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

MICHAEL GONIDAKIS, MARY PARKER, MARGARET CONDITT, BETH VANDERKOOI, LINDA SMITH, DELBERT DUDUIT, THOMAS W. KIDD JR., DUCIA HAMM, Plaintiffs, BRIA BENNETT, REGINA C. ADAMS, KATHLEEN M. BRINKMAN, MARTHA CLARK, SUSANNE L. DYKE, MERYL NEIMAN, HOLLY OYSTER, CONSTANCE RUBIN, EVERETT TOTTY, Intervenor-Plaintiffs, v. FRANK LAROSE, in his capacity as Ohio Secretary of State, Defendant.	Case No. 2:22-cv-00773 Judge Amul R. Thapar Judge Algenon L. Marbley Judge Benjamin J. Beaton

BENNETT PETITIONERS' OPPOSITION TO PLAINTIFFS' SECOND AMENDED MOTION FOR A PRELIMINARY INJUNCTION AND DECLARATORY RELIEF

Intervenor-Plaintiffs Bria Bennett, Regina C. Adams, Kathleen M. Brinkman, Martha Clark, Susanne L. Dyke, Meryl Neiman, Holly Oyster, Constance Rubin, and Everett Totty (the "Bennett Petitioners") hereby oppose the Gonidakis Plaintiffs' Second Amended Motion for a Preliminary Injunction and Declaratory Relief, ECF No. 96.

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INTRODUCTION AND LOCAL RULE 7.2(a)(3) SUMMARY

In 2015, more than 70 percent of Ohio voters voted to adopt the "Fair District Amendments" to Article XI of the Ohio Constitution and bring an end to partisan gerrymandering of the General Assembly. In their motion for a preliminary injunction, Plaintiffs create a false sense of urgency that would leave those Amendments a dead letter. Plaintiffs would require Ohio officials to conduct General Assembly elections under a reapportionment plan *that the Ohio Supreme Court has already held violates the Ohio Constitution*. They also ask the Court to disregard various other election laws and deadlines that must be ignored to conduct an election under this unconstitutional reapportionment plan on May 3. This would be an extraordinary and entirely unnecessary intrusion into Ohio's state sovereignty.

To the extent any relief is required at this time, it would be far less disruptive to Ohio's sovereignty—and far more consistent with Ohio law, under which constitutional requirements trump statutory provisions, *see State ex rel. Ohio Gen Assembly v. Brunner*, 114 Ohio St.3d 386 ¶ 30 (2007); *infra* Part II.A.3.b.i, pp. 23-24—to order a delay to the General Assembly primary. Courts have frequently done so in redistricting cases where necessary to allow time for the preparation of a lawful map. *See, e.g.*, *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972) ("If time presses too seriously [to implement a remedial reapportionment plan], the District Court has the power appropriately to extend the [election deadline] time limitations imposed by state law."); *infra* Part II.A.3.b.i, pp. 22-23 & n.7 (citing additional cases).

Plaintiffs' arguments in support of a preliminary injunction are substantially similar to their arguments in support of a TRO, *compare* ECF No. 84 at PageID 1160-70, *with* ECF No. 96 at PageID 1582-95. These arguments lack merit for the same reason as well, and thus this response is in many respects similar to ECF No. 90. The principal differences are in the background section and in Parts I, II.A.1, II.A.3, and II.C of the argument.

As explained in Part I, *infra* pp. 5-11, granting Plaintiffs' preliminary injunction would not preserve the status quo—it would irreversibly alter it. And it would have this Court usurp the Ohio Supreme Court's authority and improperly cut short the Ohio Redistricting Commission's ongoing, daily proceedings to prepare districts that comply with Ohio law, in violation of the Supreme Court's command for deference to state redistricting processes. *Growe v. Emison*, 507 U.S. 25, 33-34 (1993).

Moreover, as explained in Part II, *infra* pp. 11-31, Plaintiffs do not meet any of the four requirements for preliminary relief.

Plaintiffs are unlikely to succeed on the merits. *Infra* Part II.A., pp. 11-28. They lack standing because they assert a generalized grievance equally affecting all Ohio voters. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 294 (6th Cir. 1997); *Nolles v. State Comm. for Reorganization of Sch. Dists.*, 524 F.3d 892, 900 (8th Cir. 2008); *infra* Part II.A.1, pp. 11-15. And a delay to the General Assembly primary currently set by statute for May 3, which is all that is threatened, does not violate any federal law. *Thompson v. DeWine*, 976 F.3d 610, 620 (6th Cir. 2020) (per curiam); *Nolles*, 524 F.3d at 898; *infra* Part II.A.2, pp. 15-18. Nor can Plaintiffs obtain the sole relief they seek—an order imposing the Third Plan—because the Ohio Supreme Court has already held that the Third Plan violates Ohio law, it is possible to draw a map that is lawful under both Ohio and federal law, and federal courts in reapportionment cases 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, 794-95 (1973); *infra* Part II.A.3.a, pp. 19-22. In the event the Court deems it necessary for this Court to issue relief, it should set a new

primary date and implement the Bennett Petitioners' proposed plan (the "Rodden III Plan"), which—unlike the Third Plan—complies with both federal and Ohio law. *Infra* Part II.A.3.b, pp. 22-28.

For similar reasons, Plaintiffs do not face irreparable harm. *Infra* Part II.B, p. 28. The sole issue is a delay to the May 3 primary while lawful maps are prepared, not an election under malapportioned maps or no election at all, and Plaintiffs make no showing that such a delay will irreparably harm them. In contrast, a preliminary injunction requiring use of the Third Plan will substantially harm all Ohio voters and the public interest by rendering the Fair District Amendments a nullity and requiring Ohio voters to elect and be governed by representatives from districts that the Ohio Supreme Court has held were primarily and unlawfully drawn to disfavor one political party. *Infra* Parts II.C., II.D, pp. 29-31.

BACKGROUND

The legal and factual background for this case is described in detail in the Bennett Petitioners' Opposition to Plaintiffs' Motion for Temporary Restraining Order, ECF No. 90 at PageID 1330-37. The Bennett Petitioners focus here on the significant progress that the Ohio Redistricting Commission has made in just the last few days.

The Ohio Supreme Court held the Third Plan unconstitutional on March 16. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-789, 2022 WL 803033 ¶ 2 (Ohio Mar. 16, 2022) ("*LWV III*"). The Court gave the Commission a deadline of Monday, March 28 to file a new plan with the Secretary of State. *Id.* ¶ 45. The Court further ordered that the drafting occur in public and the Commission hold frequent public meetings to promote transparency and bipartisanship. *Id.* ¶ 44. The Court also required processes to ensure that a compliant map would be drawn, including the retention of "an independent map drawer—who answers to all commission members." *Id.* ¶ 31.

