IN THE SUPREME COURT OF OHIO

Meryl Neiman, *et al.*, **League of Women Voters of Ohio, *et al.*,** **Petitioners,** **v.** **Secretary of State Frank LaRose, *et al.*,** **Respondents.**	**Case No. 2022-298** **Case No. 2022-303** ***Consolidated*** Original Action Filed Pursuant to Ohio Constitution, Article XIX, Section 3(A)

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INTRODUCTION

The Neiman Petitioners' opening brief detailed at length why the March 2 Plan violates Article XIX of the Ohio Constitution. Petitioners explained how, after the Court struck down the November 20 Plan, the Commission once again used a hyper-partisan approach wherein map drawers controlled by the Republican Legislative Commissioners drew a plan, Senate President Huffman unveiled that plan at the last moment, and the plan was rammed through on a party line vote. Neiman Pet'rs' Merits Brief, *Neiman v. LaRose*, Case No. 2022-0298 (May 5, 2022) ("Neiman Br.") at 10-16. They explained how, contrary to this Court's prior Opinion requiring adoption of a new plan that was not infused with partisan bias from one end of the state to the other, the Commission merely made minor adjustments to the existing, unconstitutional November 20 Plan. *Id.* at 26-27. And they detailed through expert testimony from Dr. Jonathan Rodden and Dr. Jowei Chen how the Commission's efforts to unduly favor the Republican Party, and split political subdivisions to that end, manifested in the March 2 Plan.

One who had not been observing Ohio's redistricting process thus far might expect the Commission to respond by attempting a full-throated defense of the March 2 Plan's constitutionality—complete with discussion of the contours of districts and the efforts made by the Commission (or the General Assembly before it) to comply with Article XIX and the Court's prior Opinion. The Republican Legislative Commissioners' brief offers none.[1] Anyone who has been observing Ohio's redistricting process understands why.

During the Commission process, President Huffman had little patience when pressed on if and how the March 2 Plan complied with Article XIX, Section 1(C)(3)(a) and (b): He claimed the

[1] The Commission and Secretary LaRose offer no substantive arguments in their own briefs, deferring entirely to the Republican Legislative Leaders and Commissioners, whose brief is herein referred to as "Resp. Br."

Commission no longer needed to follow the law. This now frighteningly familiar disregard permeates the Republican Legislative Commissioners' brief as thoroughly as partisan bias permeates the March 2 Plan. Neither Respondents' assertions of untrammeled power nor their gross mischaracterizations of the record evidence justify their actions.

The people of Ohio, having—for good reason—lost trust in partisan politicians' ability to put the public interest ahead of the pursuit of partisan power, adopted Article XIX into the Ohio Constitution. They gave this Court a necessary and critical role. When the General Assembly and the Ohio Redistricting Commission ignore their responsibilities under Article XIX, this Court is the last line of defense. The Court should strike down the March 2 Plan. If the General Assembly and the Commission yet again fail to pass a constitutional congressional districting plan, the Court should oversee the adoption of such a plan itself.

I. Article XIX's anti-gerrymandering requirements and the orders of this Court apply to the Commission at the remedial phase.

Respondents shirked their responsibilities in the face of clear constitutional text and this Court's prior Opinion. When the General Assembly failed to even propose a new congressional plan during its allotted 30 days, the Commission was reconstituted. As described in Petitioners' opening brief, it is clear the Commission did not even attempt to comply with the Court's order. *See* Neiman Br. at 7-8. Instead, it made a half-hearted attempt to cloak its gerrymander by tinkering with a few lines, leaving the invalidated November 20 Plan largely the same.

By way of justification, Respondents repeatedly assert that the Court cannot meaningfully check their power. Article XIX, Section 1(C) provides that if a redistricting plan is adopted without sufficient bipartisan support during November in "a year ending in the numeral one," "[t]he general assembly shall not pass a plan that unduly favors or disfavors a political party or its incumbents" and "[t]he general assembly shall not unduly split governmental units." Article XIX, Section

1(C)(3)(a)-(b). Emphasizing the words "general assembly," Respondents argue that the *Commission* is exempt from the anti-gerrymandering requirements, even in the face of a clear order from this Court remedying violations of those requirements. This is, of course, nonsense.

Respondents ignore the most natural reading of the text. The remedial process is governed not by Section 1, but by Section 3. The latter Section outlines this Court's jurisdiction over challenges to congressional plans, the process by which the General Assembly—and, if necessary, the Commission—enact remedial plans, and what the substance of those remedial plans should be.

