of federal law. While this Court can remedy and prevent the violation of federal law that the Commission has endeavored to create by ordering the implementation of a plan for 2022, that remedy will not address the Commission's misconduct or secure a plan for 2024. To fully address the extraordinary circumstances of these proceedings, the Court should conduct the requested contempt hearing, hold respondents in contempt of court, and impose sanctions until they enact a plan that is valid under the federal and Ohio Constitution.

CONCLUSION

The plan that the Commission enacted on March 28, 2022, is unconstitutional under the Ohio Constitution because it violates Section 6(A) and Section 6(B) of Article XI. Unless the Commission is willing to enact the Johnson/McDonald plan, insufficient time remains for the Commission to enact a new plan. Therefore, Ohio lacks a valid plan, in which case it either has no districts or districts that are malapportioned as a matter of federal law. To remedy this violation of federal law, the Court should order the respondent Secretary of State to implement the Johnson/McDonald plan for the 2022 elections. It should also retain jurisdiction and order the Commission to reconvene and draft a new plan for 2024. And it should schedule the contempt hearing, hold respondents in contempt, and impose sanctions that secure compliance with this Court's orders.

Dated: April 1, 2022

Respectfully submitted,

/s/ *Brian A. Sutherland*

Brian A. Sutherland (PHV 25406-2022)
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Tel: (415) 543-8700
Fax: (415) 391-8269
bsutherland@reedsmith.com

Peter M. Ellis (0070264)
    Counsel of Record
M. Patrick Yingling (PHV 10145-2022)
REED SMITH LLP
10 South Wacker Drive, 40th Floor
Chicago, IL 60606
Tel: (312) 207-1000
Fax: (312) 207-6400
pellis@reedsmith.com

Alicia L. Bannon (PHV 25409-2022)
Yurij Rudensky (PHV 25422-2022)
Harry Isaiah Black (PHV 25544-2022)
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
Tel: (646) 292-8310
Fax: (212) 463-7308
alicia.bannon@nyu.edu

Ben R. Fliegel (PHV 25411-2022)
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
Tel: (213) 457-8000
Fax: (213) 457-8080
bfliegel@reedsmith.com

Brad A. Funari (PHV 3139-2022)
Danielle L. Stewart (0084086)
Reed Smith Centre
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: (412) 288-4583
Fax: (412) 288-3063
bfunari@reedsmith.com
dstewart@reedsmith.com

Attorneys for Petitioners
The Ohio Organizing Collaborative, et al.

CERTIFICATE OF SERVICE

I, Danielle L. Stewart, hereby certify that on April 1, 2022, I caused a true and correct copy of the foregoing Objections and Request for Remedies of Petitioners The Ohio Organizing Collaborative, et al. to be served by email upon the counsel listed below:

Counsel for Respondents

W. Stuart Dornette (0002955)
Beth A. Bryan (0082076)
Philip D. Williamson (0097174)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut St., Suite 1800
Cincinnati, Ohio 45202-3957
Tel: (513) 381-2838
Fax: (513) 381-0205
dornette@taftlaw.com
bryan@taftlaw.com
pwilliamson@taftlaw.com

Phillip J. Strach
Thomas A. Farr
John E. Branch, III
Alyssa M. Riggins
Greg McGuire
NELSON MULLINS RILEY &
SCARBOROUGH LLP
4140 Parklake Ave., Suite 200
Raleigh, North Carolina 27612
Tel: (919) 329-3812
Fax: (919) 329-3799
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
greg.mcguire@nelsonmullins.com

Counsel for Respondents
Senate President Matt Huffman and
House Speaker Robert Cupp

(*counsel listing continued on next page*)

Erik J. Clark (0078732)
   Counsel of Record
Ashley Merino (0096853)
ORGAN LAW LLP
1330 Dublin Road
Columbus, Ohio 43215
T: (614) 481-0900
F: (614) 481-0904
ejclark@organlegal.com
amerino@organlegal.com

Counsel for Respondent
Ohio Redistricting Commission

OHIO ATTORNEY GENERAL
Bridget C. Coontz (0072919)
   Counsel of Record
Julie M. Pfeiffer (0069762)
Michael A. Walton (0092201)
   Assistant Attorneys General
Michael J. Hendershot (0081842)
   Deputy Solicitor
30 E. Broad Street, 16th Floor
Columbus, OH 43215
Tel: (614) 466-2872
Fax: (614) 728-7592
bridget.coontz@ohioago.gov
julie.pfeiffer@ohioago.gov
michael.walton@ohioago.gov
michael.hendershot@ohioago.gov

Counsel for Respondents
Secretary of State Frank LaRose, and
Auditor Keith Faber

C. Benjamin Cooper (0093103)
 Counsel of Record
Charles H. Cooper, Jr. (0037295)
Chelsea C. Weaver (0096850)
COOPER & ELLIOTT, LLC
305 West Nationwide Boulevard
Columbus, Ohio 43215
Tel: (614) 481-6000
Fax: (614) 481-6001
benc@cooperelliott.com
chipc@cooperelliott.com
chelseaw@cooperelliott.com

Special Counsel for Respondents
Senator Vernon Sykes and
House Minority Leader C. Allison Russo

John W. Zeiger (0010707)
Marion H. Little, Jr. (0042679)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 365-9900
zeiger@litohio.com
little@litohio.com
hogan@litohio.com

Counsel for Respondent
Governor Mike DeWine

Counsel for *Amici Curiae*

Subodh Chandra (0069233)
Donald Screen (0044070)
 Counsel of Record
THE CHANDRA LAW FIRM LLC
The Chandra Law Building
1265 West 6th Street
Cleveland, Ohio 44113
Tel: (216) 578-1700
subodh.chandra@chandralaw.com
donald.screen@chandralaw.com

Janette McCarthy Wallace (0066257)
Anthony P. Ashton*
Anna Kathryn Barnes*
NAACP
Office of the General Counsel
4805 Mount Hope Drive
Baltimore, MD 21215
Tel.: (410) 580-5777
jlouard@naacpnet.org
aashton@naacpnet.org
abarnes@naacpnet.org
*Not Admitted to the State Bar of Ohio

Counsel for Amicus Curiae The Ohio
State Conference of the NAACP

Stephanie Marie Chmiel (0087555)
Mary Elizabeth Csarny (0097682)
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Tel.: (614) 469-3247
Fax: (614) 469-3361
stephanie.chmiel@thompsonhine.com
mary.csarny@thompsonhine.com

Counsel for Amicus Curiae David Niven

Andrew William Garth (0088905)
 City Solicitor
Emily Smart Woerner (0089349)
 Deputy City Solicitor
Shannon Doyle Price (0100744)
 Assistant City Solicitor
CITY OF CINCINNATI
801 Plum Street, Room 214
Cincinnati, Ohio 45202
Tel.: (513) 352-3307
Fax: (513) 352-1515
emily.woerner@cincinnati-oh.gov
shannon.price@cincinnati-oh.gov

Counsel for Amicus Curiae City of
Cincinnati

Jon Greenbaum*
Ezra D. Rosenberg*
Pooja Chaudhuri*
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1500 K Street, N.W., Ste. 900
Washington, D.C. 20005
Tel.: (202) 662-8600
jgreenbaum@lawyerscommittee.org
erosenberg@lawyerscommittee.org
pchaudhuri@lawyerscommittee.org
*Not Admitted to the State Bar of Ohio

*Counsel for Amicus Curiae The Ohio
State Conference of the NAACP*

Donald C. Brey (0021965)
Ryan C. Spitzer (0093515)
ISAAC WILES & BURKHOLDER, LLC
Two Miranova Place, Suite 700
Columbus, Ohio 43215-5098
Tel.: (614) 221-2121
Facsimile: 614-365-9516
dbrey@isaacwiles.com

Counsel for Amicus Curiae Renew Ohio

Dated: April 1, 2022

By: */s/ Danielle L. Stewart*
Danielle L. Stewart
Ohio Sup. Ct. Reg. No. 0084086
Reed Smith LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
Tel: 412-288-4583
Fax: 412-288-3063
dstewart@reedsmith.com

Attorneys for Petitioners
The Ohio Organizing Collaborative, et al.

