

IN THE SUPREME COURT OF OHIO

**LEAGUE OF WOMEN VOTERS OF  
OHIO, et al.,**

**Petitioners,**

v.

**OHIO REDISTRICTING COMMISSION,  
et al.,**

**Respondents.**

**Case No. 2021-1193**

**Original Action Filed Pursuant to  
Ohio Const. Art. XI**

---

**PETITIONERS' MOTION FOR LEAVE TO FILE *INSTANTER*  
OBJECTIONS TO THE OHIO REDISTRICTING COMMISSION'S  
SEPTEMBER 29, 2023 REVISED GENERAL ASSEMBLY PLAN**

---

Freda J. Levenson (0045916)  
ACLU OF OHIO FOUNDATION, INC.  
4506 Chester Avenue  
Cleveland, Ohio 44103  
Tel: 614-586-1972  
flevenson@acluohio.org

David J. Carey (0088787)  
ACLU OF OHIO FOUNDATION, INC.  
1108 City Park Avenue, Suite 203  
Columbus, OH 43206  
(614) 586-1972  
dcarey@acluohio.org

Julie A. Ebenstein (PHV 25423-2023)  
AMERICAN CIVIL LIBERTIES UNION  
125 Broad Street  
New York, NY 10004  
(212) 519-7866  
jebenstein@aclu.org

Robert D. Fram (PHV 25414-2023)  
COVINGTON & BURLING, LLP

Dave Yost  
OHIO ATTORNEY GENERAL

Julie M. Pfeiffer (0069762)  
Michael A. Walton (0092201)  
Jonathan D. Blanton (0070035)  
Michael J. Hendershot (0081842)  
Constitutional Offices Section  
30 E. Broad Street, 16th Floor  
Columbus, Ohio 43215  
(614) 466-2872  
julie.pfeiffer@ohioago.gov  
michael.walton@ohioago.gov  
michael.hendershot@ohioago.gov  
jonathan.blanton@ohioago.gov

*Counsel for Respondents Ohio Redistricting  
Commission, Ohio Governor DeWine, Ohio  
Secretary of State LaRose and Ohio Auditor  
Faber*

Phillip J. Strach  
Thomas A. Farr

Salesforce Tower  
415 Mission Street, Suite 5400  
San Francisco, CA 94105-2533  
(415) 591 6000  
rfram@cov.com

Yale Fu (PHV 25419-2023)  
COVINGTON & BURLING, LLP  
3000 El Camino Real  
5 Palo Alto Square, 10th Floor  
Palo Alto, CA 94306-2112  
(650) 632-4700  
asharma@cov.com

*Counsel for Petitioners*

John E. Branch, III  
Alyssa M. Riggins  
NELSON MULLINS RILEY & SCARBOROUGH,  
LLP  
4140 Parklake Ave., Suite 200  
Raleigh, North Carolina 27612  
(919) 329-3812  
phil.strach@nelsonmullins.com  
tom.farr@nelsonmullins.com  
john.branch@nelsonmullins.com  
alyssa.riggins@nelsonmullins.com

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

*Counsel for Respondents Senator Robert  
McColley and Representative Jeffrey LaRe*

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

*Counsel for Respondents Senate Minority  
Leader Nickie Antonio and House Minority  
Leader Allison Russo*

Petitioners League of Women Voters of Ohio, *et al.* hereby move this Court for leave to file *instanter* Petitioners’ objection to the Ohio Redistricting Commission’s September 29, 2023 Revised General Assembly Plan (the “September 2023 Plan”).

On May 25, 2022, this Court ordered the Ohio Redistricting Commission to reconvene and draft a revised General Assembly district plan that complied with Article XI of the Ohio Constitution. *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 168 Ohio St.3d 522, 2022-Ohio-1727, ¶ 5. That revised plan was to be filed with the court by 12:00 pm on June 3, 2022. Petitioners’ objections, if any, were to be filed by 12:00 pm on June 7, 2022, with Respondents’ responses due on June 9. On September 29, 2023—fully 483 days after their deadline to submit a plan to this Court—the Commission passed the September 2023 Plan. Three days after that, on October 2, 2023, they finally submitted the September 2023 Plan to the Court.

In its May 25, 2022 Order, this Court “retain[ed] jurisdiction for the purpose of reviewing the new plan.” *Id.* at ¶ 6. Petitioners now respectfully request the opportunity to submit objections, in order to facilitate that review in the manner that was authorized in that Order. Indeed, nothing has changed since that order except for Respondents’ unexplained refusal to comply with this Court’s directives. Petitioners respectfully submit that this Court should not reward Respondents’ defiance by allowing the September 2023 Plan to pass without review.

Petitioners’ proposed objections are filed concurrently with this Motion.

