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## I. INTRODUCTION

Reapportionment “is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance.” *LULAC v. Perry*, 548 U.S. 399, 416 (2006). The framers of Ohio’s Constitution considered reapportionment so important that they devoted an entire Article to it, and explicitly vested this Court with exclusive and original jurisdiction over challenges to apportionment plans. Art. XI, § 13.

Respondents enacted an apportionment plan that flagrantly violates Article XI, and they did so through a secretive process that violated the Open Meeting Act. They now invoke laches in an effort to shield their illegal plan from review. In doing so, they ignore the fundamental and far-reaching public interests at stake here, relying on cases about whether a particular candidate or question should have been placed on the ballot in a particular election. But this case is not about one election or one candidate. It is about an apportionment plan that will impact the voting rights of 11 million Ohioans for the next decade. When the rights at stake go beyond whether to place “an issue or candidate on an election ballot,” “a consideration of the merits of the claim is warranted,” for “the fundamental tenet of judicial review in Ohio is that courts should decide cases on their merits.” *State ex rel. Colvin v. Brunner*, 120 Ohio St. 3d 110, 115-16 (2008) (quoting *State ex rel. Becker v. Eastlake*, 93 Ohio St. 3d 502, 505 (2001)); see also *State ex rel. Stokes v. Brunner*, 120 Ohio St. 3d 250, 252 (2008) (same). Dismissing Relators’ claims on laches grounds would not only violate that tenet but would undermine the Constitution’s guarantee of a remedy for every right. Art. I, § 16. Indeed, Relators have been unable to find any case in which this Court dismissed an Article XI claim on laches grounds.

Respondents’ motion also ignores basic rules of procedure. A motion for judgment on the pleadings, like Respondents’, may “present[] only questions of law, and determination of the motion for judgment on the pleadings is restricted solely to the allegations in the pleadings.” *Peterson v. Teodosio*, 34 Ohio St. 2d 161, 166 (1973). But “[w]hether the four elements of laches are applicable is ultimately a factual determination.” *Hara v. Montgomery Cty. Joint*

*Vocational School Dist.*, 75 Ohio St. 3d 60, 64 (1996). Indeed, Respondents' laches argument turns largely on facts—disputed facts—beyond the pleadings, such as whether Relators diligently pursued the investigation of their claims. On a motion for judgment on the pleadings, such disputed facts must be resolved and all inferences drawn in Relators' favor. *Peterson*, 34 Ohio St. 2d at 165-66. Respondents' motion should be denied on this basis alone.

Even if the Court looks past the crucial public importance of Relators' claims and the flagrant procedural flaws of Respondents' motion, Respondents' argument fails on its own terms because Relators are not guilty of laches. Relators have moved as expeditiously as possible given the complexity of their constitutional claims, the need for careful investigation of those claims before filing, the number of Relators all around the state who had to come forward to pursue those claims, and the fact that the basis for their Open Meeting Act claim became clear only weeks before the complaint was filed. Respondents' cries of prejudice also ring hollow, for at the time the Board adopted the apportionment plan, the primary election was scheduled for May 2012, not March. It was not clear until mid-December that the primary election would occur in March; indeed, Respondents themselves had pressed for it to occur later. In any event, Relators still filed their complaint more than two months before the election.

“[T]he fundamental tenet of judicial review in Ohio is that courts should decide cases on their merits.” *Becker*, 93 Ohio St. 3d at 505. Given the importance of the issues raised in this case, the Court should adhere to that tenet, deny Respondents' motion, and address and resolve these crucial constitutional issues on the merits.