The Commission promptly began proceedings to prepare a fourth plan in response to the Ohio Supreme Court's order, and those proceedings are ongoing. On Saturday March 19, the Commission reconvened to develop a plan to prepare a lawful map. *See* Commission Meetings, Ohio Redistricting Comm'n, https://redistricting.ohio.gov/meetings (as last accessed Mar. 23, 2022). The Commission has met nearly every day since then, and it has resolved to meet daily, including on weekends, through at least Monday, March 28, the date by which the Ohio Supreme Court ordered the Commission to adopt a lawful plan. *See id.* To enable the preparation of a new plan, the Commission has retained two expert map-drawers, who are in the midst of their work. *See* Tr. of Ohio Redistricting Comm'n Mar. 21, 2022 Mtg. at 14, https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-21st-257/transcript-1381.pdf. The Commission has published a daily schedule of public meetings of the map makers, which the public may observe in-person or virtually. *See* Commission Meetings, Ohio Redistricting Comm'n, https://redistricting.ohio.gov/meetings (as last accessed Mar. 23, 2022). The Commission is also working with the Sixth Circuit's chief mediators and secured two of the Court's mediators to assist, if necessary, in reaching a final bipartisan plan. Tr. of Mar. 21, 2022 Mtg., *supra*, at 14-15. And the Ohio Supreme Court has retained jurisdiction to review the Commission's new plan once it is adopted. *LWV III*, 2022 WL 803033 ¶ 45.

On the evening of Wednesday, March 23, Secretary of State Frank LaRose issued a directive to all 88 of Ohio's boards of elections, providing that "offices and candidates for Ohio House, Ohio Senate, or State Central Committee will not appear on the ballot." ECF No. 97 at PageID 1599. He directed that "[b]oards must reprogram their election databases and prepare ballots to be ready by April 5, 2022, without the [General Assembly and related] offices" and

required them to "maintain a copy" of the ballot including the General Assembly offices *only* "[i]f boards' election management systems allows [sic] for it." *Id.* at PageID 1600. This makes sense. The status quo is that the Ohio Supreme Court has held that the Third Plan violates the Ohio Constitution and thus it cannot be used to conduct an election.

LEGAL STANDARD

In determining whether to issue a preliminary injunction, the Court must consider: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 590–91 (6th Cir. 2012). "[T]he preliminary injunction is an 'extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied "only in [the] limited circumstances" which clearly demand it.'" *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (quoting *Direx Isr., Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)).

ARGUMENT

I. A preliminary injunction is inappropriate because it would disrupt the status quo and interfere with the state's ongoing redistricting process.

A preliminary injunction is a discretionary remedy. *CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 964 F.2d 548, 553 (6th Cir. 1992). "The point of a preliminary injunction is to maintain 'the status quo' until the resolution of the case 'on its merits.'" *Adams v. Baker*, 951 F.3d 428, 429 (6th Cir. 2020) (quoting *Burniac v. Wells Fargo Bank, N.A.*, 810 F.3d 429, 435 (6th Cir. 2016)). Plaintiffs' Motion, however, does not seek to *preserve* the status quo: it seeks to fundamentally *change* it, asking this federal court to insert itself and cut short the ongoing state redistricting process that is being conducted under the active jurisdiction of the Ohio Supreme

Court. There is little "preliminary" about what Plaintiffs seek, and this overreach provides reason enough, standing alone, to deny the Motion. *See, e.g.*, *Slocum v. Bear*, No. 1:18-CV-423, 2020 WL 3403238, at *1 (S.D. Ohio June 19, 2020) (denying motion for preliminary injunction where the "nature of the equitable relief . . . sought was improper as it would have required the Court to order Defendants to affirmatively act . . ., rather than to enjoin Defendants from taking certain acts and thereby maintain the status quo"); *McCain v. Jackson*, No. 1:19-CV-234, 2019 WL 6485692, at *1 (S.D. Ohio Dec. 3, 2019) (denying motion for preliminary injunction where "affirmative relief sought . . . would go beyond preserving the status quo, providing affirmative relief before judgment on the merits"); *cf. Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1302-03 (1993) (Rehnquist, C.J., in chambers) ("By seeking an injunction, applicants request that I issue an order altering the legal status quo. Not surprisingly, they do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court.").

As Secretary LaRose's March 23 filing made clear, Plaintiffs' Motion is based on a false premise. *See generally* ECF No. 97. The status quo is not a May 3 primary under the Third Plan. To the contrary, the Ohio Supreme Court's ruling that the Third Plan violates the Ohio Constitution means that no primary election can be held under the Third Plan. Secretary LaRose has affirmatively directed Ohio's boards of elections that "offices and candidates for Ohio House, Ohio Senate, or State Central Committee *will not appear on the [May 3] ballot*." ECF No. 97 at PageID 1599 (emphasis added). That is the status quo.

The only way a primary election could be held under the Third Plan, even under Plaintiffs' own characterization, is for *this* Court to affirmatively and immediately order that the primary election proceed under that map notwithstanding the Ohio Supreme Court's clear holding that it violates Ohio law and Secretary LaRose's latest directive, and to be held using rare procedures

such as "supplemental ballot[s]." ECF No. 98 at PageID 1607. Far from preserving the status quo, such an order would affirmatively and irreversibly change the status quo, by requiring Ohio's government to conduct elections for Ohio's state legislature under districts that violate the Ohio Constitution, using supplemental ballots. The result would be to cause Ohio to be governed for the next two years by a legislature elected from districts that the Ohio Supreme Court has already found to be unlawful and unconstitutional. That is a sea change, not a pause to preserve the status quo while the Court considers the issues.

Moreover, even aside from the severe harms to federalism from this Court's ordering elections to the Ohio legislature under unconstitutional districts, a last-minute order requiring Ohioans to vote on two separate ballots, received (for mail voters) at different times but due on the same date, would itself substantially burden federally protected voting rights. Secretary LaRose's counsel conceded at the March 25 hearing that such an approach would raise profound concerns of voter confusion, and she expressly clarified that Secretary LaRose does not favor such an approach—*even though he was one of the Commission members who voted for the Third Plan*. *See* ECF No. 103 at PageID 2512 (explaining that Secretary's ability to implement a court order is impacted by "the ability of Ohio's eighty-eight county boards of elections to quickly put the Secretary's instructions into action at the local level to allow voting to begin in all eighty-eight counties at the same time").

The Supreme Court has counseled that "[a]s an election draws closer," federal court orders affecting election rules "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). An eleventh-hour order that the primary election be held under a map that is, and was widely reported to be, unconstitutional, using unusual procedures, would run afoul of this principle. Plaintiffs' argument

that the Court "should act without more delay" because the election is already underway only underscores the harm an injunction would cause at this juncture. ECF No. 98 at PageID 1606. It would be far less burdensome on Ohio voters' federal voting rights—not to mention on Ohio law more broadly—to postpone the General Assembly primary to a later date. In other words, far from preserving the status quo, the preliminary injunction Plaintiffs seek would affirmatively and irreversibly change the status quo, by requiring Ohio's government to conduct elections for Ohio's state legislature under districts that violate the Ohio Constitution, using supplemental ballots. Such an order would cause Ohio to be governed for the next two years by a legislature elected from districts that the Ohio Supreme Court has already found to be unlawful and unconstitutional. That is a sea change, not a pause to preserve the status quo while the Court considers the issues.