Dated: October 5, 2023

Respectfully submitted,

Robert D. Fram (PHV 25414-2023)  
Salesforce Tower  
415 Mission Street, Suite 5400  
San Francisco, CA 94105-2533  
(415) 591 6000  
rfram@cov.com

/s Freda J. Levenson  
Freda J. Levenson (0045916)  
ACLU of Ohio Foundation, Inc.  
4506 Chester Avenue  
Cleveland, Ohio 44103  
Tel: 614-586-1972  
flevenson@acluohio.org

Yale Fu (PHV 25419-2023)  
3000 El Camino Real  
5 Palo Alto Square, 10th Floor  
Palo Alto, CA 94306-2112  
(650) 632-4700  
asharma@cov.com

David J. Carey (0088787)  
ACLU of Ohio Foundation, Inc.  
1108 City Park Avenue, Suite 203  
Columbus, OH 43206  
(614) 586-1972  
dcarey@acluohio.org

Julie A. Ebenstein (PHV 25423-2023)  
American Civil Liberties Union  
125 Broad Street  
New York, NY 10004  
(212) 519-7866  
jebenstein@aclu.org

*Counsel for Petitioners*

## CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that on October 5, 2023 I caused a true and correct copy of the foregoing to be served by email upon the counsel listed below:

Julie M. Pfeiffer, julie.pfeiffer@ohioago.gov  
Michael A. Walton, michael.walton@ohioago.gov  
Jonathan D. Blanton, jonathan.blanton@ohioago.gov  
Michael J. Hendershot, michael.hendershot@ohioago.gov

*Counsel for Respondents Ohio Redistricting Commission, Ohio Governor DeWine, Ohio Secretary of State LaRose and Ohio Auditor Faber*

Phillip J. Strach, phil.strach@nelsonmullins.com  
Thomas A. Farr, tom.farr@nelsonmullins.com  
John E. Branch, III, john.branch@nelsonmullins.com  
Alyssa M. Riggins, alyssa.riggins@nelsonmullins.com

W. Stuart Dornette, dornette@taftlaw.com  
Beth A. Bryan, bryan@taftlaw.com  
Philip D. Williamson, pwilliamson@taftlaw.com

*Counsel for Respondents Senator Robert McColley and Representative Jeffrey LaRe*

C. Benjamin Cooper, benc@cooperelliott.com  
Charles H. Cooper Jr., chipc@cooperelliott.com  
Chelsea C. Weaver, chelseaw@cooperelliott.com

*Counsel for Respondents Senate Minority Leader Nickie Antonio and House Minority Leader Allison Russo*

/s Freda J. Levenson

IN THE SUPREME COURT OF OHIO

**LEAGUE OF WOMEN VOTERS OF  
OHIO, et al.,**

**Petitioners,**

v.

**OHIO REDISTRICTING COMMISSION,  
et al.,**

**Respondents.**

**Case No. 2021-1193**

**Original Action Filed Pursuant to  
Ohio Const. Art. XI**

---

**PETITIONERS' OBJECTION TO THE OHIO REDISTRICTING COMMISSION'S  
SEPTEMBER 29, 2023 REVISED GENERAL ASSEMBLY PLAN**

---

Freda J. Levenson (0045916)  
ACLU OF OHIO FOUNDATION, INC.  
4506 Chester Avenue  
Cleveland, Ohio 44103  
Tel: 614-586-1972  
flevenson@acluohio.org

David J. Carey (0088787)  
ACLU OF OHIO FOUNDATION, INC.  
1108 City Park Avenue, Suite 203  
Columbus, OH 43206  
(614) 586-1972  
dcarey@acluohio.org

Julie A. Ebenstein (PHV 25423-2023)  
AMERICAN CIVIL LIBERTIES UNION  
125 Broad Street  
New York, NY 10004  
(212) 519-7866  
jebenstein@aclu.org

Robert D. Fram (PHV 25414-2023)  
COVINGTON & BURLING, LLP  
Salesforce Tower  
415 Mission Street, Suite 5400

Dave Yost  
OHIO ATTORNEY GENERAL

Julie M. Pfeiffer (0069762)  
Michael A. Walton (0092201)  
Jonathan D. Blanton (0070035)  
Michael J. Hendershot (0081842)  
Constitutional Offices Section  
30 E. Broad Street, 16th Floor  
Columbus, Ohio 43215  
(614) 466-2872  
julie.pfeiffer@ohioago.gov  
michael.walton@ohioago.gov  
michael.hendershot@ohioago.gov  
jonathan.blanton@ohioago.gov

*Counsel for Respondents Ohio Redistricting  
Commission, Ohio Governor DeWine, Ohio  
Secretary of State LaRose and Ohio Auditor  
Faber*

Phillip J. Strach  
Thomas A. Farr  
John E. Branch, III  
Alyssa M. Riggins

San Francisco, CA 94105-2533  
(415) 591 6000  
rfram@cov.com

Yale Fu (PHV 25419-2023)  
COVINGTON & BURLING, LLP  
3000 El Camino Real  
5 Palo Alto Square, 10th Floor  
Palo Alto, CA 94306-2112  
(650) 632-4700  
asharma@cov.com

*Counsel for Petitioners*

NELSON MULLINS RILEY & SCARBOROUGH,  
LLP  
4140 Parklake Ave., Suite 200  
Raleigh, North Carolina 27612  
(919) 329-3812  
phil.strach@nelsonmullins.com  
tom.farr@nelsonmullins.com  
john.branch@nelsonmullins.com  
alyssa.riggins@nelsonmullins.com