In particular, Section 3(B) clearly states that, "[a] congressional district plan passed under this division *shall remedy any legal defects in the previous plan* identified by the court but shall include no changes to the previous plan other than those made in order to remedy those defects." *Id*. (emphasis added). As the Court explained, Section 3(B) "mandates both the timing *and substance* of any plan" passed after the Court has determined a congressional plan to be invalid. *Adams v. DeWine*, Slip Opinion No. 2022-Ohio-89, at ¶ 97 (emphasis added). The Section 3 process began earlier this year, when this Court invalidated the November 20 Plan on the grounds that it unduly favored the Republican Party and unduly split governmental units. *See id.* When the Court invalidated the plan, it ordered that "[b]y the plain language of Article XIX, Section 3(B), *both* the General Assembly and the reconstituted commission, should that be necessary, are mandated to draw a map that comports with the *directives of this opinion*." *Id.* at ¶ 99 (first emphasis added). These directives included passage of an entirely new congressional district plan, one that did not unduly split governmental units or unduly favor a political party or its incumbents. *See id.* at ¶ 95-96. The Court gave the General Assembly 30 days from the date the of the order to pass the new plan and, in the event it failed to do so, the Court ordered the Commission to be reconstituted and tasked with passing a plan "in accordance with the Constitution." *Id.* at ¶ 98.

Section 3 is thus straightforward. When the Court invalidates a congressional plan, the General Assembly and, if necessary, a reconvened Commission are tasked with remedying the identified constitutional violations. Where, as here, the Court has found violations of Section 1(C)(3), the plan must cure, not repeat, such violations.

Respondents' argument to the contrary is preposterous. They acknowledge that Section 3(B)(2) requires the Commission to "remedy any legal defects in the previous plan identified by the court" if the General Assembly fails to adopt a plan. But they allege that Section 3(B)(2)'s provision that the Commission must "adopt a congressional district plan in accordance with the provisions of this constitution that are then valid" somehow renders Article XIX's anti-gerrymandering requirements inoperative at this stage, because in their view only the provisions applicable to the Commission under Sections 1 and 2 can apply under Section 3. Because Section 1(C)(3) applies to the General Assembly and not the Commission, Respondents contend that the Commission is free to gerrymander to its heart's content during the remedial process.

To describe Respondents' position is to refute it: They believe the Court's act of striking down a plan as a partisan gerrymander is what empowers the Commission to then draw a partisan gerrymander. This is a patently absurd reading that would (among other things) render Section 1(C)(3) useless. Respondents' reading of Section 3(B)(1) and (2)'s clause "in accordance with the provisions of this constitution that are then valid" is at odds with the provision's context and plain meaning. The context of the excerpted phrase makes plain that it was added in contemplation of a scenario in which a court has declared one of the provisions of Article XIX invalid. *See* Article XIX, Section 3(B) ("In the event that any section of this constitution relating to congressional redistricting . . . is challenged and is determined to be invalid by an unappealed final order of a court of competent jurisdiction . . . the general assembly shall pass a congressional district plan in

accordance with the provisions of this constitution that are then valid"). Accordingly, "that are then valid" refers to the provisions left in effect after any unlawful provisions were excised from the article by a court. This is consistent with the dictionary definition of the term "valid," namely "having legal efficacy or force." *Valid*, Merriam-Webster (2022).

Respondents' interpretation also defies common sense and the broader structure of Article XIX. When it initially draws a map, the Commission is not subject to specific anti-gerrymandering rules because it is structurally constrained from gerrymandering. The Commission has no power to pass a plan unless two members of each political party vote for it. Article XIX, Section 1(B). On a seven-person Commission with two members from the minority party, as here, that means the minority party Commissioners must *unanimously* vote for the enacted plan. It is nonsensical to suggest that a Commission that cannot pass a plan in October without unanimous minority party buy-in is free to pass a partisan gerrymander on a party-line vote in March. Respondents claim this interpretation provides a "safety valve" to avoid impasse, Resp. Br. at 14, but in actuality it amounts to an end-run around Article XIX itself.