Significantly, delay is all that is threatened. Plaintiffs' Motion assumes that the alternative to a May 3 primary under the Third Plan is either an election under the now-malapportioned 2011 districts or no election at all. ECF No. 96 ("Mot.") at PageID 1582-84. Not so. Secretary LaRose has made clear that if the General Assembly primary is not held on May 3, it will be held on a later date, once lawful plans have been adopted. *See, e.g.*, ECF No. 76 at PageID 1108 ("At present, the primary election for those districts will have to be held at a later date."); Frequently Asked Questions: The Latest on Ohio's May 3 Primary (Mar. 19, 2022), Ohio Sec'y of State, https://www.ohiosos.gov/globalassets/elections/may3primaryfaq.pdf ("If the General Assembly races aren't on the May 3 ballot, when will those primary contests be held? The Ohio General Assembly has the authority to make that decision, and it can go one of two directions. First, they could move the entire primary election to a later date. Second, they could allow the statewide, congressional, and local races to continue on the May 3 ballot and reschedule the General Assembly primary contests for a later date, possibly in August when boards of elections typically

hold special elections."). And the Ohio Constitution itself *requires* that a primary election be held. *See* Ohio Const. Article V, Section 7. If for some reason the General Assembly persists in its refusal to set a new date for such an election, and the Ohio courts do not intercede, the Court could order one itself. *See infra* Part II.A.3.b.i.

Meanwhile, Ohio's state redistricting process is active and ongoing. The Commission has already met seven times in the days since the Ohio Supreme Court held the Third Plan unconstitutional on Wednesday, March 16, and it has resolved to meet daily, including on weekends, through at least Monday March 28, *See* Commission Meetings, Ohio Redistricting Comm'n, https://redistricting.ohio.gov/meetings (as last accessed Mar. 23, 2022). The Commission's two expert map-drawers are working on a new plan, and the Commission is also working with the Sixth Circuit's chief mediators. *See* Tr. of Ohio Redistricting Commission Mar. 21, 2022 Mtg. at 14-15, https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/ commission-meeting-march-21st-257/transcript-1381.pdf. And the Ohio Supreme Court has retained jurisdiction to review the Commission's new plan under an expedited briefing schedule once it is adopted. *LWV III*, 2022 WL 803033 ¶ 45.

A preliminary injunction would improperly cut short all of this state activity, which is ongoing in response to orders from—and under the active jurisdiction of—the Ohio Supreme Court. "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts," such that "'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'" *Growe*, 507 U.S. at 33 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Thus, "the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task

itself." *Id.* at 33. "[W]hen parallel State proceedings exist, the decision to refrain from hearing the litigant's claims should be the routine course." *Rice v. Smith*, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997).

To be sure, Ohio's redistricting process has taken a winding path. But while the delays in completing that process are unfortunate, they are not surprising. This is the first redistricting cycle since Ohio's voters overwhelmingly voted in 2015 to amend the Ohio Constitution to adopt the procedurally and substantively complicated Fair District Amendments governing the General Assembly redistricting process. Those amendments worked a dramatic change to Ohio redistricting law, and effectively require the unwinding of the 2011 partisan gerrymander that preceded them, with all the attendant disgorgement of political power that entails. It is understandable that this process has taken time, and that it has ultimately required the Ohio Supreme Court to authoritatively interpret the new provisions and resolve disputes over their meaning and application in a series of three decisions. *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, No. 2022-Ohio-65, 2022 WL 110261 (Ohio Jan. 12, 2022) ("*LWV I*"); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, No. 2022-Ohio-342, 2022 WL 354619 (Ohio Feb. 7, 2022) ("*LWV II*"); *LWV III*, 2022 WL 803033. The result is that it is now too late for *anyone*—this Court or the Commission—to adopt a lawful General Assembly plan in time to hold the General Assembly primary as originally scheduled on May 3. *See* ECF No. 76 at PageID 1107-08 ("With military and overseas voting ('UOCAVA') and early voting for the primary set to begin shortly, logistically, county boards of election cannot hold primary elections for those races on May 3 with yet *another* legislative district plan." (emphasis in original)).

But as the Commission's and the Ohio Supreme Court's ongoing proceedings amply demonstrate, Ohio is "fully prepared to adopt a [lawful] plan in as timely a manner as" this Court could. *Growe*, 507 U.S. at 37. Given all of the ongoing activity of the Commission, it cannot be said that Ohio is "either unwilling or unable to adopt a" legislative plan. *Id.* There is therefore no basis for a preliminary injunction from this Court cutting that activity short.

II. Plaintiffs do not meet the requirements for preliminary relief.

Plaintiffs' request for a preliminary injunction also fails when the four prerequisites for issuance of such relief are considered: Plaintiffs are unlikely to succeed on the merits and do not face irreparable harm, and a preliminary injunction would harm Ohio voters and the public interest by requiring Ohio to elect its state legislators from districts that have already been held unconstitutional under Ohio law, while also severely prejudicing candidates for office.

A. Plaintiffs are unlikely to succeed on the merits.

Plaintiffs are unlikely to succeed on the merits because they lack standing or any meritorious federal claim: their quarrel is with the scheduling of a state primary election, which is a question of state law that affects all Ohio voters equally. Moreover, Plaintiffs cannot receive the sole remedy they seek—an order mandating the use of the Third Plan—because it violates Ohio law and is not required by federal law.

1. Plaintiffs lack standing because they assert only a generalized grievance affecting all Ohio voters.

"In evaluating plaintiffs' likelihood of success on the merits, [this Court must] examine first the issue of standing." *Ne. Ohio Coal. for Homeless*, 467 F.3d at 1010. Each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). In a motion for preliminary

relief, "the district court . . . should normally evaluate standing 'under the heightened standard for evaluating a motion for summary judgment.'" *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 255 n.3 (6th Cir. 2018) (quoting *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 912 (D.C. Cir. 2015)). Thus, "mere allegations will not support standing at the preliminary injunction stage." *Doe v. Nat'l Bd. of Med. Examiners*, 199 F.3d 146, 152 (3d Cir. 1999). Rather, "plaintiffs must make a 'clear showing' that they have standing to maintain the preliminary injunction." *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017); *Nat'l Bd. of Med. Examiners*, 199 F.3d at 152 (holding that the party seeking preliminary relief must "adduce[] evidence" demonstrating his standing).