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

*Counsel for Respondents Senator Robert  
McColley and Representative Jeffrey LaRe*

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

*Counsel for Respondents Senate Minority  
Leader Nickie Antonio and House Minority  
Leader Allison Russo*

**Table of Contents**

**Table of Authorities** ..... iv

**INTRODUCTION**..... 1

**ARGUMENT**..... 4

**I. The Text of Article XI, Section 6 Confirms That Its Requirements Are Mandatory** ..... 4

        A. The Phrase “Shall Attempt” Imposes a Mandatory Obligation, Not an Aspiration..... 4

        B. Respondents Have Conceded, and Dissenting Justices of this Court Have Opined, That Section 6 Is Mandatory..... 6

        C. Section 9 Provides a Remedy for Section 6 Violations ..... 7

**II. Section 6’s History, and the Voters’ Intent, Confirm That Section 6 Is Mandatory and Enforceable** ..... 8

        A. The History of Article XI Supports the Mandatory Nature of Section 6..... 8

        B. The Ohio Voters Who Enacted Section 6 Understood and Intended It to Be Mandatory and Enforceable..... 9

**CONCLUSION** ..... 13



## Table of Authorities

### Cases

<i>Adams v. DeWine</i> , 167 Ohio St.3d 499, 2022-Ohio-89, 195 N.E.3d 74 .....	7, 10
<i>City of Centerville v. Knab</i> , 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167 .....	13
<i>Dorrian v. Scioto Conservancy Dist.</i> , 27 Ohio St.2d 102, 271 N.E.2d 834 (1971) .....	9
<i>League of Women Voters of Ohio v. Ohio Redistricting Commission</i> , 167 Ohio St.3d 255, 2022-Ohio-65.....	passim
<i>League of Women Voters of Ohio v. Ohio Redistricting Commission</i> , 168 Ohio St.3d 309, 2022-Ohio-789.....	7
<i>League of Women Voters of Ohio v. Ohio Redistricting Commission</i> , 168 Ohio St.3d 374, 2022-Ohio-1727.....	7, 8
<i>League of Women Voters of Ohio v. Ohio Redistricting Commission</i> , 168 Ohio St.3d 374, 2022-Ohio-1235.....	7, 8
<i>League of Women Voters v. Ohio Redistricting Commission</i> , 168 Ohio St.3d 28, 2022-Ohio-342.....	7
<i>Neiman v. LaRose</i> , 169 Ohio St.3d 565, 2022-Ohio-2471, 207 N.E.3d 607 .....	10
<i>Nichols v. Villarreal</i> , 113 Ohio App.3d 343, 680 N.E.2d 1259 (4th Dist. 1996).....	14
<i>State ex rel. Cincinnati Enquirer v. Lyons</i> , 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989 .....	9
<i>State ex rel. Herbert v. Bricker</i> , 139 Ohio St. 499, 41 N.E.2d 377 (1942) .....	12
<i>State ex rel. Republic Steel Corp. v. Ohio Civ. Rights Comm.</i> , 44 Ohio St.2d 178, 339 N.E.2d 658 (1975) .....	9
<i>State ex rel. Sylvania Home Tel. Co. v. Richards</i> , 94 Ohio St. 287, 114 N.E. 263 (1916) .....	13
<i>State v. Kinney</i> , 69 Ohio St.2d 567, 433 N.E.2d 217 (1982) .....	13
<i>State v. White</i> , 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393 .....	9
<i>Wilson v. Kasich</i> , 134 Ohio St.3d, 2012-Ohio-5367, 981 N.E.2d .....	12
<i>Wilson v. Lawrence</i> , 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242 .....	9

### Other Authorities

Jim Siegel, <i>Ohio Legislators Come to Redistricting Agreement</i> , Cincinnati Enquirer (Dec. 5, 2014), <a href="https://bit.ly/3D44n4B">https://bit.ly/3D44n4B</a> .....	16
--	----

### Constitutional Provisions

Ohio Constitution, Article XI, § 6 .....	9
Ohio Constitution, Article XI, Sec. 6(B) .....	13

## INTRODUCTION

Petitioners adopt and incorporate by reference the statement of facts offered by the petitioners in *Bennett v. Ohio Redistricting Commission*, Supreme Court of Ohio Case No. 2021-1198, in the *Bennett* petitioners’ Objections filed on October 5, 2023. Petitioners here also join in, adopt, and incorporate by reference the *Bennett* petitioners’ position that the General Assembly redistricting plan adopted on September 29, 2023 (“the September 2023 Plan”) violates Article XI, Section 6(B) of the Ohio Constitution. Petitioners here also adopt the *Bennett* petitioners’ stated basis for that position. Petitioners further join in, adopt, and incorporate by reference the further basis for that position offered by the petitioners in *Ohio Organizing Collaborative v. Ohio Redistricting Commission*, Supreme Court of Ohio Case No. 2021-1210, in their Objections filed on October 5, 2023. Petitioners write further to explain and underscore the reasons why Section 6 is mandatory and enforceable, as this Court has repeatedly held it to be. In short, prevention of partisan gerrymandering—including when approved on a bipartisan basis—is among the primary reasons why Article XI exists at all, and its text bears out that purpose.