How to Verify This Transaction

Every Notarize transaction is recorded and saved for a minimum of five years. Whether you receive an electronic or printed paper copy of a Notarize document, you can access details of the transaction and verify its authenticity with the information below.

To get started, visit verify.notarize.com and enter this information:

Notarize ID:	N56DG668
Access PIN:	AFAUCV

For more information on how to verify Notarize transactions, please visit:
support.notarize.com/notarize-for-signers/verifying-document-authenticity

N Notarize

THE OHIO ORGANIZING COLLABORATIVE, *et al.*,	:	Case No. 2021-1210
	:	
	:	**APPORTIONMENT CASE**
Petitioners,	:	
v.	:	Filed pursuant to S.Ct.Prac.R. 14.03(A) and section 9 of Article XI of the Ohio Constitution to challenge a plan of apportionment promulgated pursuant to Article XI.
	:	
OHIO REDISTRICTING COMMISSION, *et al.*,	:	
	:	
	:	
Respondents.	:	
	:	

AFFIDAVIT OF MICHAEL S. LATNER

IN SUPPORT OF OBJECTIONS

I, Michael S. Latner, having been duly sworn and cautioned according to law, hereby state that I am over the age of eighteen years and am competent to testify as to the facts set forth below based on my personal knowledge and having personally examined all records referenced in this affidavit, and further state as follows:

1.   I am a Professor in the Political Science Department at California Polytechnic State University. My qualifications, teaching and research experience, and knowledge and understanding of redistricting is detailed in my prior submission to this Court on October 22, 2021.

2.   I am familiar with and have studied Article XI of the Ohio Constitution. I am also familiar with this Court's opinions in this case, *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-65, Slip Opinion No. 2022-Ohio-342, and Slip Opinion No. 2022-Ohio-789.

3. I have previously submitted an affidavit and expert report to this Court concerning the compliance of the General Assembly district plan adopted by the Ohio Redistricting Commission on September 15, 2021 (the "Original Plan"), an affidavit regarding the revised General Assembly district plan adopted by the Ohio Redistricting Commission on January 22, 2022 (the "First Revised Plan"), and an affidavit regarding the revised General Assembly district plan adopted by the Ohio Redistricting Commission on February 24, 2022 (the "Second Revised Plan"). I now submit a subsequent affidavit to assess the third revised General Assembly district plan adopted by the Ohio Redistricting Commission on March 28, 2022 (the "Third Revised Plan") and the General Assembly district plan adopted during the previous redistricting cycle by the Ohio Apportionment Board, which was "the body then responsible for drawing Ohio's legislative-district maps[,]"[1] on September 30, 2011 ("2011 Plan").[2]

4. Specifically, I have been asked to analyze the Third Revised Plan for compliance with Article XI of the Ohio Constitution. To conduct this analysis, I rely on total population data from the 2010 and 2020 Decennial Census and 2016-2020 election data from the Voting and Election Science Team (VEST) datahub.[3] These data, including shapefile data, are publicly available through several repositories and mapping projects.[4] I have also reviewed several other plans for comparison, including a plan submitted on March 28, 2022 by two independent map drawers hired by the Commission, Douglas Johnson and Michael McDonald ("Johnson/McDonald"), and a plan submitted on February 15, 2022 by Ms. Bria Bennett, one of

---

[1] Slip Opinion No. 2022-Ohio-65, ¶ 340.

[2] These plans both include maps for the state House and Senate. References below to these individual maps will retain this nomenclature, e.g., "Original House," "First Revised Senate" and "Second Revised House".
[3] https://dataverse.harvard.edu/dataverse/electionscience.
[4] I obtained data from the following:
Redistricting Data Hub: https://redistrictingdatahub.org/data/about-our-data/#pl.
Dave's Redistricting App: https://davesredistricting.org/.

the named petitioners in *Bennett, et al. v. Ohio Redistricting Commission, et al.*, No. 2021-1198, which was the third plan prepared by Dr. Jonathan Rodden in this litigation ("Rodden III"). In a letter to the Ohio Redistricting Commission dated February 15, 2022, counsel for the petitioners in *Bennett* and *League of Women Voters* stated that the Rodden III plan "fully complies" with Article XI, Section 3's line-drawing requirements and Article XI, Section 5's requirements for the numbering of state Senate districts. I have also independently reviewed the Rodden III plan for constitutional compliance. I have not identified any deviations from these line-drawing and numbering requirements. The February 15, 2022 letter, and all of the above-referenced plans, are available for download on the Ohio Redistricting Commission's website.[5]

5.   I have also been asked to analyze the 2011 Plan to determine whether the Plan reflects equipopulous districts when applied to Ohio's current demographic configuration, *i.e.*, whether the Plan is malapportioned. For this analysis, I used 2020 Census population data and overlayed the 2020 state legislative House plan TIGRIS redistricting files provided by the US Census, i.e. last decade's House plan that was used in the 2020 election.

6.   I am receiving compensation for my study and testimony at an hourly rate of $250 per hour. My compensation is in no way dependent on the outcome of the dispute.

SUMMARY OF MY OPINIONS

7.   The Third Revised Plan continues to run afoul of principles of proportionality and symmetry, in a manner that is very similar to the Ohio Supreme Court's recent findings with respect to the Second Revised Plan. Indeed, the two plans are virtually identical: a comparison of the Second and Third Revised Plans' House districts reveals that only 0.265 percent of the population changed districts at all. The continuity between the two plans results in similar

---

[5] https://www.redistricting.ohio.gov/maps.

partisan performance. Alternative plans, including Johnson/McDonald and Rodden III, achieve substantially greater proportionality and partisan symmetry.

8.   Like the invalidated Second Revised Plan, the Third Revised Plan nominally creates 54 Republican leaning House districts and 45 Democratic leaning House districts. However, this summary statistic is misleading because 17 of the seats that favor Democrats are actually toss-up districts, while *none* of the seats that favor Republicans fall into this category. In other words, 17 out of the 45 Democratic-leaning districts have been drawn to be between 50 and 52 percent or less Democratic, while there are *zero* Republican-leaning districts that fall into this toss-up category. Excluding toss-ups, 34 percent of the House seats favor Democrats, while 66 percent of those seats favor Republicans, yielding a difference in proportionality from statewide vote shares of 12 percent. Compared to the First Revised Plan, which created 14 such toss-ups, the Third Revised House map actually performs worse with a two-point vote swing, as a result of the three additional toss-ups.