"[S]tanding to sue may not be predicated upon an interest . . . which is held in common by all members of the public"—a generalized grievance. *Schlesinger*, 418 U.S. at 220. A plaintiff has no standing to sue if "whatever [his] injury, it [is] one he share[s] with 'all members of the public.'" *United States v. Richardson*, 418 U.S. 166, 178 (1974). The Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-–does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-75. "The party who invokes the power [of judicial review] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Nat'l Rifle Ass'n of Am.*, 132 F.3d at 294 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

This rule is fully applicable in cases, like this one, in which voters challenge state supreme court decisions relating to elections as allegedly violating federal rights. *Lance v. Coffman*, 549 U.S. 437, 439-442 (2007) (per curiam). Such voters must show some harm to themselves in particular; they may not sue based on arguments that the state's actions generally impair voting rights or render an election unfair. *See id.*; *Nolles*, 524 F.3d at 900; *Looper v. Bowman*, 958 F. Supp. 341, 344 (M.D. Tenn. 1997).[1] As the Eighth Circuit has explained, the claim that an interpretation of state law "resulted in a fundamentally unfair election does not allege a personalized injury" if plaintiffs "do not allege that they were treated differently than other voters or that their votes were diluted as compared to other voters, that election officials refused to count their votes or failed to follow state election procedures, or even that the [state officials] violated state law . . . ." *Nolles*, 524 F.3d at 900; *see also Looper*, 958 F. Supp. at 344 ("The Court finds that Plaintiff's allegations of denial of the right to associate with like minded voters and participate in a democratic election do not identify any 'concrete and particularized' injury which he has suffered or will suffer because of the Defendants' conduct. . . . The alleged injuries . . . are abstract and common to all voters or candidates in Putnam County . . . .").

Plaintiffs present evidence of injury only as to one individual Plaintiff, Mr. Gonidakis himself. *See* Aff. of Michael Gonidakis, ECF No. 84-1. And Mr. Gonidakis's asserted injuries are

[1] None of the cases that Plaintiffs cite suggest otherwise. *See* ECF No. 98 at PageID 1609; *Nemes v. Bensinger*, 467 F. Supp. 3d 509, 522 (W.D. Ky. 2020) (finding that plaintiffs who claimed substantial individualized harm due to lack of adequate polling locations in their counties had standing); *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777, 793 (E.D. Mich. 2018) (finding that plaintiffs had standing where they "submitted evidence of district-specific injuries to their individual votes"); *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 388 (6th Cir. 2020) (finding that plaintiffs in voting rights case did *not* have standing where they made only "speculative allegations of past and future harm"); *Adams v. Clinton*, 90 F. Supp. 2d 35, 41 (D.D.C.), *aff'd sub nom. Alexander v. Mineta*, 531 U.S. 940 (2000), *and aff'd*, 531 U.S. 941 (2000) (finding that plaintiffs' complete lack of representation satisfied the injury-in-fact requirement).

shared with every active voter in Ohio: he "typically participate[s] in the statewide legislative primary election process" by "learning about candidates; supporting candidates, financially or otherwise; and associating with like-minded voters," he has begun "engaging in [his] usual election-related activity concerning General Assembly legislative districts," but if the election is not held under the Third Plan, then "all [his] work to-date engaging in the election process will be for nothing." *Id.* ¶¶ 7-12. Mr. Gonidakis does not identify anything concrete that he has done as part of his "usual election-related activity," *id.* ¶ 9, much less make any showing that such activities differ from those all of all other Ohio voters. And regardless, Mr. Gonidakis's investment of "personal resources into" the election process "does not transform a fundamentally generalized grievance into a personal one." *Johnston v. Geise*, 88 F. Supp. 3d 833, 842 (M.D. Tenn. 2015). Any uncertainty created by the invalidation of the Third Plan is in no way unique or particularized to Mr. Gonidakis—it is true in equal measure of every single voter in Ohio.

It would be a different matter if there were an "imminent," "concrete," and "certainly impending" threat that no primary election at all will be held. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). There is no such threat. All parties and all relevant officials agree that a primary election must be held; the sole question is precisely when that primary will be held in the more than seven months before the November general election. It would be speculative for the Court to assume that—if and when it becomes clear that this Court will not order the use of an unlawful map to accommodate the May 3 date—the General Assembly will persist in refusing to reschedule the General Assembly primary for an appropriate date.

Mr. Gonidakis also asserts an additional form of injury from the malapportionment, under the 2020 census, of his legislative districts from last decade. *Id.* ¶ 14. Unlike Mr. Gonidakis's other asserted injuries, injury from residing in overpopulated districts would suffice to give Mr.

Gonidakis standing, were there any prospect whatsoever of elections proceeding under last decade's districts. But there is no such prospect. Secretary LaRose has never once suggested that the invalidation of the Third Plan means that elections will proceed under last decade's districts. To the contrary, Secretary LaRose has made clear that (absent relief from this court) the primary will be postponed while new, lawful districts are drawn. *Supra* Part I. Without any realistic prospect that an election will actually be held under a malapportioned map, any malapportionment injury to Mr. Gonidakis is purely hypothetical, not certainly impending as would be required to provide standing to sue. *Clapper*, 568 U.S. at 410.

2. Plaintiffs have no federal claim, because the scheduling of the General Assembly primary is a question of Ohio law.

Plaintiffs also are unlikely to succeed in proving any violation of federal law. Their threatened injury stems entirely from the delay of the May 3 General Assembly primary. But Plaintiffs have no *federal* right to have the General Assembly primary held on May 3 rather than on some other day. The timing of the primary election for the Ohio General Assembly is entirely a question of Ohio law. And the lack of a federal claim will be dispositive, because "federal courts lack jurisdiction to enjoin state officials on the basis of state law." *Ohio Republican Party*, 543 F.3d at 360 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124-25 (1984)).

In arguing otherwise, Plaintiffs rely upon their "fundamental right" to vote, Mot. at PageID 1582-83, and freedom of association, Mot. at PageID 1584-85. But to the extent those rights are threatened, it is only because Ohio will hold the General Assembly primary later than it was originally scheduled. Nothing in federal law prohibits such a delay. To the contrary, "the Federal Constitution gives states, not federal courts, 'the ability to choose among many permissible options when designing elections.'" *Thompson v. DeWine*, 976 F.3d 610, 620 (6th Cir. 2020) (per curiam) (quoting *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020)). Federal courts "don't have the

power to tell states how they should run their elections." *Id.* That is particularly so for a wholly state election, as here: "[e]lection law, as it pertains to state and local elections, is for the most part a preserve that lies within the exclusive competence of the state courts." *Nolles*, 524 F.3d at 898 (quoting *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001)).

This case does not involve any of the "limited circumstances" in which an election procedure involving only state officials may violate federal law. *Id.* There is no allegation of "discriminat[ion] against a discrete group of voters." *Id.* Rather, the delay to the General Assembly primary affects all Ohio voters equally. Nor is this a case involving "willful and illegal conduct of election officials result[ing] in fraudulently obtained or fundamentally unfair voting results." *Id.* at 899. Finally, there is no question of "election officials refus[ing] to hold an election though required by state law, resulting in a complete disenfranchisement." *Id.* at 898. Unlike in the cases in which courts have found such a violation, Ohio has not refused to hold an election and thereby entirely prevented voters from selecting public officials for some term of office. *Cf. Bonas*, 265 F.3d at 78 (town officials extended their terms and "dispense[d] with the 2001 election" without legal authority); *Duncan v. Poythress*, 657 F.2d 691, 695 (5th Cir. 1981) (governor appointed a new Supreme Court justice where Georgia law required a special election). Unlike in *Bonas* and *Duncan*, no one has been or will be disenfranchised, and no official has taken office or extended their term without authority. Rather, Ohio voters will merely vote in a primary election held at some date later than May 3—a primary date set more than half a year before the general election date—once lawful districts can be established. *Supra* Part I. The lawfulness of that delay is entirely a question of state law and provides no basis for this Court's intervention. Many states conduct summer primaries, and just this week, the U.S. Supreme Court emphasized that there is still plenty of time to draw districts for them. *See Wisc. Legislature v. Wisc. Elections Comm'n*, No. 21A471,

2022 WL 851720 at *1 (U.S. Mar. 23, 2022) (reversing the Wisconsin Supreme Court's adoption of legislative maps and explaining that "[s]ummarily correcting the error gives the [state] court sufficient time to adopt maps consistent with the timetable for Wisconsin's August 9th primary election").