A gerrymander is equally offensive to democracy and violative of the Ohio Constitution whether it is passed by one or both political parties. As the saying goes, “Voters should pick their politicians; not the other way around.” Here, the commissioners disregarded immense public opposition to their initial, skewed proposal; negotiated only negligible tweaks in discussions that took place outside of the voters’ view; and unveiled their final product to the public only minutes before enacting it. Their backroom dealing yielded maps that disregard the criteria established by Ohio voters in the Ohio Constitution. As set forth in the Affidavit of Dr. Jonathan Rodden, attached as an exhibit to the *Bennett* petitioners’ September 29, 2023 Objections (“Rodden Aff.”) the September 2023 Plan falls far short of the requirements of Article XIX, Section 6(B). Under

the proportionality requirement set forth in that provision, a map must reflect the statewide preferences of Ohio voters. As Dr. Rodden has shown, while voter preferences dictate that either 44% or 46% of the districts must lean Democratic, and 54% or 56% Republican, the September 2023 Plan fails to meet this metric, providing instead 31% or 33% Democratic-leaning seats and 67% or 69% Republican-leaning seats, depending on whether one includes 2022 election data. See Rodden Aff. Tables 6 and 7.

Section 6(B) forbids public officials, whether by virtue of a single party or bipartisan maneuver, to deviate from the preferences of the voters. Section 6(B) exists primarily for the benefit of Ohio voters, *not* the political parties. It employs as its standard “the statewide preferences of the voters of Ohio,” and requires that the resulting map “correspond closely” to those preferences. That metric in particular, as this Court has held, focuses directly on the vote itself, and not the political parties’ successes or failures that result. When a majority of the Commission attempted to advance another theory—that the “statewide preferences of the voters” were reflected in the political parties’ respective fortunes—this Court rightly rejected it. See January 12, 2022 Order, *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 167 Ohio St.3d 255, 2022-Ohio-65, ¶ 107 (“Calculating the percentage of statewide election victories over the last ten years does not indicate the preferences of individual Ohio voters. The ‘statewide preferences of the voters of Ohio’ must be determined by examining how the voters voted[.]”). So far-fetched was Respondents’ interpretation of Section 6(B) that Secretary LaRose called it “asinine.” *Id.* at ¶ 52. At bottom, Section 6(B) has no regard for the Commission’s subjective intent, or the political parties’ preferences. It employs an explicit, objective measure to protect the voters from even a partisan gerrymander that was ultimately approved by both political parties.

One of this Court’s core holdings in this action—reiterated time and time again—has been that Article XI, 6(B) is not a mere toothless appendage to the Article, but is mandatory and enforceable. Since deciding that “Section 6 imposes enforceable duties on the commission,” this Court has consistently adhered to its conclusion about Section 6’s mandatory nature. January 12, 2022 Order, *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 167 Ohio St.3d 255, 2022-Ohio-65, ¶¶ 83, 138; *see also* February 7, 2022 Order, 168 Ohio St.3d 28, 2022-Ohio-342, ¶¶ 30, 50; March 16, 2022 Order, 168 Ohio St.3d 309, 2022-Ohio-789, ¶ 24; April 14, 2022 Order, 168 Ohio St.3d 374, 2022-Ohio-1235, ¶ 56; May 25, 2022 Order, 168 Ohio St.3d 374, 2022-Ohio-1727, ¶ 4.

Indeed, even the Justices who dissented from these decisions have since recognized that Article XI requires an attempt to meet the standards in Section 6 of Article XI. January 14, 2022 Order, *Adams v. DeWine*, 167 Ohio St.3d 499, 2022-Ohio-89, 195 N.E.3d 74 at ¶ 108 (Kennedy, J., Fischer, J., and DeWine, J., dissenting) (“In stark contrast to Article XI, which establishes the standards for adopting a General Assembly-district plan, Article XIX does not require a congressional-district plan to even *attempt* to provide proportionately representative districts.”).

Nothing has changed in the interim period except for the composition of this Court. Respondents’ actions make abundantly clear their belief that, as a result, this Court’s prior rulings are no longer the law—or at least, will not be enforced. By their manifest disregard for Section 6(B), Respondents are flouting this Court’s binding interpretation of that Section. As explained below, this Court is correct in its construction of Article XI.

## ARGUMENT

### I. The Text of Article XI, Section 6 Confirms That Its Requirements Are Mandatory

#### A. The Phrase “Shall Attempt” Imposes a Mandatory Obligation, Not an Aspiration

As this Court has held—repeatedly and in no uncertain terms, “the qualifying word ‘attempt’ does not mean that the Section 6(B) standard is merely aspirational.” February 7, 2022 Order, 168 Ohio St.3d 28, ¶ 90, 2022-Ohio-342. “[C]lear language in Section 6 establishes that the section’s standards are not merely aspirational. . . . Section 6 speaks not of desire but of direction: the commission *shall attempt* to achieve the standards of that section.” January 12, 2022 Order, 167 Ohio St. 3d 255, 2022-Ohio-65, ¶ 90 (emphasis original); *see also id.* at ¶ 83 (“Section 6 imposes enforceable duties on the commission.”); April 14, 2022 Order, 168 Ohio St.3d 374, 2022-Ohio-1235, ¶ 56; May 25, 2022 Order, 168 Ohio St.3d 374, 2022-Ohio-1727.