9.   The Senate map functions similarly. The Third Revised Plan nominally creates 18 Republican leaning districts and 15 Democratic leaning districts, but 6 of the Democratic districts are toss-ups, while once again *none* of the Republican districts fall into that category. Excluding toss-ups, 33 percent of the Third Revised Senate seats favor Democrats, while 67 percent of those seats favor Republicans, creating a disproportionality from statewide voting averages of 13 percent. Like the House map, the Third Revised Senate map performs worse than the First Revised Plan with a two-point vote swing.

10.   A truly proportional districting plan yields proportional shares of seats for votes across a range of possible outcomes. The Third Revised Plan is designed to approximate proportionality for a single election outcome, i.e., one in which Democrats earn 46 percent of

the statewide vote, while Republicans earn 54 percent. But statistically speaking, the likelihood of an election with that exact result is small. Rather, ebbs and flows in partisan vote share are to be expected. A small two percentage point shift in the electorate in favor of Republicans would be expected to wipe out 17 Democratic House seats and 6 Democratic Senate seats, giving Republicans 72% percent of House seats and 73% percent of Senate seats—a supermajority in both chambers. Equivalent shifts among voters in favor of Democrats would not yield *any* additional seats, much less the extreme gains that Republicans would see. Because of the Third Revised Plan Plan's asymmetric reliance on toss-up districts, it sets a performance ceiling for Democrats and a performance floor for Republicans. Thus, similar to the First and Second Revised Plans, the Third Revised Plan performs like a "winner-take-all" gerrymander but with only a one-way ratchet in favor of Republicans.

11.   The Third Revised Plan also produces significant asymmetry, and therefore continues to systemically disfavor Democratic voters. The Third Revised Plan does little to improve on the significant asymmetry of either the Original Plan, the First Revised Plan, or the Second Revised Plan, which is a direct outgrowth of what appears to be a minimalist approach to meeting proportionality standards in Section 6(B).

12.   Viable comparison plans submitted to the Commission, including the Johnson/McDonald and Rodden III plans, create at least 42 percent Democratic House and Senate districts, including toss-ups, and would not generate extreme disproportionalities under two-point swing election scenarios. These comparison plans also achieve substantially greater partisan symmetry in both the House and Senate.

13.   I also conclude that the 2011 Plan is malapportioned. Of the 99 House districts, 40 exceed 5 percent population deviations. Five House districts are below ideal population

estimates by more than 10 percent, with an average deviation of -12.3 percent. Twenty one

districts are five to ten percent below population requirements, with an average deviation of -7.2

percent. Seven districts exceed population requirements by 5 to 10 percent, with an average

deviation of +7.5 percent, and seven districts exceed population requirements by more than 10

percent, with an average population deviation of +13.5 percent. The maximum deviation for the

2011 House Plan using 2020 population estimates is 34.2 percent. There are currently over 4.5

million Ohio residents living in over-populated districts, meaning that they would be

underrepresented by living in districts with more constituents per representative relative to other

Ohioans.

<div align="center">

ANALYSIS AND OPINIONS

</div>

I.   The Proportion of Districts in the Third Revised Plan That Favor Each Political Party Does Not Correspond with the Statewide Preferences of the Voters of Ohio

14.   To conduct the proportionality analysis, I employed the same methodology and

used the same data sources as those I employed in my earlier affidavits and expert report, as

modified by guidance from the Ohio Supreme Court in its February 7, 2022 opinion:

"[C]ompetitive districts . . . must either be excluded from the proportionality assessment or be

allocated to each party in close proportion to its statewide vote share." Slip Op. 2022-Ohio-342,

¶ 62; see also Slip Opinion No. 2022-Ohio-789, ¶ 38 (reaffirming this guidance).

15.   I proceeded in four steps. First, I calculated the statewide preferences of the voters

of Ohio, based on available statewide state and federal partisan general election results during

the last ten years. Second, I calculated the statewide proportion of districts whose voters favor

each political party, as well as the proportion of toss-up districts, based on the same set of

statewide elections. I did this for the House and the Senate maps in the Third Revised Plan, as

well as for the Second Revised Plan, First Revised Plan, the Original Plan, and alternative plans

<div align="center">

6

</div>

submitted to the Commission (Johnson/McDonald, Rodden III). Then, to determine whether the statewide election figures "closely correspond" to the partisan seat shares from the plans, I calculated the difference between those two figures. Finally, I compared the difference between statewide election figures and partisan seat shares in the prior plans and alternative plans.

a. Proportionality When Toss-Up Districts Are Excluded

16.   Tables 1 and 2 display statewide vote share. The tables lay out the Democratic (DEM) and Republican (GOP) seats and seat share for the respective House and Senate Third Revised Plan, as well as the toss-up districts that are estimated to yield vote shares from 48 to 52 percent for either party.[6] Excluding the toss-up districts, the Third Revised House Plan yields respective Democratic and Republican seat shares of 34 and 66 percent. Compared to statewide vote shares, these seat shares produce a disproportionality of 12 percent. For the Third Revised Senate Plan, once toss-up districts are removed, the respective Democratic and Republican seat shares of 33 and 67 percent produce a disproportionality of 13 percent.

---

[6] In the Court's most recent opinion, it stated that districts within this range are "'competitive' . . . and . . . must be excluded when assessing [a] plan's overall proportionality." Slip Opinion No. 2022-Ohio-789, ¶ 42.

TABLE 1

Proportionality of Third Revised House Plan

	VOTE SHARE	SEATS	SEAT SHARE	SEAT SHARE WITHOUT TOSS-UPS	DIFFERENCE
DEM	46%	28	28%	34%	−12%
GOP	54%	54	55%	66%	12%
Toss-ups (48-52%)		17	17%		
			Disproportionality without toss-ups:		**12%**

TABLE 2

Proportionality of Third Revised Senate Plan

	VOTE SHARE	SEATS	SEAT SHARE	SEAT SHARE WITHOUT TOSS-UPS	DIFFERENCE
DEM	46%	9	27%	33%	−13%
GOP	54%	18	55%	67%	13%
Toss-ups (48-52%)		6	18%		
			Disproportionality without toss-ups:		**13%**

b. Proportionality When Toss-Up Districts Are Included

17.   As noted above, the Third Revised Plan has a significant and unusually large number of House and Senate districts that lean Democratic by razor-thin margins.[7] If the "lean" of the districts is unbiased, or randomly distributed between the two parties, it is reasonable to expect the parties to split these districts roughly 50/50 over the course of elections due to ebbs and flows in voter support. However, the design of the toss-up districts in the Third Revised Plan—just like the design of the First and Second Revised Plans—looks anything but random.

---

[7] Under a normal distribution, about 7 percent of districts would fall into this "toss-up" range, *i.e.*, 7 House seats and 2 Senate seats.