Plaintiffs' argument that the 2010 General Assembly districts are now malapportioned does nothing to change this. Mot. at PageID 1583-84. Again, even if this Court does nothing, there is no prospect of an election occurring under the 2010 districts. Everyone agrees that such an election would be unconstitutional (as a matter of both federal and state law), and there is no evidence that Ohio plans to conduct one. *Supra* Part I. Rather, the status quo is a delay to the primary while the Commission finalizes lawful maps. *Id.* If some threat of an election under the 2010 districts later emerges, the Court can step in then.

Finally, Plaintiffs' procedural due process arguments about the Ohio Supreme Court's three decisions reviewing General Assembly plans likewise do not assert a valid federal claim. Mot. at PageID 1585-89. The Gonidakis Plaintiffs were not and are not parties to the Ohio Supreme Court proceedings. The Due Process Clause's procedural rights in state court belong solely to *litigants*, not third parties. *See, e.g.*, *Gilbert v. Ferry*, 298 F. Supp. 2d 606, 616-17 & n.11 (E.D. Mich. 2003) (dismissing § 1983 due process claim against Michigan Supreme Court by an attorney in state proceedings because the attorney was "either reasserting the due process interests of his clients or predicating his claim on the rights of his clients to a fair and impartial tribunal"); *In re Goodman*, No. 14-br-62333, 2015 WL 3507119, at *3 (N.D. Ohio Bankr. June 1, 2015) ("Debtor was not a party to the first state court action and was therefore not injured by it. Consequently, the court rejects Debtor's argument that the due process violations resulting in entry of the first state court judgment are the source of his injury.").

Moreover, even a *party* to the Ohio Supreme Court proceedings could not challenge the fairness of its decisions in this court: under the *Rooker-Feldman* doctrine, review of such decisions lies solely via a writ of certiorari from the United States Supreme Court. *See D.C. Ct. App. v. Feldman*, 460 U.S. 462, 482 (1983). It is no coincidence that every one of the procedural due process cases Plaintiffs cite involved a party to the state court decision challenging that decision on direct Supreme Court review. *See Reich v. Collins*, 513 U.S. 106 (1994) (direct review of Georgia Supreme Court decision); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (direct review of Supreme Court of South Carolina decision); *Saunders v. Shaw*, 244 U.S. 317 (1917) (direct review of Louisiana Supreme Court decision).

In any event, Plaintiffs' quarrel is with the substance of the Ohio Supreme Court's rulings, not the procedure. Plaintiffs make plain that they disagree with the Ohio Supreme Court's interpretation of Article XI's requirements. Mot. at PageID 1587-89. But the Ohio Supreme Court is the arbiter of the Ohio Constitution, and its decisions are controlling. *In re Darvocet, Darvon, & Propoxyphene Prod. Liab. Litig.*, 756 F.3d 917, 937 (6th Cir. 2014). In any event, Plaintiffs' second-guessing of the Ohio Supreme Court's interpretation of Ohio law, in a case to which they are not a party, cannot show a violation of Plaintiffs' federal procedural due process rights.

3. Plaintiffs' sole proposed remedy is unlawful and improper given the alternatives available to this Court, should relief become necessary.

Even if Plaintiffs had standing and a potential federal claim associated with the date of Ohio's primary election, they still have no likelihood of success in obtaining the sole remedy they seek: an order requiring Secretary LaRose to conduct General Assembly elections under the Third Plan. The Ohio Supreme Court has already held that the Third Plan violates the Ohio Constitution, and there is no basis for this Court to order that the Third Plan nevertheless be used. Rather, if it later becomes necessary for this Court to issue relief, the Bennett Petitioners respectfully submit

that the appropriate remedy would be (1) setting a new primary date, presuming that the General Assembly has not already set a new primary election date itself, as it will, in fact, inevitably need to do and (2) ordering implementation of a map that complies with both federal and state law, such as the Bennett Petitioners' proposed state legislative plan (the "Rodden III Plan").

a. The Third Plan violates valid Ohio state law as authoritatively construed by the Ohio Supreme Court.

This Court should not order the implementation of a state legislative plan that the Ohio Supreme Court has held violates the Ohio Constitution. To be sure, federal courts can order state officials to conduct legislative elections under particular reapportionment plans if doing so is necessary to remedy a violation of federal law. *White*, 412 U.S. at 794-95. But when federal courts do so, 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." *Id.* at 795; *see also Perry v. Perez*, 565 U.S. 388, 393 (2012) ("'[F]aced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan-–even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)).[2]

[2] Although Plaintiffs suggest that the fact that the Third Plan was passed by the Commission means that the plan is reflective of the state's policies, *see* ECF No. 98 at PageID 1612, that is simply incorrect. This plan was invalidated by the Ohio Supreme Court under voter-approved state constitutional amendments. *See State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21 ("[The Ohio Supreme Court] is the ultimate arbiter of the meaning of the Ohio Constitution."). A federal court indeed must follow the policy of the state when drawing an apportionment plan, but that state policy includes what is "expressed in statutory and constitutional provisions." *White*, 412 U.S. at 795. A plan that flagrantly violates the state constitution does not embody state policy—it manifests a perversion of state policy.

Thus, a federal court 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, federal reapportionment remedies must be "limited to those necessary to cure any constitutional or statutory defect." *Id.* at 43. This is just a particular application of general preemption principles, under which federal law displaces state redistricting laws only if those laws "are an *unavoidable obstacle* to the vindication of the federal right." *Large v. Fremont Cnty., Wyo.*, 670 F.3d 1133, 1145 (10th Cir. 2012).[3] In remedying a federal-law violation, federal courts therefore may not "gratuitously disregard[] state laws—laws that need *not* be disturbed to cure the [federal law] violation." *Id.* (emphasis in original). "In that situation, the conflict with state law is not a necessary consequence of the remedial operation of federal law but, rather, it reflects a mere policy disagreement" between the state law and the reviewing court. *Id.* at 1146.

Here, the Ohio Supreme Court has spoken very clearly: the Third Plan violates Ohio law's partisan fairness provisions, and those violations run so deep they taint the plan in its entirety and require the drafting of an entirely new plan. *LWV III*, 2022 WL 803033 ¶¶ 2, 44. Nothing about that Ohio-law holding is contrary to or preempted by federal law. To the contrary, the U.S. Supreme Court has expressly held that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply" in combatting excessive partisan gerrymandering. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). Thus, federal law provides no justification for ordering Ohio to conduct elections under the unconstitutional Third

[3] *Large* involved a remedial plan adopted by a local government, not a federal court. *See id.* But the preemption question is the same: the extent to which state law districting requirements are displaced by federal law. Of particular relevance here, *Large* expressly holds that the federal court's duty is to follow state law, not the choices of state map-drawers who violate state law. *Large*, 670 F.3d at 1145-46.