Indeed, under Respondents' crabbed interpretation of Article XIX, the General Assembly would be similarly liberated to enact partisan gerrymanders once the Court invalidates a plan under Section 3(B). According to Respondents, the only requirements applicable to the Commission at any stage are the line-drawing requirements of Section 2. In other words, Respondents claim that once the remedial process reaches the Commission, the provisions "that are then valid" are limited to Section 2. Resp. Br. at 12-13. But on this reading, the same would go for the General Assembly: the anti-gerrymandering requirements of Section 1(C)(3) only apply where "the general assembly passes a congressional district plan under division (C)(1) of [Section 1]."[2] Section (C)(1), in turn,

[2] Equivalent provisions also apply after a four-year plan expires. Article XIX, Section 1(F)(3).

applies if the Commission "does not adopt a plan later than the last day in October of a year ending in the numeral one," and requires the General Assembly to adopt a plan "not later than the last day of November of that year." So if Respondents' reading is correct, *no* anti-gerrymandering requirements apply to *anyone* at the remedial stage. This Court does not interpret the Ohio Constitution to mandate such absurd results. *See State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382, 384, 481 N.E.2d 632 (1985) ("It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences."); *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16 (applying statutory construction rules to constitutional provisions).

The Court has already explained that Section 3 supplies "both the timing *and substance* of any plan" passed at the remedial stage. *Adams*, at ¶ 97. The Commission, as well as the General Assembly, was required to pass a plan that "remed[ied] any legal defects in the previous plan identified by the court." This the Commission plainly did not do.

II. Respondents present no substantive defense of the March 2 Plan.

The March 2 Plan violates Article XIX and this Court's *Adams* order. *See* Neiman Br. at 16-25, 31-37. Petitioners' opening brief explained, citing extensive supporting evidence, why the March 2 Plan flouts the prohibition on undue partisanship. The March 2 Plan features gross partisan disproportionality and extreme partisan asymmetry unexplainable by neutral factors such as compliance with the remainder of Article XIX or Ohio's political geography, *id.* at 31-33; it "dilutes Democratic votes around cities, often cracking communities of color and submerging them in overwhelmingly white, Republican districts," *id.* at 33; it made only minor alterations to a previously invalidated plan, in contravention of this Court's order, *id.* at 35; and it was adopted through a one-sided, partisan process controlled by the Republican Legislative Commissioners, *id.* at 34-35. Petitioners also explained how the March 2 Plan unduly splits governmental units by

once again "pair[ing the] urban core of Cincinnati proper with rural, Republican Warren County by way of a narrow corridor through northeast Hamilton County." *Id.* at 36-37. Petitioners provided supporting affidavits from Dr. Jonathan Rodden and Dr. Jowei Chen.

Respondents do not attempt to defend the March 2 Plan. They offer *no* response to Petitioners' detailed evidence of the partisan map drawing process; *no* response to Dr. Rodden's testimony as to the numerous ways the plan was drawn to unduly advantage the Republican Party and unduly split governmental units; and *no* expert testimony of their own. Instead, they present a series of excuses and obfuscations—backed only by their counsel's say-so—none of which can rebut the overwhelming evidence that the March 2 Plan violates Article XIX and this Court's order.

First, Respondents invoke the presumption of constitutionality afforded to district plans and the discretion afforded to the Commission. Resp. Br. at 15. But the Commission may exercise discretion only within the bounds of its constitutional authority. Here, district plans "are subject to judicial review for constitutional compliance," *Adams* at ¶ 26, and the Court does not defer to the redistricting body "on questions of law," *see id.* at ¶ 28. *Cf. League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-65, at ¶ 80 (explaining that the "presumption of constitutionality and high burden of proof do not require [the Court] to defer to the commission's interpretation of" a constitutional provision). That is, the presumption does not mean the Commission (or General Assembly) gets to do whatever it wants.

Second, Respondents seemingly attempt to excuse their failure to counter Petitioners' evidentiary showing by complaining they could not meaningfully review Petitioners' expert testimony, but this only reflects Respondents' own failure to engage in expert discovery. Respondents initially claim that none of Petitioners' "experts have been subject to discovery." Resp. Br. at 15. This is false. Respondents Cupp and Huffman served Petitioners with discovery

requests on March 30, 2022 requesting Dr. Rodden's and Dr. Chen's files. *See* Affidavit of Derek S. Clinger, Motion for Leave to File Rebuttal Evidence, *Neiman v. LaRose*, Case No. 2022-0298 (June 1, 2022), at ¶ 2-3. Petitioners provided all the requested data within two days, and received no follow-up requests. *Id.* at ¶ 4-5. Respondents then grouse that Petitioners' experts were not subject to cross examination and that they had "no time to vet [Dr. Chen's code] at all." Resp. Br. at 23. Respondents could have deposed Dr. Rodden or Dr. Chen during the more than three weeks available for discovery, but chose not to do so. They could have "vet[ted]" Dr. Chen's code at any point after it was provided on April 1, but did not. Moreover, Respondents Cupp and Huffman have had access to the block assignment files for Dr. Chen's 1,000 simulated congressional plans since December 10, 2021, when those files were produced in *Adams v. DeWine*. *See* Affidavit of Derek S. Clinger, *Adams v. DeWine*, Case No. 2021-1428 (Dec. 10, 2021), at ¶ 15. Respondents' baseless speculation about evidence they may have if they had bothered to conduct discovery does nothing to undermine the substantive conclusions of Petitioners' experts.