## II. STATEMENT OF FACTS

On September 30, 2011, the Apportionment Board (the “Board”) adopted the 2012-2022 Apportionment Plan (the “Plan”). Relators believed that the Plan might violate Article XI of the Constitution and possibly other legal requirements as well—such as the Voting Rights Act and

the one-person, one-vote principle of the Fourteenth Amendment—and immediately began investigating that possibility. *See* Affidavit of Dennis E. Murray, Jr. (“Murray Aff.”) ¶ 2.<sup>1</sup>

Relators’ decision to challenge the Plan in court was not made lightly. While it was immediately apparent that the plan divided many communities throughout the state, a great deal of factual, expert, and legal investigation and analysis was required to determine whether or not such divisions were necessary in accordance with Article XI. *Cf. Voinovich v. Ferguson*, 63 Ohio St. 3d 198, 200 (1992). Relators’ analysis began immediately after the Plan was adopted and included retaining several independent experts, painstaking work developing alternative maps, and careful evaluation of Article XI and the case law applying it. *See* Murray Aff. ¶¶ 2-3. Later, after filing the complaint, Relators found through discovery that Respondents had themselves identified many of the districts where they unnecessarily violated Article XI. *Id.* ¶ 3 (citing Appendix of Exhibits to Affidavit of Lloyd Pierre-Louis at 828 (Summary document showing unnecessary splits of political subdivisions)). But, of course, this document had not previously been available to Relators, and Respondents obviously had not admitted previously that many of the Article XI violations in the enacted plan were avoidable. *Id.*

While investigating potential Article XI claims, Relators were also investigating whether the Plan violated federal law. *Id.* ¶ 4. This was a complex endeavor that required analyzing alternative map configurations and determining whether the three “preconditions” for pursuing a Voting Rights Act claim were satisfied in any part of Ohio: (1) the minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) the minority group must be “politically cohesive”; and (3) the majority must vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”

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<sup>1</sup> As explained below, Relators believe that this motion should be denied based solely on the pleadings. In an abundance of caution, however, Relators submit this affidavit in case the Court accepts Respondents’ invitation to look beyond the pleadings.

*Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Relators retained another expert to conduct this analysis; his work began in October and continued through December. Murray Aff. ¶ 4.<sup>2</sup>

As Relators' Article XI investigation progressed, they identified dozens of districts across Ohio that had been drawn in violation of Article XI. *See id.* ¶ 5. Relators understood that to satisfy standing requirements in bringing their claim, voters in each challenged district would have to come forward to participate. *See, e.g., State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 469-70 (1999) ("In order to have standing . . . , the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general. . . ."). That, too, took time, as many voters demurred from filing suit against Respondents, four powerful elected officials. Murray Aff. ¶ 5. Indeed, there are districts in the Plan that Relators believe violate Article XI but are not challenged here because no voter came forward in those districts willing to sue Respondents and subject themselves to potential public scrutiny. *Id.*

As Relators were preparing to file suit based on the Article XI violations they had identified, new evidence came to light of another serious violation of Ohio law. In mid-December, the Ohio Campaign for Accountable Redistricting ("OCAR") published a report and substantial evidence obtained through public record requests indicating that the Plan was adopted in violation of the Open Meeting Act. *See* First Affidavit of Michael McDonald, Exh. B. Relators were unaware of that potential claim until the OCAR report was published, as the report exposed previously secret communications between the Joint Secretaries of the Board and the Board's Republican members. Murray Aff. ¶ 6. Relators chose to investigate this claim and incorporate it into their complaint along with their constitutional claims, believing it more efficient to bring all of their challenges to the Plan in one case at the same time. *See id.*

Meanwhile, Ohio legislators were engaged in ongoing debates as to when the 2012 primary election would occur. At the time the Board adopted the Plan, the primary was

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<sup>2</sup> Although Relators ultimately chose for a variety of reasons not to pursue federal claims in this forum, investigating those claims was not only reasonable, but required of any diligent counsel.