Plan. Plaintiffs cannot wield a preliminary injunction motion in this Court as a magic wand to conjure away the Ohio Supreme Court decision rejecting use of the Third Plan because it violates Ohio law.

In arguing otherwise, Plaintiffs rely on *Reynolds v. Sims*, 377 U.S. 533, 537 (1964). Mot. at PageID 1593. But *Reynolds* is entirely consistent with this analysis. *Reynolds* emphasized that "state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated," and held that "courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible." 377 U.S. at 584. But "[w]hen there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." *Id.* Such a conflict was present in *Reynolds* itself, because the federal right at issue—the right to districts of substantially equal population—was directly inconsistent with state constitutional provisions providing for unequal districts. *Id.* at 568-69.[4]

There is no inconsistency here. Ohio law prohibits General Assembly plans drawn primarily to favor one political party, including the Third Plan, but nothing in federal law *requires* unfair districts. It is entirely possible to draw General Assembly districts that comply with both Ohio law's requirements and federal law—the Ohio Supreme Court expressly so concluded, and Plaintiffs make no contrary showing. *LWV I*, 2022 WL 110261, at * 27. Even if the Court at some point concludes that it must impose its own districts to redress Plaintiffs' federal claims, the Court

[4] Similarly, in *McDaniel v. Paty*, 435 U.S. 618 (1978), and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), which Plaintiffs also cite, state constitutional provisions prohibiting ministers from serving as legislators and prohibiting aid to religious schools, respectively, were held directly inconsistent with the First Amendment, and thus preempted. Nothing in either case suggests that a federal court may order a remedy that violates state law where, as here, doing so is *not* required to protect federal rights.

would need to impose districts that comply with the Fair District Amendments. *White*, 412 U.S. at 794-95; *Reynolds*, 377 U.S. at 584. The Third Plan emphatically does not fit the bill.

b. In the event this Court must issue relief, it should set a new primary date and, if it becomes necessary to adopt General Assembly maps in this litigation, order implementation of the Rodden III Plan.

Plaintiffs baselessly assert that implementing the Third Plan is the only means by which to protect Ohioans' voting rights for the 2022 General Assembly election. Not so. If this Court finds it appropriate to issue relief in this case, then there is no need for it to settle for a plan that the Ohio Supreme Court has already held unconstitutional merely to keep the primary as scheduled on May 3. Rather, it should (1) set a new primary date and (2) adopt a legally valid map, such as the constitutionally-compliant Rodden III Plan, which the Bennett Petitioners proposed to both the Commission and the Ohio Supreme Court.

i. This Court may set a new primary date for General Assembly seats.

If the General Assembly does not act to reschedule the General Assembly primary, this Court may schedule a later primary date itself.[5] Federal and state courts alike modify election deadlines when needed to enforce lawful redistricting plans, and the United States Supreme Court has authorized judicial alteration of the election schedule in these circumstances.[6] *See, e.g.*, *Sixty-*

[5] Plaintiffs can scarcely dispute the point; they, too, suggest that this Court could move the current statutory deadlines if it does not adopt the Third Plan. Mot. at PageID 1594 n.3.

[6] Plaintiffs' argument that the Ohio Supreme Court "lacks the ability to modify the May 3, 2022, primary election date on its own" is meritless. Mot. at PageID 1590. The Ohio Supreme Court has broad authority to postpone the General Assembly primary and otherwise modify election deadlines to address the harm that would occur if elections were to proceed under unconstitutional districts. *Hale v. State*, 55 Ohio St. 210, 45 N.E. 199 (1896), (explaining that courts have "powers as are necessary to the orderly and efficient exercise of jurisdiction," which also "must be regarded as inherent"); *see also* Ohio Const. Article IV, Section 2(B)(1)(f); *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-65 ("*LWV I*") at ¶ 136 (ordering further relief under Article IV, Section 2(B)(1)(f), noting that "because the election cycle should not proceed with a General Assembly–district map that we have declared invalid, it is appropriate to issue further

Seventh Minn. State Senate v. Beens, 406 U.S. 187, 201 n.11 (1972) ("If time presses too seriously [to implement a remedial reapportionment plan], the District Court has the power appropriately to extend the [election deadline] time limitations imposed by state law."); *see also Upham v. Seamon*, 456 U.S. 37, 44 (1982) (per curiam) ("[W]e leave it to [the District Court] in the first instance to determine whether to . . . reschedule the [congressional] primary elections.").[7] In fact, three decades ago, a federal district court similarly changed Ohio's May primary date for General Assembly elections after state legislative districts were found to be unconstitutional. *See Quilter v. Voinovich*, 794 F. Supp. 756, 757 (N.D. Ohio 1992), *rev'd on other grounds*, 507 U.S. 146 (1993) (finding state legislative districts unconstitutional, ordering that "the date of May 5, 1992 for the holding of the Ohio primary election is vacated to the extent that candidates for election to the General Assembly are concerned," and directing election officials "to cause such primary election to be held on June 2, 1992, provided, however, that on proper showing the court may provide an alternate date").

Moreover, the question of whether to defer to a state statute setting the primary date or state constitutional provisions is one of state law, on which Ohio law is dispositive. *See Mullaney*

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remedial orders in an effort to have the redistricting commission adopt a plan that complies with Article XI in time for the plan to be effective for the 2022 election cycle"). And although the Ohio Supreme Court has thus far declined to issue such relief—and one member of the court has expressed the view that it cannot issue such relief, 03/24/2022 Case Announcements #2, 2022-Ohio-957—the court has stated only that it will not do so at this time, *not* that it has no authority to do so. *LWV III*, 2022 WL 803033 ¶ 44.

[7] *See also Larios v. Cox*, 305 F. Supp. 2d 1335, 1343 (N.D. Ga. 2004) (noting court's power to extend election deadlines and ordering new statewide maps be drawn in time for upcoming primary election); *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022) (modifying congressional and statewide election calendar "to provide for an orderly election process" due to impasse and noting suspension of state legislative election deadlines until resolution of litigation); Order, *In the Matter of 2022 Legislative Districting of the State*, Misc. Nos. 21, 24, 25, 26, 27 (Md. Mar. 15, 2022) (postponing 2022 gubernatorial primary and related deadlines) (attached as Exhibit 1); *Harper v. Hall*, 379 N.C. 656, 658 (2021), *reconsideration dismissed*, 867 S.E.2d 185 (N.C. 2022) (postponing 2022 primary and related deadlines).