18.   Tables 3 and 4 display the results of my analysis when toss-up districts are allocated to each party, including the impact of minor (2 percent) uniform vote swings for the Third Revised Plan, Second Revised Plan, the First Revised Plan, the Original Plan, the Johnson/McDonald plan, and the Rodden III plan. For the Third Revised House Plan, the number of toss-up districts is extremely large (17). See Table 3. Note that alternative plans contain only 3 to 6 toss-ups, closer to what would be expected across a normal distribution.

19.   Subtracting 2 percent from the expected Republican vote shares in each district and adding it to the Democratic vote shows that such a vote swing would result in *zero* additional Democratic seats, because Democrats are already favored to win all 17 toss-ups in the Third Revised Plan. However, the same minor vote swing toward Republicans would give them all 17 seats, or a 72 percent supermajority of seats with 56 percent of the vote. This is the same underlying design found in the Second Revised Plan and the First Revised Plan. Notably, under either the Johnson/McDonald or Rodden III plans, both parties would benefit from minor vote swings in their favor, as should be the case under a fair plan.

TABLE 3

Swing Analysis of Original, Revised, and Alternative House Plans

PLAN	SEAT SHARES WITH TOSS-UP (D/R)	TOSS-UPS (D/R)	+2%D	SEAT SHARES WITH D SWING	+2%R	SEAT SHARES WITH R SWING
3rd Revised	45%/55%	17/0	no change	45%/55%	+17R	23%/72%
2nd Revised	45%/55%	19/0	no change	45%/55%	+19R	26%/74%
1st Revised	42%/58%	14/0	no change	42%/58%	+14R	28%/72%
Original	35%/65%	3/2	+2D	37%/63%	+3R	34%/66%
Johnson/McDonald	45%/55%	3/3	+3D	49%/51%	+3R	42%/58%
Rodden III	43%/57%	2/1	+1D	44%/56%	+2R	41%/59%

20.   The same pattern is revealed in the Third Revised Senate Plan. See Table 4. Indeed, I find that the Third Revised Senate Plan, which has 6 districts that barely lean

Democratic and no corresponding Republican toss-up districts, performs worse than the First Revised Plan. Both the number and partisan lean of these districts is designed to benefit Republicans. With a two-point swing in favor of Republicans, Republicans are expected to win a 73 percent supermajority of Senate seats. By contrast, the Democratic Senate seat share would remain at 55 percent with an analogous 2 percent vote swing in their favor.

TABLE 4

Swing Analysis of Original, Revised, and Alternative Senate Plans

PLAN	SEAT SHARES WITH TOSS-UP (D/R)	TOSS-UPS (D/R)	+2%D	SEAT SHARES WITH D SWING	+2%R	SEAT SHARES WITH R SWING
3rd Revised	45%/55%	6/0	no change	45%/55%	+6R	27%/73%
2nd Revised	45%/55%	8/0	no change	45%/55%	+8R	21%/79%
1st Revised	39%/61%	3/2	+2D	45%/55%	+3R	30%/70%
Original	27%/73%	0/2	+2D	33%/64%	no change	27%/73%
Johnson/McDonald	45%/55%	2/0	no change	45%/55%	+2R	39%/61%
Rodden III	42%/58%	2/1	+1D	44%/56%	+2R	41%/59%

21.   A comparison between the Second and Third Revised House plans illustrates how this "one winner takes all, one winner takes none" works, and how little has changed between the two plans. Figure 1 displays the Democratic vote shares for the 99 House districts, in order of increasing vote share or party lean, for both plans. First, note that both plans have an identical gap just before the 50 percent support line, where Democrats start winning seats. That absence of Republican-leaning toss-up seats is what prevents Democrats from making any gains from a 2-point vote swing. On the other side of that line, Republicans stand to gain the 17 seats ranging from 50 and 52 percent. This is a major source of asymmetry in the plans. Additionally, you can see that Democrats are packed into five districts that are 80 percent-plus Democratic, with no corresponding packed Republican districts. This is another source of asymmetry, as it allows map drawers to allocate fewer safe seats to Democrats.

22.   Second, you can only see a handful of Third Revised House Plan districts (hollow

dots), because these are the only districts where voters were placed in different districts,

changing their partisan support. With the exception of those six districts, the two plans are

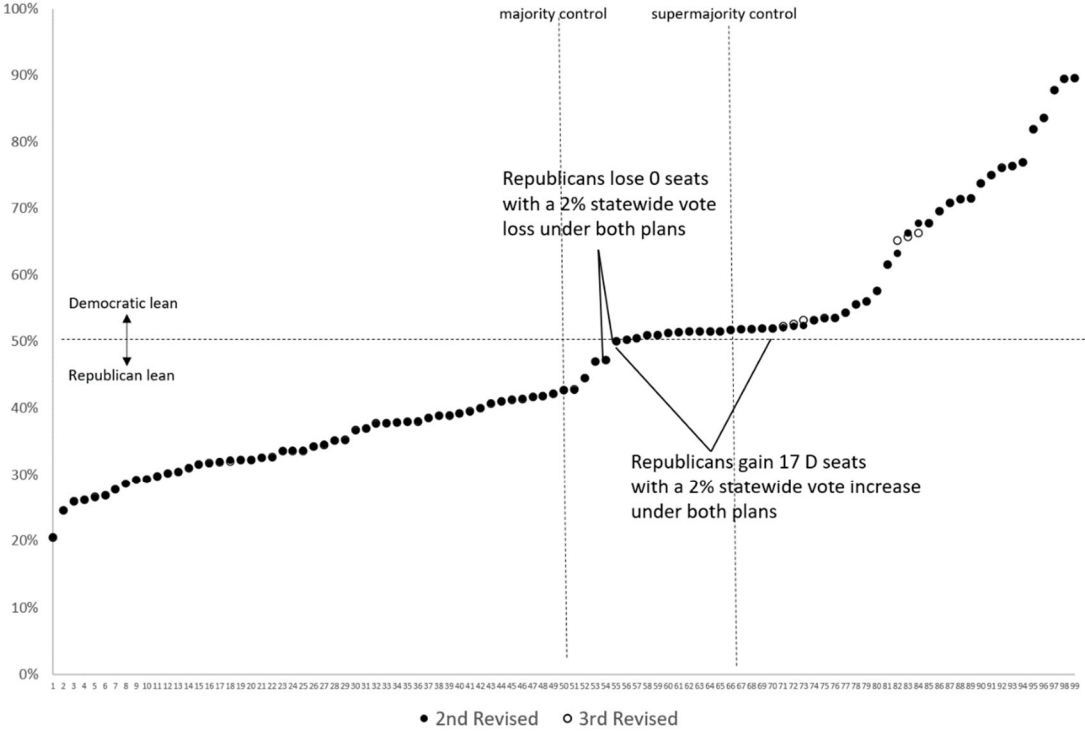identical. As a result, the two plans perform similarly.

Figure 1: District Level Vote Shares in House Plans

23.   One can observe that only a small number of district populations changed

between the Second and Third Revised Plans. There was only a change of 451 census blocks

out of 276,478 (0.0016 percent of census blocks), which impacts only 0.265 percent of the total

population.. Otherwise, the Second and Third Revised Plans are identical, which explains their

similar performance.