To be sure, the word “attempt” in Section 6 is a necessary acknowledgement that the Commission must not abandon the other requirements of the Article. As Section 6 states, nothing in that section “permits the commission to violate the district standards described in Sections 2, 3, 4, 5, or 7” of Article XI. Ohio Constitution, Article XI, § 6. Should compliance with all provisions prove actually impossible, “Section 6 contemplates that the standards set forth in it may not come to fruition.” January 12, 2022 Order, 167 Ohio St. 3d 255, 2022-Ohio-65, ¶ 90.

Here there is no doubt that the requirements of Section 6(B) could be met while also meeting the standards set forth in Sections 2, 3, 4, 5 or 7. As set forth in the Rodden Affidavit, at least two other plans that were submitted to the Commission plainly demonstrate that it is possible to meet the requirements of all of these sections. *See* Rodden Aff. Section V, ¶¶ 24-28. The Commission instead chose not to adopt either of those two compliant plans, or to devise one of its own—in effect, simply disregarding that Section 6(B) has been repeatedly found binding.

Indeed, the September 2023 Plan is no more compliant with Section 6(B) than were the plans previously invalidated by this Court. See Rodden Aff. ¶¶ 21.

The mere possibility that Section 6 compliance could prove incompatible with other sections of the Article—even though here, it does not—does not reduce the entire Section to the status of a mere suggestion. Section 6 flatly requires that the Commission “shall attempt” to meet specific strictures: (1) not to primarily favor or disfavor a party, (2) to adhere to the statewide voter preferences, and (3) to draw compact districts. Both components of that phrase, “shall attempt,” denote a requirement. “Shall” means “must,” as this Court has held. *See, e.g., Wilson v. Lawrence*, 150 Ohio St.3d 368, 371, 2017-Ohio-1410, ¶ 13, 81 N.E.3d 1242, 1245 (“‘Shall’ means must. . . . And [t]he word ‘must’ is mandatory.”) (citations omitted); *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 107, 271 N.E.2d 834, 837 (1971) (“The word ‘shall’ is usually interpreted to make the provision in which it is contained mandatory, especially if frequently repeated.”); *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 28 (“We have repeatedly recognized that use of the term ‘shall’ in a statute or rule connotes a mandatory obligation unless other language evidences a clear and unequivocal intent to the contrary”). “Attempt” requires that the Commission exhaust available means to achieve compliance. *See* January 12, 2022 Order, 167 Ohio St.3d 255, 2022-Ohio-65, ¶ 85 (comparing “attempt” to “endeavor,” which is construed similarly) (citing *State ex rel. Republic Steel Corp. v. Ohio Civ. Rights Comm.*, 44 Ohio St.2d 178, 339 N.E.2d 658 (1975)).

In sum, and as this Court has held, if the Commission can meet Section 6’s standards without violating Sections 2, 3, 4, 5, and 7, then it must do so. Empty gestures and bad-faith negotiations—or for that matter, deviation from Section 6 for any reasons *other than* necessity to comply with Sections 2, 3, 4, 5, or 7, including for political expediency or simply at the

Commission’s discretion—do not constitute an “attempt.” *Id.* at ¶ 88 (“If it is possible for a district plan to comply with Section 6 and Sections 2, 3, 4, 5, and 7, the commission must adopt a plan that does so.”); *see also, e.g., State v. White*, 103 Ohio St.3d 580, 583, 2004-Ohio-5989, ¶ 14, 817 N.E.2d 393, 396 (holding that a statute stating that a clerk “shall attempt to collect costs” from a convicted person meant that the clerk had no discretion not to do so).

**B. Respondents Have Conceded, and Dissenting Justices of this Court Have Opined, That Section 6 Is Mandatory**

Previous respondents in this litigation have effectively conceded elsewhere that Section 6 imposes enforceable standards. In litigating a challenge to congressional maps under Article XIX of the Ohio Constitution, they contrasted Article XIX with Article XI. The former, they argued, contained no proportionality standard akin to Section 6(B), which they claimed implied that proportionality was not a requirement of Article XIX. Filed December 17, 2021: Ohio Senate President Matt Huffman and Ohio House Speaker Cupp Resp’ts’ Merits Br., at 19, *Adams v. DeWine*, 167 Ohio St.3d 499, 2022-Ohio-89 (No. 2021-1449). If Section 6 conveyed only a meaningless aspiration to proportionality, of course, there would be no contrast to draw with Article XIX.