Third, Respondents claim that Petitioners demand the "best" congressional plan, Resp. Br. at 16, or a plan with a certain compactness score, *see id.* at 17-18. Again, this is flatly false. Petitioners simply ask this Court to enforce its prior order requiring the General Assembly and the Commission "to draw a map that comports with the directives of [its] opinion," *Adams* at ¶ 99 (emphasis omitted). The Opinion explained that Article XIX, Section 1(C)(3)(a) prohibits "a plan that favors or disfavors a political party or its incumbents to a degree that is in excess of, or unwarranted by, the application of Section 2's and Section 1(C)(3)(c)'s specific line-drawing requirements to Ohio's natural political geography." *Id.* at ¶ 40. And under Article XIX, Section 1(C)(3)(b), a "split may be unwarranted if it cannot be explained by any neutral redistricting criteria but instead confers a partisan advantage on the party that drew the map." *Id.* at ¶ 83.

Petitioners provided evidence that the March 2 Plan violates these standards. *See* Neiman Br. at 31-37. Petitioners have never claimed a congressional plan must have a particular score on a particular measure of compactness or partisanship to pass constitutional muster. Rather, the Court may consider evidence to ascertain whether the Ohio Constitution has been violated. The Court already held in *Adams* that alternative or simulated plans "are relevant evidence that the enacted plan unduly favors" a political party. *Adams* at ¶ 68. What is so striking about the March 2 Plan is that a wide array of methods and tools indicate the plan is characterized by undue partisan bias. Dr. Rodden's analyses support this conclusion, as do Dr. Chen's simulation-based analyses. The Court relied on this same kind of evidence in *Adams*. *Id.* at 46-66. Given the small changes the Commission made to the November 20 Plan struck down in *Adams*, it is not surprising that the evidence shows that the March 2 Plan unduly advantages the Republican Party.

Respondents quote courts in other jurisdictions as to the limitations of various comparative metrics for identifying partisan bias, but those opinions say nothing about the responsibility and authority that the Ohio Constitution gives this court to invalidate congressional plans that violate Article XIX. Indeed, the Court has already considered these metrics as one form of evidence that a plan unduly favors a political party. *Id.* ¶ 60-66. To the extent that other jurisdictions' precedent is appropriate, Petitioners note that several state supreme courts have looked to compactness and partisan bias metrics to identify violations of state constitutional prohibitions against partisan intent. *See Harper v. Hall*, 858 S.E.2d 499, 552-55 (N.C. 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 816-17 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 402-04, 410 (Fla. 2015). Similarly, federal courts have long considered compactness when deciding whether traditional redistricting principles were subordinated to

another motive. *See, e.g., Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (2017). There is no reason why this Court cannot do the same here, as it did in *Adams*. *See Adams* at ¶ 71, 77.

Fourth, Respondents allege that Dr. Chen and Dr. Imai's evidence is "conflicting" because "a majority of Dr. Chen's simulations result in 10 Republican districts and 5 Democratic districts," while a majority of Dr. Imai's simulations result in eight Republican districts and seven Democratic districts. Resp. Br. at 19-20. As an initial matter, Respondents' summary of Dr. Chen's analysis is incorrect. Using the same elections dataset used by the Commission, Dr. Chen's simulations most frequently produced nine Republican districts and six Democratic districts. *See* Neiman Br. at 19 (citing NEIMAN_EVID_00395 (Affidavit of Dr. Jowei Chen at ¶ 19 (Mar. 4, 2022) ("Chen Aff.")).[3] The fact that Dr. Chen's and Dr. Imai's results differ is also unremarkable. As explained several times in this litigation and in the *Adams* litigation, Dr. Chen and Dr. Imai use different elections datasets. *See, e.g., Adams* at ¶ 55, 67. Dr. Imai used the same dataset that the General Assembly used when it passed the November 20 Plan, which included only statewide federal elections from 2012-2020. (*See* NEIMAN_EVID_00228-00229 (Affidavit of Dr. Kosuke Imai, *Adams v. DeWine*, No. 2021-1428, at ¶ 17-18 (Dec. 10, 2021)).) In contrast, Dr. Chen uses the Commission's dataset, which includes all statewide election contests from 2016-2020. (Chen Aff. ¶ 8-10). That these different datasets result in different seat allocation outcomes does not affect the usefulness of the analyses in determining whether the March 2 Plan features excessive or unwarranted partisan favoritism. As this Court explained in *Adams*, the relevant question is not whether two experts "used different datasets," but rather whether they "applied the same datasets to the enacted plan that they applied to the simulated or alternative plans [when] compar[ing]