24.   As was the case in the Second Revised Plan, this unusual pattern of district

allocations suggests that the Commission again intended to use toss-up districts that are

nominally Democratic to create an illusion of increased proportionality without producing a map that would produce proportionate outcomes. That this was a deliberate choice by the Commission is underscored by existence of alternative plans, including Johnson/McDonald and Rodden III, that achieve proportionality without relying on an unusually high number of Democratic toss-up districts, as well as by the persistent asymmetry and failure of the Third Revised Plan to meet partisan fairness, which is discussed further below.

II.   The Third Revised Plan Favors Republican Voters and Disfavors Democratic Voters

25.   To conduct the partisan fairness analysis, I used the same statistical and comparative partisan symmetry analysis as in my prior affidavits and expert reports.

26.   First, I determined the degree to which the Third Revised Plan exhibits asymmetry in the allocation of votes to seats between the parties. Second, I compared asymmetries across the above-mentioned comparison plans. Such comparison is helpful because it demonstrates that the Commission could have introduced and adopted a less biased remedial plan.

27.   Partisan symmetry is a broadly accepted metric used by political scientists to measure partisan bias.[8] The principle of partisan symmetry requires that a districting system award the same number of seats to each party's candidates for the same share of statewide votes that they receive. The question posed by a partisan symmetry analysis, in other words, is how

---

[8] Barry Burden and Corwin Smidt, "Evaluating Legislative Districts Using Measures of Partisan Bias and Simulations, *Sage Open*, 10, 4, 2020; https://doi.org/10.1177/2158244020981054; Anthony J McGann, Charles Anthony Smith, Michael Latner, Alex Keena, "A Discernable and Manageable Standard for Partisan Gerrymandering" *Election Law Journal*, 14, 4, 2015; John F. Nagle. "Measures of Partisan Bias for Legislating Fair Elections", *Election Law Journal*: 2015. pp. 346-36; .http://doi.org/10.1089/elj.2015.0311.

many more (or fewer) seats does one party get for some share of the statewide vote as compared to what another party gets for that same statewide vote share.

28.   Scientifically, accepted measures of partisan symmetry follow logically from the principle that an electoral system should treat the parties and their voters equally and that the party that wins the most votes should win the most seats.[9] As before, I estimate symmetry in two ways: (1) a simple numeric formula (S) that can be calculated by hand,[10] and (2) a computational model of symmetry with statistical confidence intervals. The computational symmetry models estimate symmetry in the seats-votes function across a range of vote shares, which in this case is between 45 and 55 percent, while S measures symmetry in the distribution of support for parties across the districts that each party wins.

29.   To calculate the simple measure of symmetry, S, I take the districts that are 5 percent above or below the statewide average of party support and determine what proportion of those districts favor Democrats and what proportion favor Republicans. That is, a plan's bias under S equals the proportion of seats with Democratic vote share above five percent of the Democratic average minus the proportion of seats with Republican vote share above five percent of the Republican average. Put simply, S tells you whether a districting plan creates more Republican or Democratic leaning districts relative to the party's statewide average. A negative value for S means Republicans are advantaged while a positive value means Democrats are advantaged. In this report, simple S symmetry is charted graphically in the form of histograms. A symmetrical plan would show similar distributions of districts on either side of the vertical line denoting the average vote share; an asymmetrical plan would give the favored party more districts past the line denoting the average vote share for the party.

---

[9] McGann, et.al., "A Discernable and Manageable Standard for Partisan Gerrymandering".
[10] This metric was first developed by Anthony McGann during the writing of *Gerrymandering the States,* p. 30.

30.   For the computational models, I calculate partisan symmetry for the plans, but instead of assuming uniform vote swing across districts, I impute random "noise" (up to five points) in 1,000 simulations of district vote distributions to reflect the idiosyncrasies and perturbations that occur in real elections over time. The procedure also allows me to calculate confidence intervals to provide estimates of statistical significance. In this report, the computational model is charted as a seats/votes *S*-curve function.

31.   Figure 2 below displays a histogram of the allocation of seats for the Third Revised House Plan, as well as the estimated seats/votes function. The histogram illustrates the skew in the allocation of seats, where more Democratic seats are won in overwhelmingly Democratic districts (80 percent vote share and above) with virtually no corollary Republican districts. This results in more wasted votes for Democrats. As a result, under the Third Revised House Plan, Democratic voters would only expect to win approximately 44% percent of House seats with 50 percent of statewide votes, as shown in the seats/votes function. By contrast, Republicans would expect to win approximately 53 percent of House seats with 50 percent of the statewide vote. Relative to their statewide vote share, Republicans have more districts where they earn 5 percent more than their statewide vote average (46) than Democrats (35), which means their voters are allocated more efficiently under the Third Revised House plan. Compared to the Second Revised Plan, the number of seats where Democrats win 5 percent or more than their statewide vote average has increased by one, slightly improving symmetry, but consistent with each of the Commission's plans, Republicans maintain a substantial, and statistically significant, advantage.
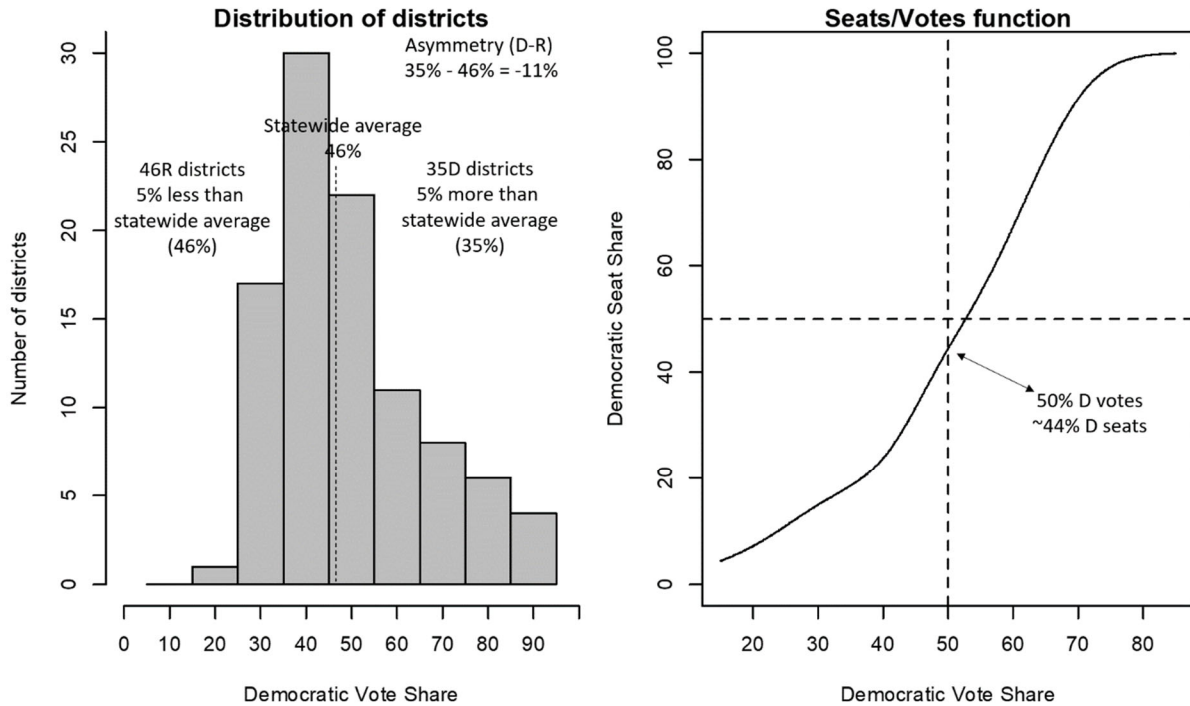
Figure 2: Third Revised House Map Asymmetry