v. Wilbur, 421 U.S. 684, 691 (1975) ("State courts are the ultimate expositors of state law."); *Florida v. Powell*, 559 U.S. 50, 56 (2010) ("It is fundamental . . . that state courts be left free and unfettered by us in interpreting their state constitutions." (quotations omitted)). And as the Ohio Supreme Court has held, the Ohio Constitution is the supreme law of the state. *See State ex rel. Ohio Gen Assembly v. Brunner*, 114 Ohio St.3d 386 ¶ 30 (2007) ("Our analysis begins and ends with the Ohio Constitution, our state's most fundamental law."); *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 26-27 (1912) ("There can be no honest controversy but that the written constitution of the state is the paramount law, and while courts are required to accept the law as given them by the lawmaking power of the state, yet when that law is clearly in conflict with the constitution under authority of which it was enacted, it is the duty of the court to sustain the paramount law and refuse to enforce any and all legislation in contravention thereof."). Indeed, courts routinely change statutorily set deadlines to protect constitutional rights, including voting rights. *Compare* R.C. 3501.32(A) (polls "shall be closed by proclamation at seven-thirty p.m.") *with Ohio Democratic Party v. Cuyahoga Cnty. Bd. of Elections*, No. 1:06-cv-2692 (N.D. Ohio Nov. 7, 2006) (ordering polls to remain open until 9:00 p.m.). There is therefore no question that the primary date should bend to Article XI of the Ohio Constitution—not the other way around, as Plaintiffs would have it.

Although the Bennett Petitioners hope that the Commission will heed the Ohio Supreme Court and adopt a constitutionally-compliant plan on March 28, if this Court *does* order a deadline, it should set a primary election date in August, in order to leave sufficient time for additional judicial review if necessary, as well as the procedural steps that must necessarily precede any primary date. *See* ECF No. 88-1 (Deputy Assistant Secretary of State and State Elections Director's declaration setting forth that "candidates who are members of a recognized political

party are required to file declarations of candidacy and petitions with signatures ninety days before a primary election."). Unless the candidate filing deadline is modified, even a June 28 primary would require candidates to make their filings on March 30—the same day as the preliminary injunction hearing—which would be near-impossible, as candidates may not be ready to file their declarations on zero notice.[8] In fact, Ohio law already provides for special elections to be held on the first Tuesday after the first Monday in August, *see* R.C. 3501.01(D), and just last year, Ohio held special primary elections for the 11th and 15th Congressional districts in August with the winning nominees appearing on the November ballot. *See, e.g.*, Ohio Sec'y of State, 2021 Official Election Results, available at https://www.ohiosos.gov/elections/election-results-and-data/2021-official-election-results/ (last visited Mar. 25, 2022). Some municipalities in Ohio, including Cleveland, even hold their primary elections in September. *See* Cleveland City Council, City Charter, Chapter 3, Section 4, available at https://www.clevelandcitycouncil.org/legislation-laws/charter-codified-ordinances (last visited Mar. 25, 2022). Thus, Ohioans are no strangers to elections in August and September, and this Court should not allow Plaintiffs' false urgency to dictate a remedy that is plainly contrary to the Ohio Constitution.[9]

ii. If this Court ultimately needs to order the adoption of a plan, it should choose the Rodden III Plan.

Although, again, the Bennett Petitioners' primary interest is in the completion of the ongoing state redistricting process, they understand that there may come a time when this Court

[8] Substantial hurdles for candidates exist even under the Third Plan, *see infra* Part II.C, further demonstrating that it is too late even for Plaintiffs' unlawful remedy.

[9] Many states hold their primaries as late as August and September without consequence for the November general election. *See, e.g.*, Mich. Comp. Laws § 168.551 (setting Michigan's 2022 primary for August 2); Wis. Stat. § 8.15 (setting Wisconsin's 2022 primary for August 9); Fla. Stat. § 99.061 (setting Florida's 2022 primary for August 23); Mass. Gen. Laws Ann. ch. 53, § 10 (setting Massachusetts's 2022 primary for September 6); N.H. Rev. Stat. § 653:8 (setting New Hampshire's 2022 primary for September 13).

must issue a remedy to ensure that Ohioans are able to vote for General Assembly members this year. As explained above, that time has not yet come. If it does, this Court should adopt a plan that complies with state and federal law, as other courts have routinely done when the redistricting authority fails to adopt a constitutional plan in time. *See Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 72, 399 Wis. 2d 623, 630; Order on Remedial Plans, *Harper v. Hall*, No. 21 CVS 500085 (N.C. Sup. Ct. Feb. 23, 2022) (attached as Exhibit 2); *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 549106 (Pa. Feb. 23, 2022); *Wattson v. Simon*, No. A21-0243, 2022 WL 456357, at *8 (Minn. Feb. 15, 2022). The Bennett Petitioners respectfully submit that, should this step become necessary, the Court should adopt the Rodden III Plan.[10]

The Rodden III Plan is a General Assembly district plan that complies with all of the requirements set forth in Article XI of the Ohio Constitution, including those regarding equal population, technical line-drawing, partisan fairness, and traditional redistricting criteria. It was submitted to the Commission for consideration on February 15, and substantially similar versions were submitted to the Commission and the Ohio Supreme Court as early as October. As such, the Rodden III Plan has been rigorously explained in expert affidavits submitted by map-drawer Dr. Jonathan Rodden, a professor of political science at Stanford University who has published extensively on political representation, geographic location of demographic and partisan groups, and the drawing of electoral districts, and who has been accepted and testified as an expert witness in many election law and redistricting cases. *See* Feb. 28 Rodden Aff., Exhibit 3; Jan. 25 Rodden Aff., Exhibit 4; Oct. 22 Rodden Aff., Exhibit 5. Notably, last month, the Pennsylvania Supreme Court ordered the implementation of a congressional map drawn by Dr. Rodden after a political branch impasse. *Carter*, 2022 WL 549106.

[10] The Rodden III Plan is available on the Ohio Redistricting Commission's website at https://redistricting.ohio.gov/assets/district-maps/district-map-773.zip.

As Dr. Rodden's affidavit set forth in detail, the Rodden III Plan achieves greater proportionality than any plan adopted by the Commission to date, consistent with the state constitutional requirement 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 Const. Article XI, Section 6(B). In fact, the Rodden III Plan gets closer to proportionality than the Third Plan by *nearly 10%* in both chambers of the General Assembly. Feb. 28 Rodden Aff., ¶ 30, 34; *see also LWV III* ¶ 42 (explaining that "competitive" districts "must be excluded when assessing [a] plan's overall proportionality" (citing *LWV II* ¶ 62) and holding that the Third Plan "does not 'closely correspond' to the statewide preferences of the voters of Ohio" and violates Article XI, Section 6(B)).

Likewise, the Rodden III Plan was not "drawn primarily to favor or disfavor any political party," Ohio Const. Article XI, Section 6(A), unlike the Third Plan. *See LWV III* ¶ 24 ("Substantial and compelling evidence shows beyond a reasonable doubt that the main goal of the individuals who drafted the second revised plan was to favor the Republican Party and disfavor the Democratic Party."). For example, whereas the Third Plan created 19 nominally Democratic-leaning House districts with Democratic vote shares between 50% and 52% (and no Republican-leaning House districts in the same category), the Rodden III Plan creates just two (and one such Republican-leaning House district). *See* Feb. 28 Rodden Aff., ¶ 24 tbl. 1; *see also LWV III* ¶ 33 ("The remarkably one-sided distribution of toss-up districts is evidence of an intentionally biased map, and it leads to partisan asymmetry."). Moreover, the Rodden III Plan surpasses the Commission's two most recent plans on traditional redistricting criteria such as compactness and political subdivision splits, further demonstrating lack of partisan intent. Feb. 28 Rodden Aff., ¶ 24 tbl. 1.