[3] It is troubling that Respondents have repeated this mischaracterization of Dr. Chen's analysis—Petitioners' opening brief addressed this issue expressly because "Respondents Huffman and Cupp have previously misrepresented Dr. Chen's affidavit" on this point. Neiman Br. at 19 n.6.

partisan outcomes." *Adams* at ¶ 67. Expert analyses that do so "are relevant to the question whether the enacted plan favors a party in a way unwarranted by the neutral factors in Article XIX." *Id.*

No matter what dataset one uses, the partisan bias of the March 2 Plan is evident. Both Dr. Chen's and Dr. Imai's analyses indicate that the March 2 Plan disproportionately favors the Republican Party, in a manner that cannot be explained by Ohio's political geography or Article XIX's other requirements. (*See* Chen Aff. ¶ 2-3, 62-65; Affidavit of Dr. Kosuke Imai at ¶ 3-4, 11 (Apr. 25, 2022)). Petitioners do not claim that simulation analyses are required to establish undue partisan favoritism, nor do they claim that a particular dataset must be used in conducting those simulations. Rather, Dr. Chen's and Dr. Imai's analyses add to the considerable evidence that the March 2 Plan unduly favors the Republican Party and contains undue splits of governmental units.

Fifth, Respondents misrepresent Petitioners' requested remedy. Petitioners are not asking this Court to "simply adopt one of Petitioners' maps here and now." Resp. Br. at 23; *see infra* Part III.D Rather, Petitioners ask this Court to invalidate the March 2 Plan and, because this is a new lawsuit, remand the matter to the General Assembly and Commission pursuant to Article XIX, Section 3(B). Petitioners also ask the Court to prepare a backstop in case those bodies, who are thus far 0-6 in adopting constitutional plans in the General Assembly and congressional contexts, once again fail to follow the law. Article XIX does not constrain this Court's ability to fashion such an equitable remedy. *See, e.g., North Carolina v. Covington,* 137 S. Ct. 1624, 1625 (2017) ("Relief in redistricting cases is 'fashioned in the light of well-known principles of equity.'").

Under the rhetorical bluster, Respondents' argument is that this Court cannot judge a Commission-drawn remedial plan. This would nullify Article XIX and has no basis in that article's text nor in *Adams*. The Court should conclude that the March 2 Plan violates Article XIX.

III. This Court has the power, consistent with state and federal law, to adopt a plan of its own.

A. Respondents' request for delay is meritless.

Having successfully gamed the process to ensure that the 2022 elections are run under a blatantly unconstitutional congressional map, Respondents now turn their sights on 2024. To start, Respondents audaciously assert that this Court should hit the reset button on this entire litigation. Resp. Br. at 25. Respondents propose that this Court should delay decision for at least another five months by "exercis[ing] its jurisdiction to develop a more fulsome record of evidence that includes the hallmarks of cross-examination and fact finding before making any decision." *Id.* Respondents made a similar request before the Court issued its scheduling order. *See* Huffman and Cupp Response to Motion for Scheduling Order, *Neiman v. LaRose*, Case No. 2022-0298 (Mar. 22, 2022) at 10. The Court should reject Respondents' untimely request that the Court reconsider the schedule. This case is now fully submitted: The Court issued a scheduling order, Respondents had ample opportunity to take discovery, and the matter has been briefed by all parties.[4]

Respondents have made very clear to this Court what they would do with any delay in this Court's decision. If litigation over the General Assembly maps has taught us anything, it is that Respondents will exploit any delay in order to ensure elections are run under maps of their liking. This Court should proceed with this litigation on the schedule already prescribed.

B. The Ohio Constitution does not preclude this Court from adopting a remedial congressional plan.

Next, Respondents argue that this Court is powerless to order a congressional map of its own. Resp. Br. at 25-31. The allure of this argument to Respondents is obvious to anyone who has

[4] Respondents also argue that elections might produce "more up to date representation" in the General Assembly or on the Commission. This argument has no basis in Article XIX and is merely aimed at delaying a remedy until past January 2023, when any new members would be sworn in.

observed litigation over General Assembly maps this past year. Article XI, which governs General Assembly redistricting, bars this Court from adopting General Assembly maps of its own. Respondents have successfully exploited that prohibition to pass one unconstitutional General Assembly plan after another in violation of the express orders of this Court. *See, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Comm. ("LWV V")*, Slip Opinion No. 2022-Ohio-1727, at ¶ 5 (May 25, 2022).