32.   Figure 3 shows a similar pattern for the Third Revised Senate Plan. Because Democrats are concentrated into fewer districts, they are expected to win approximately 44 percent of seats with 50 percent of the statewide vote. By contrast, Republicans are expected to win approximately 53 percent of Senate seats with 50 percent of the statewide vote. Republicans also have more safe seats. Republicans win 15 seats (45 percent) with 5 percent more of their statewide vote share, compared to 12 seats (36 percent) for Democrats. While the Senate asymmetry simulations tend to have larger standard errors (in parentheses) due to fewer observations, these results are statistically significant, and tend to mirror the results of the Second Revised Plan. The simple symmetry measures also indicate that any improvement over the Second Revised Plan is marginal.
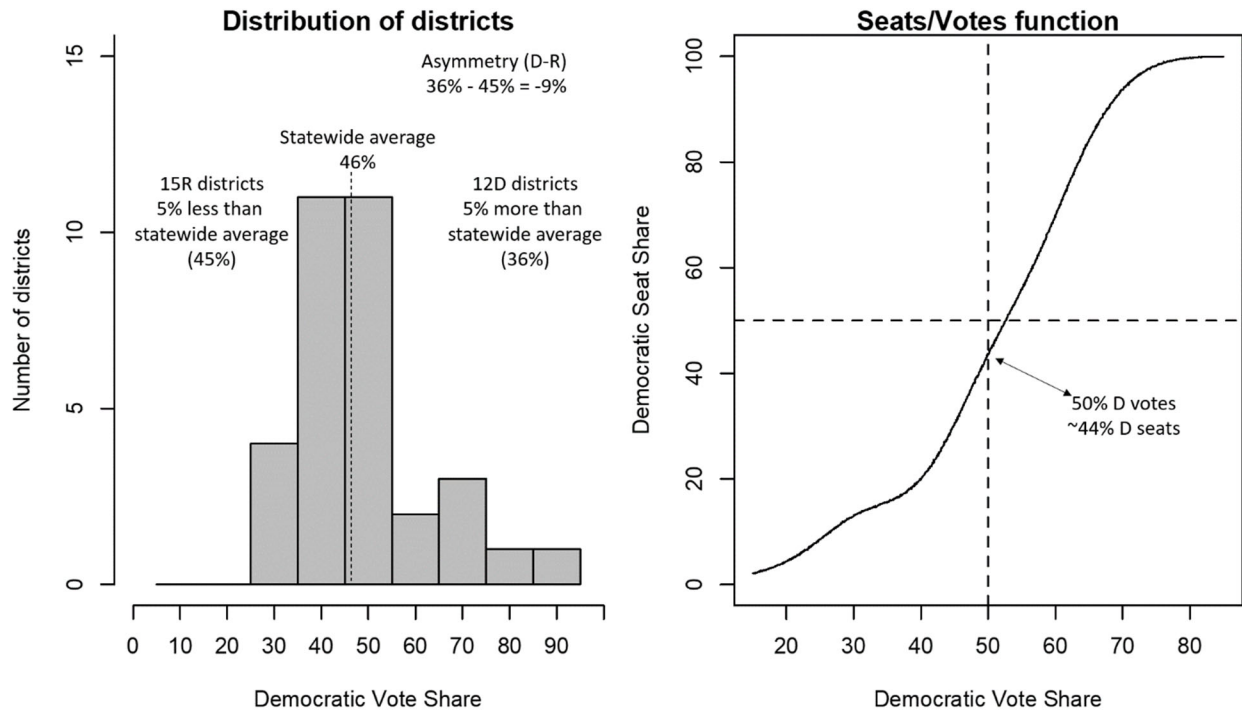
Distribution of districts

Asymmetry (D-R)
36% - 45% = -9%

Statewide average
46%

15R districts
5% less than
statewide average
(45%)

12D districts
5% more than
statewide average
(36%)

Seats/Votes function

50% D votes
~44% D seats

Figure 3: Third Revised Senate Map Asymmetry

33.   Most importantly, the asymmetry in both the Third Revised House and Senate

maps still lags far behind the alternative plans in fairness. See Tables 5 and 6,

TABLE 5

Asymmetry in Original, Revised, and Alternative House Plans

PLAN	SIMPLE S	ASYMMETRY	(95% CONFIDENCE)
3rd Revised	−11	−11.30	(5.6)
2nd Revised	−13	−11.60	(5.94)
1st Revised	−13	−13.90	(5.76)
Original	−15	−15.39	(5.87)
Johnson/McDonald	−4	−5.20	(5.63)
Rodden III	−6	−8.40	(5.38)

TABLE 6

Asymmetry in Original, Revised, and Alternative Senate Plans

PLAN	SIMPLE S	ASYMMETRY	(95% CONFIDENCE)
3rd Revised	−9	−12.90	(10.6)
2nd Revised	−12	−11.10	(10.2)
1st Revised	−18	−15.70	(10.54)
Original	−15	−17.34	(10.48)
Johnson/McDonald	3	−4.82	(10.6)
Rodden III	−9	−6.40	(9.89)

34.   The commission did not need to create yet another asymmetric plan, as evidenced by the fact that the Johnson/McDonald and Rodden III plans are more symmetric than the Third Revised Plan at a statistically significant level.[11] For example, if we compare the estimated House symmetry scores from those plans of -5.2 and -8.4, respectively, to the symmetry score for the Third Revised Plan, -11.3, we can say with greater than 95 percent confidence that the

---

[11] Johnson/McDonald T-Test =; -35.357, p-value < 2.2e-16; Rodden III T-test = -26.071, p-value < 2.2e-16