Finally, the Commission did not raise a single concern with the Rodden III Plan—under state law, federal law, or otherwise—in the entire time the Rodden III Plan was before it, and the Ohio Supreme Court has already cited Dr. Rodden's plans favorably in its opinions, *see LWV I*, ¶¶ 112-13, 126, 130; *LWV II* ¶¶ 23 n.6, 32, 47. Accordingly, if this Court must order the implementation of a plan, that plan should be the Rodden III Plan—not a plan that the Ohio Supreme Court has already held unconstitutional.

B. Plaintiffs do not face irreparable harm, merely a delayed primary.

The requirement of irreparable harm "is indispensable" to a motion for preliminary relief: "If the plaintiff isn't facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit." *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019) (emphasis in original). And "[t]o merit a preliminary injunction, an injury 'must be both certain and immediate,' not 'speculative or theoretical.'" *Id.* at 327 (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991)).

Plaintiffs argue that they face irreparable harm absent relief because elections will either be held under the malapportioned 2011 maps or will not be held at all. Mot. at PageID 1589-90. But as explained above, *supra* Part I, that is just not so: the status quo is a primary held on a later date once lawful maps are drafted, not the 2011 maps or no election at all. As noted above, the Court can simply order the primary be held at a later date, such as the date in August set aside already for special elections. Plaintiffs offer no evidence or argument that a delay to the primary will irreparably harm them, and no such harm is apparent.

C. A preliminary injunction would irreparably harm the vast majority of Ohio voters, who amended the Ohio Constitution's requirements for state legislative redistricting, and candidates who relied upon the Ohio Supreme Court's ruling and the Secretary of State's directives.

While Plaintiffs will not be irreparably harmed in the absence of a preliminary injunction, ordering Secretary LaRose to maintain the Third Plan would cause substantial and irreparable harm to the Ohio voters who amended Article XI of Ohio's Constitution to include anti-gerrymandering provisions. In November 2015, Ohio voters overwhelmingly approved the Fair District Amendments to Article XI, which overhauled the redistricting process for General Assembly districts and set forth clear and enforceable standards for partisan fairness. *See LWV I*, 2022 WL 110261, ¶ 4; *see also* Jeffrey S. Sutton, *Who Decides?* 296 (2021) (explaining that Ohio's redistricting reform had "a wide spectrum of support in the state legislature" and won "75% of the vote"). The Ohio Supreme Court invalidated the Third Plan under Article XI's new provisions.

A federal court order mandating implementation of the Third Plan would render Article XI a nullity for the primary and general 2022 elections, and cause Ohio to be governed for the next two years by legislators elected from districts that unfairly disfavor one political party in violation of Ohio law. Moreover, granting Plaintiffs' requested relief would set a precedent, in any future election cycles in which the Commission delays implementation of a legally compliant plan, for federal courts to mandate the implementation of General Assembly maps that violate Article XI. This outcome would irreparably harm those Ohioans who advocated for and achieved state constitutional reform.

In addition, an order mandating implementation of the Third Plan would irreparably harm the Bennett Petitioners and the other two Petitioner groups, who are composed of Ohio voters and nonprofit, nonpartisan organizations with members residing in Ohio, who have successfully

obtained a ruling from the Ohio Supreme Court invalidating the Third Plan. Those parties' rights under Article XI of the Ohio Constitution ought to weigh heavily in the balancing of harms.

An order imposing the Third Plan for the May 3 primary at this late date would also irreparably harm General Assembly candidates. The Commission adopted the Third Plan on February 24, after the February 2 deadline for candidates to file declarations of candidacy, the February 14 deadline for boards of elections to certify the sufficiency of candidates' petitions, and the February 18 deadline for protests against those petitions. *See* Ohio Sec'y of State, 2022 Elections Calendar, https://www.ohiosos.gov/publications/2022-elections-calendar/. The Secretary of State had the authority under emergency legislation passed by the General Assembly, H.B. 93, to move some of those deadlines, but not others: in particular, he could not postpone the deadline for filing a declaration of candidacy. *See* Directive 2022-26 (Feb. 26, 2022), https://www.ohiosos.gov/globalassets/elections/directives/2022/directive-2022-26.pdf. Thus, the only candidates under the Third Plan were candidates who had previously filed for candidacy under a prior plan.

Following the adoption of the Third Plan and before it was held unlawful, Secretary LaRose ordered that boards of elections certify candidate petitions by March 14 and receive protests against such petitions by March 17. *Id.* He also noted the constitutional right of candidates to move into their new districts within 30 days, by March 26—tomorrow. *Id.* On March 17, however, after the Ohio Supreme Court ruled the Third Plan unconstitutional, Secretary LaRose ordered boards of elections *not* to adjudicate protests, and instead to notify candidates whose certification was challenged that the protest against them was cancelled. Directive 2022-30 (Mar. 17, 2022), https://www.ohiosos.gov/globalassets/elections/directives/2022/dir2022-30.pdf. And on March 23, Secretary LaRose ordered that boards of elections' decisions certifying or rejecting candidates'

petitions were "null and void" and that protests against certifications were "moot." Directive 2022-31 (Mar. 23, 2022), https://www.ohiosos.gov/globalassets/elections/directives/2022/dir2022-31.pdf.

The result is that there are, at this time, no certified candidates for General Assembly elections under the Third Plan, and no protests to certifications have been adjudicated. Moreover, candidates who faced a March 26 deadline to move to their new districts—and there are an unusually large number of such candidates precisely because the candidate petitions were due before the Third Plan was drafted—would reasonably have relied on Secretary LaRose's Directives and the Ohio Supreme Court's decisions in *not* making arrangements to move to their new districts tomorrow. If the Court were to order implementation of the Third Plan next week for a May 3 primary, there may well be districts without candidates, or districts with artificially uncontested races, and there certainly will be certification protests that were not and cannot be adjudicated. The harm to candidates (and the voters who support them) is substantial, and it can be avoided only by postponing the primary.

D. The public interest weighs against a preliminary injunction.

The public interest would not be served by the implementation of a General Assembly plan that the state's highest court has already held to violate the state constitution. "The public has an interest in ensuring that the State's [primary] election is conducted pursuant to state law." *Smith v. S.C. State Election Comm'n*, 901 F. Supp. 2d 639, 649 (D.S.C. 2012). In determining whether to issue a preliminary injunction, this Court should weigh heavily the "[s]erious and irreparable harm [that will] result if Ohio cannot conduct its election in accordance with its lawfully enacted" redistricting procedures. *See Thompson*, 959 F.3d at 812. Indeed, "giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest." *Id.*

CONCLUSION

For the foregoing reasons, the Court should deny the Gonidakis Plaintiffs' Motion for a Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 25th Day of March, 2022.

/s/ Donald J. McTigue_____
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