However, this Court does not face such constraints when considering *congressional* redistricting plans. In the General Assembly context, Article XI, Section 9 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 in the manner prescribed by this article" and similarly bars the Court from ordering "the commission to adopt a particular general assembly district plan or to draw a particular district." Article XIX contains no such provision. Ironically, Respondents—in attacking a strawman argument Petitioners have not made—note certain provisions of Article XIX have "teeth, but these provisions do not have legs; they cannot walk their way into other instances of how or when a congressional plan could be passed." Resp. Br. at 11. Respondents' argument here would have Article XI, Section 9(D) stroll all the way over to Article XIX and replace "general assembly district plan" with "congressional district plan."

Respondents' position is all the more untenable in light of the fact that voters approved the modern version of Article XI three years before they approved Article XIX. The voters therefore knew that Article XI expressly barred court-drawn maps when they voted for Article XIX, an amendment without any limitations on court-drawn maps.[5] *See City of Centerville v. Knab*, 162

[5] Contrary to Respondents' claim, *see* Resp. Br. at 26, the federal Elections Clause placed no limitation—at the time of Article XIX's adoption or at any other point—on state courts adopting remedial district plans to remedy constitutional violations, *see infra* Part III.C.

Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 28 ("[W]e presume that the voters who approved an amendment were aware of existing Ohio law."). As emphasized in Petitioners' opening brief, this omission is telling: When language is included in one area of a statute, but excluded elsewhere, courts presume the drafter acted "intentionally and purposely in the disparate inclusion or exclusion." *Salinas v. United States RRB*, 141 S. Ct. 691, 698 (2021) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). This Court should decline Respondents' invitation to rewrite Article XIX to bar the remedy often employed by courts in these circumstances—a court-drawn map. Neiman Br. at 44-45 (collecting cases where state courts ordered maps).

C. The United States Constitution does not bar court-drawn congressional plans.

Having realized they cannot take refuge in the text of the Ohio Constitution,[6] Respondents claim Article XIX is preempted by the federal Constitution. Respondents advance an unsupported interpretation of the federal Elections Clause that no court—state or federal—has ever endorsed, and which runs contrary to nearly one hundred years of unbroken U.S. Supreme Court precedent.

The U.S. Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Constitution, Article I, Section 4, cl. 1. Respondents argue that the Elections Clause's use of the term "Legislature" creates an exclusion by implication: Under their unprecedented theory, because the Elections Clause grants the General Assembly the power to draw a congressional map, this Court cannot order a map of its own to remedy a constitutional violation. But this interpretation finds no support in the text or history of the clause and is foreclosed by binding U.S. Supreme Court precedent.

[6] In fact, Respondents' *only* retort to Petitioners' textual argument above is that "Petitioners fail to take heed of the federal Elections Clause." Resp. Br. at 26. For the reasons that follow, that argument is meritless.

First, the Elections Clause's use of the term "legislature" does not nullify ordinary judicial review. In fact, at the time of the framing, the term "legislature" referred not just to "an entity created to represent the people," but also "an entity *created and constrained by the state constitution*." Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 Sup. Ct. Rev. (forthcoming) (manuscript at 24) (emphasis in original). Both at the founding and now, this entailed review of the legislature's actions by the state courts; in fact, review by state courts "predated the Philadelphia Convention, *Federalist No. 78,* and *Marbury v. Madison*." *Id.* at 24.

Consequently, courts have consistently held that state courts have a significant role to play in the congressional redistricting process, one which includes the adoption of remedial maps. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 34, 42 (1993) (holding "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's . . . federal congressional districts" and in "ignoring the . . . legitimacy of state judicial redistricting"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (explaining that "[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply" in partisan gerrymandering cases challenging congressional maps) (emphases added)); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm.*, 576 U.S. 787, 817-18 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution"). Respondents seek from the federal Elections Clause free rein to violate the Ohio Constitution, but "nothing in the language of [that

clause] gives support to a construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964). Indeed, Respondents concede that the U.S. Supreme Court has never adopted the reasoning they advance here. Resp. Br. at 30.[7]