Third Revised House Plan will produce greater asymmetries than the Johnson/McDonald and Rodden III plans. Histograms also show that both the Johnson/McDonald and Rodden III House and Senate plans are visibly more symmetric, with greater parity in the percentage of seats where each party wins more than its statewide average. See Figures 4-7. Under the Johnson/McDonald and Rodden III plans, Democrats and Republicans are expected to receive similar seat shares with 50 percent of votes, as the seats/votes curve is visibly closer to the 50 percent votes/seats intersection. Crucially, there are no statistically significant asymmetries in either of the Johnson/McDonald maps or the Rodden III Senate plan. I should note that the simple S and computational symmetry measures diverge somewhat because they are calculated using different metrics (the number of safe seats v change in the seats/votes curve as voter preferences change). The computational measure is superior in that it is a truly predictive estimate of future performance, and it is possible to estimate the statistical significance of differences across different plans.
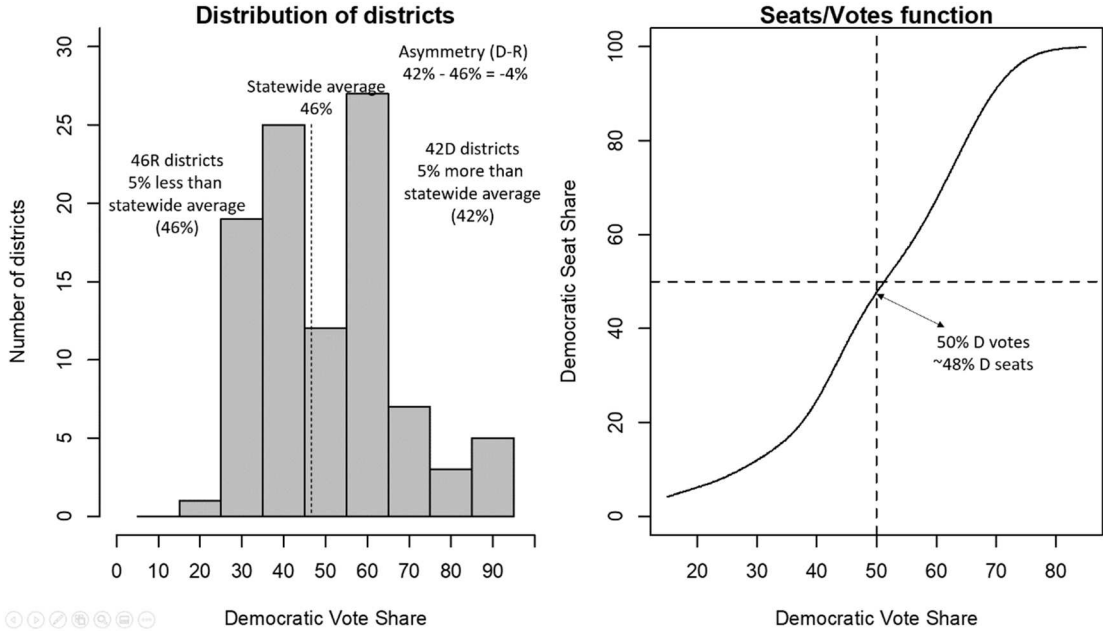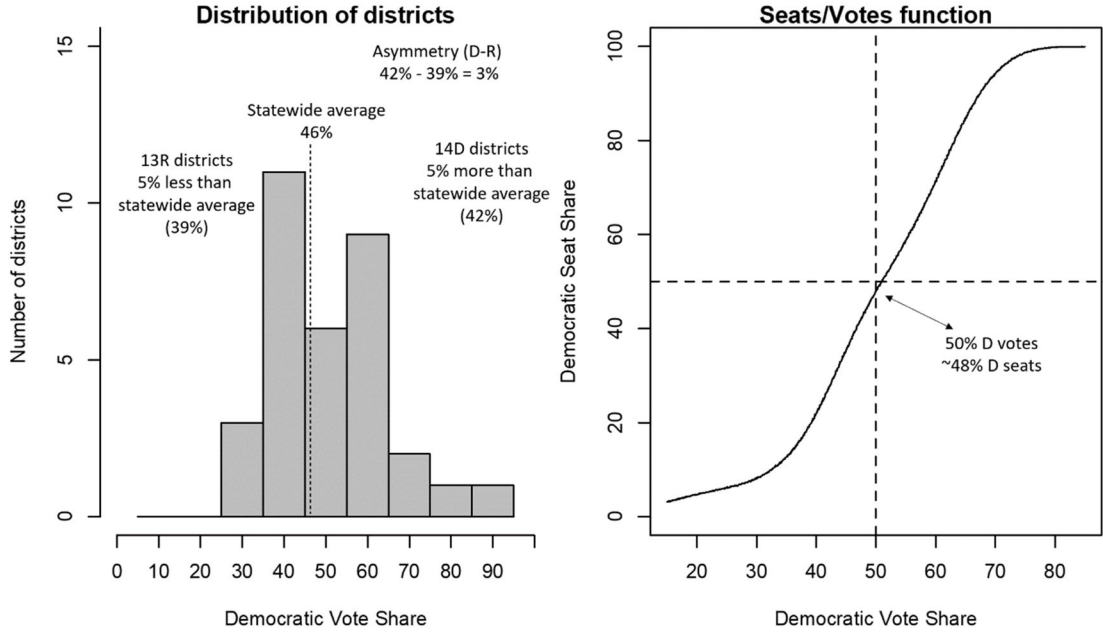

Figure 4: Johnson/McDonald House Map Asymmetry

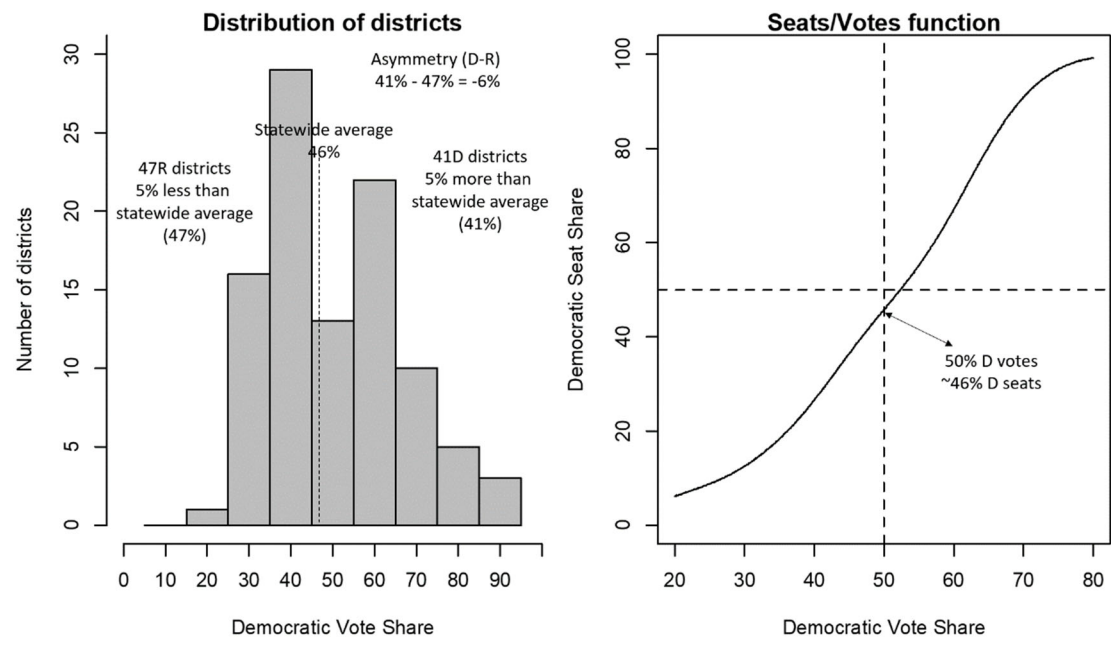**Figure 5: Johnson/McDonald Senate Map Asymmetry**