Three dissenting justices of this Court made a similar contrast, finding that an “attempt” to comply with Section 6(B) is a mandatory provision: “In stark contrast to Article XI, which establishes the standards for adopting a General Assembly-district plan, Article XIX does not require a congressional-district plan to even attempt to provide proportionately representative districts.” *Adams v. DeWine*, 167 Ohio St.3d 499, 2022-Ohio-89, 195 N.E.3d 74, ¶ 108 (Kennedy, Fischer, and DeWine, JJ., dissenting); *see also id.* at ¶ 142 (“While Article XI directs the Ohio Redistricting Commission to attempt to draw a general Assembly–district plan in which the statewide proportion of districts that favors each political party ‘correspond[s] closely to the

statewide preferences of the voters of Ohio” based on a proportionality formula, there is no similar language in Article XIX”); *Neiman v. LaRose*, 169 Ohio St.3d 565, 2022-Ohio-2471, 207 N.E.3d 607, ¶ 81 (Kennedy and DeWine, JJ., dissenting) (“The majority clings to proportionality, which appears in Article XI of the Ohio Constitution but not in Article XIX, the relevant provision in this case.”); *id.* at ¶ 88 (“In Article XI, which applies to General Assembly redistricting, proportionality is something the commission is instructed to attempt, and Article XI, Section 6 of the Ohio Constitution provides the formula for the commission to apply.”); *id.* at ¶ 98 (Fischer, J., dissenting) (“I fully join the other dissenting opinion.”).

### C. Section 9 Provides a Remedy for Section 6 Violations

This Court has also rejected the argument that Section 6 lacks a remedy, as “the inclusion of specific remedies in Section 9(D)(3) if a plan fails to comply with other sections does not preclude us from declaring a plan invalid if it fails to comply with Section 6.” January 12, 2022 Order, 167 Ohio St. 3d 255, 2022-Ohio-65, ¶ 83. As the Court explained, Section 9(A) confers on it “exclusive, original jurisdiction in all cases arising under” *Id.* at ¶¶ 69, 93. Section 9(B) confirms the Court’s authority to invalidate “any general assembly district plan made by the Ohio redistricting.” *Id.* at ¶ 69. Further, if the Court finds any plan invalid, 9(B) contains an unequivocal general grant of authority to see it remedied: “‘notwithstanding any other provisions of this constitution,’ the commission must be reconstituted as provided in Article XI, Section 1 to adopt a new plan ‘to be used until the next time for redistricting’ occurs.” *Id.* (quoting Ohio Constitution, Article XI, Section 9(B)); *see also id.* at ¶ 94–95 (rejecting contrary arguments).

The fact that “other provisions of this constitution”—9(D)(3) among them—provide specific remedies for violations of sections *other than* Section 6 does nothing to remove the



Court’s power to remedy Section 6 violations. *Id.* at ¶ 70 (further reasoning that the term “notwithstanding” overrides any provision that “could” be construed to conflict with 9(B)).

**II. Section 6’s History, and the Voters’ Intent, Confirm That Section 6 Is Mandatory and Enforceable**

**A. The History of Article XI Supports the Mandatory Nature of Section 6.**

The history of Article XI, from the Constitution of 1851 through the 2015 Amendment, bolsters the conclusion that Section 6 imposes mandatory requirements. “Prior to the [Ohio] Constitution of 1851, the apportionments of legislative districts had been made by the General Assembly with the result that oftentimes political advantage was sought to be gained by the party in power. Accordingly, Article XI was incorporated in the Constitution for the purpose of correcting the evils of former days.” *State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 508, 41 N.E.2d 377, 382 (1942). “The objective sought by the constitutional provisions was the prevention of gerrymandering.” *Id.* at 509. The original Article XI aimed to do so via new constraints on the redistricting process, and transferring the process from the General Assembly to the Ohio Apportionment Board.

The test of time proved the 1851 Version of Article XI insufficient to serve its purpose. The maps that came out of Ohio’s 2011 decennial apportionment process reflected an egregious partisan gerrymander. In 2012, Democratic candidates won 50.2% of the statewide vote, but only 39.4% of Ohio’s state house seats. See Compl. Citations, Ex. Vol. 1 at COMP\_0022; Suppl. Vol. 1 at 199 (Warshaw Expert Aff.). This bias persisted throughout the decennial: in the 2020 state house elections, Democrats won 45.1% of the votes, but only 35.4% of the seats. *Id.* The extreme seat bias was the result of intentional self-dealing by the party that controlled the map-drawing process. Compl. Citations, Ex. Vol. 1 at COMP\_0022-0026; Suppl. Vol. 1 at 199-203. When, in 2011, a group of voters challenged that plan for its partisan unfairness, this Court found it lacked

the power to act because, at that time, the “words used in Article XI d[id] not explicitly require political neutrality, or for that matter, politically competitive districts or representational fairness, in the apportionment board’s creation of state legislative districts.” *Wilson v. Kasich*, 134 Ohio St.3d at 225, 2012-Ohio-5367, ¶14, 981 N.E.2d at 820.

Ohio voters responded by adding precisely the safeguards that this Court had found missing. They did so by way of Article XI, Sections 6(B). On November 3, 2015, Ohio voters—by an overwhelming margin of 71.5% to 28.5%, Compl. Citations, Ex. Vol. 1 at COMP\_0282-0283; Suppl. Vol. 1 at 229-230—amended the Constitution to add express constitutional commands that districts “shall correspond closely to the statewide preferences of the voters of Ohio.” Ohio Constitution, Article XI, Sec. 6(B).