Additionally, even if the first part of the Elections Clause somehow shielded legislative action from court-ordered remedies, Congress has utilized *its* power under the Elections Clause to grant courts that power. The second part of the Elections Clause gives Congress the power to "make or alter" regulations related to federal elections. Pursuant to this power, Congress enacted 2 U.S.C. § 2a(c), which prescribes federally mandated requirements for congressional maps when states have not redistricted "in the manner provided by the law thereof." The U.S. Supreme Court has interpreted "the law thereof" to include *substantive* state constitutional provisions. *Branch v. Smith*, 538 U.S. 254, 277-78 (2003) (plurality opinion). In addition to mandating compliance with substantive state constitutional constraints, Congress has authorized state courts to establish remedial congressional districting plans. Under 2 U.S.C. § 2c, which requires single-member congressional districts, courts may "remedy[] a failure" by the state legislature "to redistrict constitutionally," and the statute "embraces action by state and federal courts." *Id*. at 270, 272. Section 2a(c) also recognizes state courts' power to adopt congressional plans. Its default procedures apply "[u]ntil a State is redistricted in the manner provided by [state] law," and the *Branch* plurality explained that this "can certainly refer to redistricting by courts as well as by legislatures," and "when a court, state or federal, redistricts pursuant to § 2c, it necessarily does so

[7] Respondents claim this precedent is not applicable "where the Commission has timely acted", but cite no support for this distinction. Resp. Br. at 30. Moreover, Petitioners request a court-drawn map only for the situation when the General Assembly or Commission has failed to adopt a plan that complies with Article XIX and this Court's orders within Section 3(B)'s time limits.

'in the manner provided by [state] law.'" *Id.* at 274 (emphasis added); *see Ariz. State Leg.*, 576 U.S. at 812 (same).

The cases cited by Respondents confirm this understanding. In *Ohio ex rel. Davis v. Hildebrant*, the U.S. Supreme Court affirmed this Court's rejection of a claim that Ohioans could not, consistent with the Elections Clause (among other things), invalidate a congressional redistricting plan by popular referendum. 241 U.S. 565, 566-67 (1916). The argument by petitioners in that case is a variation of Respondents' argument here: In that case, petitioners argued that a popular referendum allowing voters to approve or disapprove a congressional plan violates the Elections Clause's grant of legislative authority to the General Assembly. *Id.* at 567. Both this Court and the U.S. Supreme Court disagreed. *Id.* at 569. Similarly, here, Petitioners seek judicial review and remedy of an unconstitutional congressional plan, a democratic backstop even more well-established than veto by popular referendum.

Nor can Respondents hide behind cases describing redistricting as a "legislative" function. *See, e.g., Wilson v. Kasich*, 134 Ohio St. 3d 221, 2012-Ohio-536, 981 N.E.2d 814, ¶ 19-22. No one in this case disputes that the Ohio Constitution grants the General Assembly and Commission the power to draw a congressional map. The question before the Court is whether this Court can, in its exercise of *judicial* review, remedy a constitutional violation by appointing a special master or adopting a map of its own. This Court's cases, as well as federal cases, establish that this is standard judicial business. As described above, the U.S. Supreme Court has recognized that state courts have the power to draw congressional maps to remedy constitutional violations. *E.g.*, *Growe*, 507 U.S. at 42; *Branch*, 538 U.S. at 272, 278. And special masters are frequently employed to assist courts in producing congressional maps to remedy partisan gerrymandering or other legal defects. *See, e.g.*, *Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 31471 (May 20, 2022, N.Y. Sup. Ct.

2022); *Harper*, 858 S.E.2d at 552-55. Respondents do not dispute that this Court has the power to appoint a special master to assist in the enforcement of its orders. *See Grande Voiture D'Ohio v. Montgomery Cnty. Voiture No. 34*, 2d Dist. Montgomery No. 29064, 2021-Ohio-2429 (explaining that the Court's authority to appoint a special master pursuant to its "inherent power to enforce [its] final judgments" is "well established") (collecting cases); *State ex rel. Allstate Ins. Co. v. Gaul*, 131 Ohio App. 3d 419, 431, 722 N.E.2d 616 (8th Dist. 1999) ("[A]s jurisprudence developed in Ohio, it is clear that the appointment of a special master was inherent in courts of equity and in actions to which the parties were not entitled to a jury."). The federal Elections Clause leaves undisturbed the ordinary system of checks and balances that has existed since Ohio's founding: The legislative authority makes laws, the judicial authority reviews them and, where necessary, prescribes remedies when the laws violate the state constitution.