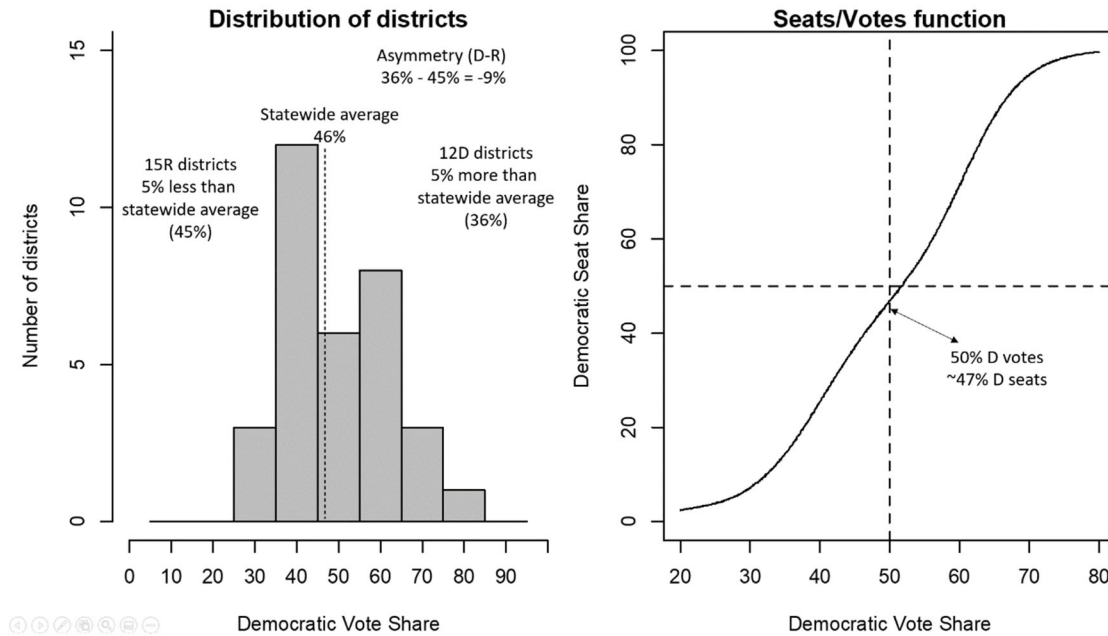**Figure 6: Rodden III House Map Asymmetry**

Figure 7: Rodden III Senate Map Asymmetry

III. As a Result of Significant Population Shifts During the past Decade, the 2011 Plan is Unconstitutionally Malapportioned

35.   According to the 2010 Census, Ohio had a population of 11,536,504. Therefore, a decade ago, the ideal population of each of Ohio's 99 state House districts (*i.e.*, the State's total population divided by the number of districts) was 116,530 persons.

36.   According to the 2010 Census data, the 2011 House Plan had a maximum deviation (*i.e.*, the difference between the most populated district and least populated district) of 19,157 persons (16.44 precent of the ideal district population). Only two districts exceeded a 5 percent population deviation.

37.   The results of the 2020 Census report that Ohio's resident population as of April 2020 increased by 2.3 percent, totaling 11,799,448 persons. Consequently, the ideal population for each of Ohio's 99 state House districts as of 2020 is 119,186.

38.   While this is a relatively minor change in total statewide population, the way it has been distributed throughout the state has changed more dramatically. In the past decade,

Ohio's population has shifted significantly, which skews the current legislative districts away from population equality. Table 7 below, which was generated from Census data, reveals how populations for Ohio's legislative districts has shifted between 2010 and 2020.

39.   Table 7 shows that, between 2010 and 2020, the maximum deviation among state House districts increased from 16.4 percent to 34.2 percent.

TABLE 7

Malapportionment in 2011 House Plan

	NUMBER OF DISTRICTS	AVERAGE DEVIATION
Districts > -10% deviation	5	−12.3%
Districts > -5% deviation	21	−7.2%
Districts > 5% deviation	7	7.5%
Districts > 10% deviation	7	13.5%
Total deviation		**34.2%**

40.   In light of these population shifts, the 2011 legislative district configurations are malapportioned. If utilized in any future election, including the 2022 elections, these configurations would dilute the strength of Petitioners' votes in legislative elections since they live in districts that have significantly larger populations than those districts in which other voters reside.

41.   Petitioner Samuel Gresham Jr. lives at 255 Old Trail Drive, Columbus, OH 43213, which is in House district 26 and Senate district 15 in the 2011 Plan. Based on 2020 census data, both House district 26 and Senate district 16 are overpopulated by more than 5%.

42.   Petitioner Ahmad Aboukar lives at 5019 Noor Park Circle, Dublin, OH 43016, which is in House district 24 and Senate district 16 in the 2011 Plan. Based on 2020 census data, both House district 24 and Senate district 16 are overpopulated by more than 5%.

43.   Petitioner Mikayla Lee lives at 111 Latta Avenue, Unit C, Columbus, OH 43215, which is in House district 18 and Senate district 15 in the 2011 Plan. Based on 2020 census data, both House district 18 and Senate district 15 are overpopulated by more than 5%.

44.   Petitioner Prentiss Haney lives at 918 Windsor Street, Cincinnati, OH 45206, which is in House district 32 and Senate district 9 in the 2011 Plan. Based on 2020 census data, House district 32 is overpopulated by more than 5%. I was also asked to review the data files accompanying the Johnson/McDonald Plan that were posted by the independent map-drawers on the Commission's website on March 28, 2022.[12] According to these files, the population deviation of each district in the Johnson/McDonald plan is less than 5 percent from perfect population equality. Thus, the Johnson/McDonald plan complies with equal-population requirements mandated by *Reynolds v. Sims*, 377 U.S. 533 (1964).

CONCLUSION

45.   My conclusion with respect to the Third Revised Plan echoes my earlier conclusions regarding the Second Revised Plan, as they are nearly identical plans: The Commission has again failed to produce fair maps. The expected outcomes under the Commission's plans are not an inevitable function of Ohio's political geography, as evidenced by the performance of the Johnson/McDonald and Rodden III plans. Given that the Commission members have now repeatedly refused to adopt compliant alternative plans, and given their continued attempt to mimic proportionality through the asymmetric use of toss-up districts, I

---

[12] https://redistricting.ohio.gov/assets/district-maps/district-map-1180.zip.

must conclude that the Third Revised Plan reflects an intent to maximize partisan advantage over fairness.

46.   With respect to the 2011 Plan, I conclude that it is unconstitutionally malapportioned.

Michael S. Latner   04/01/2022
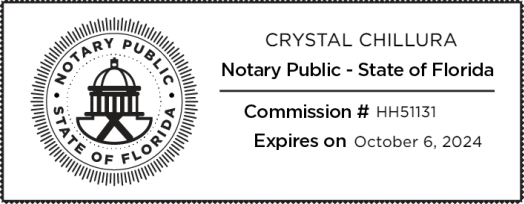_____

Michael S. Latner

State of Florida

County of Pasco

This foregoing instrument was acknowledged before me by means of online notarization,

this 04/01/2022 by Michael S. Latner.

____ Personally Known OR __✔Produced Identification

Type of Identification Produced _DRIVER LICENSE__

Crystal Chillura   Online Notary

Notarized online using audio-video communication