This evolution of Article XI—from the 1851 version, to the partisan gerrymandering of the 2011 decennial, to *Wilson*, to the 2015 amendment—makes clear that Section 6 is mandatory, and indeed, a fundamental pillar and purpose of the 2015 amendment to the Article.

**B. The Ohio Voters Who Enacted Section 6 Understood and Intended It to Be Mandatory and Enforceable.**

“In construing constitutional text that was ratified by direct vote, [this Court] consider[s] how the language would have been understood by the voters who adopted the amendment.” *City of Centerville v. Knab*, 162 Ohio St.3d 623, 2020-Ohio-5219, 166 N.E.3d 1167, ¶ 22. When interpreting the Ohio Constitution, “[i]t is the duty of the court to ascertain and give effect to the intent of the people.” *Id.* (citing *State ex rel. Sylvania Home Tel. Co. v. Richards*, 94 Ohio St. 287, 294, 114 N.E. 263 (1916)). Accordingly, “the polestar in the construction of the constitutional, as well as legislative, provisions is the intention of the makers and adopters thereof.” *State v. Kinney*, 69 Ohio St.2d 567, 570, 433 N.E.2d 217 (1982) (internal citation omitted).

Ohio voters' intention and understanding in 2015, when they voted to enshrine Section 6(B) in the Ohio Constitution, could not have been clearer that this provision be mandatory and enforceable. The ballot placed before them in the voting booth explained that the amendment's express purpose was to "[e]nd the partisan process for drawing Ohio House and Senate districts, and replace it with a bipartisan process with the goal of having district boundaries that are more compact and politically competitive." Compl. Citations, Ex. Vol. 1 at COMP\_0284; Suppl. Vol. 1 at 231.

The ballot measure was consistently characterized and promoted as a reform to end partisan gerrymandering—including by several current and former Respondent members of the Commission. Their language unambiguously described a mandatory prohibition not only for Section 6(B) specifically, but for the entirety of Section 6, which is governed by the same "shall attempt" language. Former Respondents President Huffman and Senator Sykes co-chaired a political campaign to pass the measure, and they stated in their campaign materials that the amendment would provide "fairness" by "[p]rotect[ing] against gerrymandering by *prohibiting* any district from primarily favoring one political party" and "*[r]equir[ing]* districts to closely follow the statewide preferences of the voters" (emphasis added). Nor was there any scintilla of suggestion that Sections 6 created a right devoid of a judicial remedy. Quite the opposite; President Huffman and Senator Sykes, invoking the requirements of Section 6(A), confirmed that the amendment "creates a process for the Ohio Supreme Court to order the commission to redraw the map *if the plan favors one political party.*" Dep. Stip., Ex. Vol. 4 at DEPO\_00914:8-13, 00982; Suppl. Vol. 2 at 270 (V. Sykes Tr.) and 280 (campaign flyer, V. Sykes Dep. Ex. 3) (emphasis added).

Respondent Auditor Faber similarly promised Ohioans that a “yes” vote on the ballot measure amending the Constitution would “*make sure* state legislative districts are drawn to be more competitive and compact, and *ensure* that no district plan should be drawn to favor or disfavor a political party.” Compl. Citations, Ex. Vol. 1 at COMP\_0285; Suppl. Vol. 1 at 174 (emphasis added).

While “[a] single legislator does not speak for the entire Ohio General Assembly,” *Nichols v. Villarreal*, 113 Ohio App.3d 343, 349, 680 N.E.2d 1259 (4th Dist. 1996), it is telling that Respondents’ own contemporaneous statements—including in the legislative record—also reflect the mandatory nature of Section 6. For instance, during floor passage, then-Representative Huffman, the chief sponsor of the legislation, stated “[t]here’s specific language in there about how the map *can’t* favor or disfavor one political party.” Hist. Rec., Ex. Vol. 1 at HIST\_0030:6-7 (emphasis added). He further added: “So it’s [] basically the concepts *that I think the public has demanded*, and most of us have said is important when we’re drawing these maps. Basically, for basic issue of fairness.” *Id.* at HIST\_0030:10-13 (emphasis added).<sup>1</sup> Representative Huffman also contemporaneously stated that he thought HJR 12, the joint resolution that would become Article XI, “represents some big compromises on the majority’s part. The majority will not be able to do the kind of things that have happened in the last several years.” Jim Siegel, *Ohio*

---

<sup>1</sup> See also Hist. Rec., Ex. Vol. 1 at HIST\_0048:12-15 (Rep. Alicia Reese endorsing HJR 12, in part, because “one of the best lines . . . for my constituents is . . . no district plan shall be drawn primarily to favor or disfavor a political party.”); *id.* at HIST\_0047:4-8 (Rep. John Becker opposing HJR 12 because of Section 6’s constitutional requirements, disapproving that Section 6(B) “guarantees, we will forever have a very close 5050 split in this chamber.”). In previous iterations of this litigation, Respondents “ma[d]e much of” statements made by a single Democratic Representative, Kathleen Clyde, who described Section 6 as “aspirational.” This Court discounted that statement as both isolated, and contrary to the plain text of the provision. See January 12, 2022: *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 167 Ohio St.3d 255, 2022-Ohio-65, ¶¶ 89–90.