Moreover, the General Assembly and people of Ohio, in the exercise of their legislative power, gave this Court the power to order a map. As described above, in striking contrast to Article XI, Article XIX places no limits on this Court's power to adopt a remedial plan. *See supra* Part III.B. Even if the power of the General Assembly to legislate in the field of congressional redistricting were somehow inviolate, the General Assembly has, through the legislative process, placed limits on that power through Article XIX. Indeed, Respondents' reliance on a novel doctrine that legislatures have unreviewable authority to control congressional redistricting is a particularly inapt fit for Ohio. Again, it was the *legislature* that conceived Article XIX, including its provisions empowering the Court's judicial review (and omitting the limitations on the Court's remedial power found in Article XI). It was Respondent Huffman who helped shepherd the adoption of

Article XIX, touting its "clear rules to prevent the skullduggery that often happens."[8] And it was the General Assembly that forewent its opportunity to adopt a remedial congressional plan after *Adams*, refusing to so much as hold a hearing on a new plan. *See* Neiman Br. at 6-9. The Court should reject Respondents' self-aggrandizing claim that they have unchecked power.[9] Under U.S. Supreme Court precedent, state courts can adopt remedial maps when the legislative authority in the state adopts an unconstitutional plan or no plan at all.

D. This Court's intervention is necessary to ensure Ohioans are able to vote under a constitutional congressional map.

Finally, Respondents mischaracterize the relief Petitioners seek. Petitioners do not ask for implementation of a Court-drawn map in the first instance.[10] Instead, consistent with Article XIX,

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[8] Erick Trickey, *States Aren't Waiting for the Supreme Court to Solve Gerrymandering*, Politico Magazine (July 7, 2018), https://www.politico.com/magazine/story/2018/07/07/supreme-court-state-gerrymandering-218955/.

[9] Respondents would have this Court believe that they seek only to limit state courts' ability to order remedial maps, while leaving their power to apply state constitutions to laws concerning federal elections intact. Not likely. At this very moment, a certiorari petition is pending before the U.S. Supreme Court which seeks to obliterate *all* state court review of laws concerning federal elections. In that petition, applicants argue that the North Carolina Supreme Court violated the Elections Clause simply by "striking down the General Assembly's own congressional map on state-law grounds." Petition for Writ of Certiorari, *Moore v. Harper*, No. 21-1271 at 33-34 (Mar. 17, 2022). According to the petition, "The Elections Clause *does not* give the state courts, or any organ of state government, the power to second-guess the legislature's determinations." *Id.* at 34. Counsel to Respondents Huffman and Cupp, who represented the legislative defendants in *Harper* while the case was being considered by North Carolina courts, made an identical argument before the North Carolina Supreme Court. Legislative Defendants' Br., *Harper v. Hall*, 21-CVS-015426 at 183-84 (N.C. 2022). Make no mistake about Respondents' endgame: They seek not just the defanging of this Court's remedial authority, but also invalidation of this Court's review of any legislation regarding federal elections.

[10] Secretary LaRose misapplies the *Purcell* principle to Petitioners' requested relief. LaRose Resp. Br. at 2-3. The *Purcell* doctrine cautions *federal* courts against intervening with state election laws when an election is imminent, *see Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020), and does not limit state judicial authority where, as here, a *state court* must intervene to remedy violations of the state constitution. This Court granting Petitioners relief does not increase the risk of voter confusion but only ensures compliance with the very constitutional reforms ratified by the same voters merely four years ago.

Petitioners' proposed relief affords the Commission and General Assembly yet another chance to approve a constitutional plan. Only in the event that those bodies fail to timely adopt a constitutional plan as prescribed by Article XIX, Section 3, would this Court intervene by ordering a map of its own or adopting a plan prepared by a special master.

If this Court grafted the restrictions of Article XI, Section 9(D) onto Article XIX and found itself powerless to order its own congressional map if necessary, the results would be calamitous. We know this because it has already happened. In the General Assembly redistricting context, the Commission has consistently violated this Court's orders. As a result, the 2022 elections will be run under maps this Court has twice declared unconstitutional. Order, *Gonidakis v. LaRose*, S.D.Ohio No. 2:22-cv-0773, 2022 U.S. Dist. LEXIS 95341 (May 27, 2022) (three-judge court). Having now passed seven unconstitutional redistricting plans (including the March 2 Plan), there can be no doubt that Respondents will try to pass an eighth, so long as they believe this Court cannot hold them accountable. This "stunning rebuke of the rule of law" should go no further. *LWV V* at ¶ 10 (O'Connor, C.J., concurring). To stop this cycle of lawlessness, this Court can, and indeed must, retain the power to order its own map in the event the General Assembly or Commission fails to timely pass a constitutional map.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court declare the March 2 Plan invalid, order the General Assembly and Commission to adopt a new remedial plan, retain jurisdiction over this case, and appoint a special master to draft a remedial plan for the Court to implement in the event the General Assembly and Commission do not timely adopt a constitutional remedial plan.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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