*Legislators Come to Redistricting Agreement*, Cincinnati Enquirer (Dec. 5, 2014),  
<https://bit.ly/3D44n4B>.

Appropriately, this Court has not been blind to Article XI's enactment history and original public understanding. In finding Section 6 enforceable, it "reject[ed] the notion that Ohio voters rallied so strongly behind an anti-gerrymandering amendment to the Ohio Constitution yet believed at the time that the amendment was toothless." January 12, 2022: *League of Women Voters of Ohio v. Ohio Redistricting Commission*, 167 Ohio St.3d 255, 2022-Ohio-65, ¶ 101. Such a conclusion would be "supported neither by the information given to voters in 2015 nor by common sense." *Id.*

And as the Court correctly observed, absent the ability to enforce Section 6 through the Article's judicial enforcement mechanism in Section 9(B), a toothless amendment is all that would remain. The purpose and function of partisan gerrymandering, after all, is to shield politicians from political accountability by hamstringing voters' ability to remove them. That is doubly so in the case of the Commission itself:

The suggestion that the solution to unconstitutional partisan gerrymandering is simply to vote out its perpetrators is disingenuous. ... See, e.g., *Gill v. Whitford*, \_\_\_ U.S. \_\_\_, \_\_\_, 138 S.Ct. 1916, 1935, 201 L.Ed.2d 313 (2018) (Kagan, J., concurring). If the legislative members of the commission that adopted the instant plan are voted out of office, the party that appointed them will simply appoint different partisans. And common sense dictates that notwithstanding attrition based on term limits or any other reasons, the officeholders will stand for reelection primarily on the basis of their performance in those offices, not as members of the redistricting commission. The notion that the voters who overwhelmingly approved the amendment of Article XI meant to hinge the eradication of partisan gerrymandering on the election of various officeholders simply holds no water.

*Id.*

## CONCLUSION

For the foregoing reasons, this Court should (1) invalidate the General Assembly district plan adopted by the Commission on September 29, 2023; and (2) require the Commission to adopt a General Assembly district plan consistent with this Court's procedural directives and with the substantive provisions of Article XI, Sections 6(B) of the Ohio Constitution as explained in this Court's prior decisions in this action.

Given that the Commission has before it a substantially compliant map, but has nonetheless taken no meaningful action for approximately *sixteen months* since this Court last ordered it to reconvene and adopt a compliant plan, Petitioners respectfully request that the Commission be ordered to adopt a plan within a few days of this Court's order.

Dated: October 5, 2023

Respectfully submitted,

Robert D. Fram (PHV 25414-2023)  
Salesforce Tower  
415 Mission Street, Suite 5400  
San Francisco, CA 94105-2533  
(415) 591 6000  
rfram@cov.com

/s Freda J. Levenson  
Freda J. Levenson (0045916)  
ACLU of Ohio Foundation, Inc.  
4506 Chester Avenue  
Cleveland, Ohio 44103  
Tel: 614-586-1972  
flevenson@acluohio.org

Yale Fu (PHV 25419-2023)  
3000 El Camino Real  
5 Palo Alto Square, 10th Floor  
Palo Alto, CA 94306-2112  
(650) 632-4700  
asharma@cov.com

David J. Carey (0088787)  
ACLU of Ohio Foundation, Inc.  
1108 City Park Avenue, Suite 203  
Columbus, OH 43206  
(614) 586-1972  
dcarey@acluohio.org

Julie A. Ebenstein (PHV 25423-2023)  
American Civil Liberties Union  
125 Broad Street  
New York, NY 10004  
(212) 519-7866  
jebenstein@aclu.org

*Counsel for Petitioners*

## CERTIFICATE OF SERVICE

I, Freda J. Levenson, hereby certify that on October 5, 2023 I caused a true and correct copy of the foregoing to be served by email upon the counsel listed below:

Julie M. Pfeiffer, julie.pfeiffer@ohioago.gov  
Michael A. Walton, michael.walton@ohioago.gov  
Jonathan D. Blanton, jonathan.blanton@ohioago.gov  
Michael J. Hendershot, michael.hendershot@ohioago.gov

*Counsel for Respondents Ohio Redistricting Commission, Ohio Governor DeWine, Ohio Secretary of State LaRose and Ohio Auditor Faber*

Phillip J. Strach, phil.strach@nelsonmullins.com  
Thomas A. Farr, tom.farr@nelsonmullins.com  
John E. Branch, III, john.branch@nelsonmullins.com  
Alyssa M. Riggins, alyssa.riggins@nelsonmullins.com

W. Stuart Dornette, dornette@taftlaw.com  
Beth A. Bryan, bryan@taftlaw.com  
Philip D. Williamson, pwilliamson@taftlaw.com

*Counsel for Respondents Senator Robert McColley and Representative Jeffrey LaRe*

C. Benjamin Cooper, benc@cooperelliott.com  
Charles H. Cooper Jr., chipc@cooperelliott.com  
Chelsea C. Weaver, chelseaw@cooperelliott.com

*Counsel for Respondents Senate Minority Leader Nickie Antonio and House Minority Leader Allison Russo*

/s Freda J. Levenson