scheduled for May 2012. See H.B. 194, 129th General Assembly (2011), available at [http://www.legislature.state.oh.us/BillText129/129\\_HB\\_194\\_EN\\_N.html](http://www.legislature.state.oh.us/BillText129/129_HB_194_EN_N.html). At the end of October, however, the Assembly passed a bill moving the state legislative primary to March and the federal primary to June. See H.B. 318, 129th General Assembly (2011), available at [http://www.legislature.state.oh.us/bills.cfm?ID=129\\_HB\\_318](http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_318). Both dates were far from certain, however, as the Assembly debated extensively whether to move both primaries to the same date, possibly in May or June. Murray Aff. ¶ 7. Several Respondents had pushed for the state legislative primary to be moved back to May or June. See, e.g., Joe Vardon, Husted Backs Moving 2012 Primary to May, Columbus Dispatch (June 21, 2011). As late as early December, leaders in the House discussed consolidating both primaries in late April or early May. Murray Aff. ¶ 7. It was not until December 14, when the Assembly passed a bill consolidating both primaries in March, that it became clear that the primary would actually occur then. See H.B. 369, 129th General Assembly (2011), available at [http://www.legislature.state.oh.us/BillText129/129\\_HB\\_369\\_EN\\_N.html](http://www.legislature.state.oh.us/BillText129/129_HB_369_EN_N.html).

When the March primary date became clear, Relators were in the midst of finalizing their Article XI claims, confirming participation of Relators in the challenged districts, and analyzing their potential Open Meeting Act claim. Murray Aff. ¶ 8. Relators knew that in an original action in this Court, the opportunities for discovery and factual development after filing would be limited. Thus, it was crucial to Relators' cause that they have their evidence largely compiled before filing. As soon as the voters in each challenged district had the legal research and expert analysis necessary to support their claims completed, they promptly filed their complaint. See *id.* Had Relators filed sooner, there is simply no way that they could have been confident in the merits of their claims and prepared and presented the evidence necessary to support them.<sup>3</sup> *Id.*

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<sup>3</sup> This Court's accelerated briefing schedule, of course, only demonstrates the critical importance of such pre-filing preparation.

### III. LAW AND ARGUMENT

#### A. Courts Routinely Decline To Apply Laches to Cases (Like This One) Involving Significant Public Interests.

In Ohio, the elements of laches are “(1) unreasonable delay or lapse of time in asserting a right, (2) absence of an excuse for the delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party.” *State ex rel. Owens v. Brunner*, 125 Ohio St. 3d 130, 133 (2010) (internal quotation marks and citation omitted).

In applying these factors, this Court looks to the circumstances of each case and weighs the interests at stake. *See, e.g., State ex rel. Stoll v. Logan Cty. Bd. of Elections*, 117 Ohio St. 3d 76, 79 (2008). Respondents, however, rely on cases that bear no resemblance to this one. They cite “expedited election cases” in which parties challenged only “a pending election,” S. Ct. R. 10.9(A)(1), and demanded only that a particular person or issue be placed on or taken off the ballot. For example, Respondents rely heavily on *Rust v. Lucas County Board of Elections*, 108 Ohio St. 3d 139 (2005). But the only question there was whether the relator had gathered enough signatures to run for the Toledo Board of Education—a question of local and limited significance. Respondents also rely heavily on *State ex. rel. Fishman v. Lucas County Board of Elections*, 116 Ohio St. 3d 19 (2007). But the narrow question in that case was whether the signatures on two “partial petitions” submitted by a candidate for Toledo municipal court judge gave him enough to be placed on the ballot.<sup>4</sup>

This case could not be more different. To begin with, Respondents concede, as they must, that “this is not an ‘expedited elections matter,’” Motion at 3; indeed, if it were, they would have been barred from filing this motion. S. Ct. R. 10.9(A)(3). More importantly, unlike the cases Respondents cite, this case is not a challenge to the outcome of one election. Nor is it a dispute about whether a particular person or issue will be on the ballot for a local election.

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<sup>4</sup> *See also, e.g., Owens*, 125 Ohio St. 3d 130 (relator challenged invalidation of signatures that prevented him from appearing on ballot); *State ex rel. Landis v. Morrow Cty. Bd. of Elections*, 88 Ohio St. 3d 187 (2000) (relator sought writ to be certified as candidate for sheriff).

Instead, it addresses the very structure of Ohio's democracy for the next decade. This Court has not been willing to apply laches in such a case, nor should it.

For example, in *Colvin*, 120 Ohio St. 3d 110, the question was whether allowing voters to register for absentee ballots by expedited means was consistent with Ohio law. The respondents raised a laches defense, but this Court rejected it, saying: “[T]his case differs from other cases in which we have applied laches to bar a consideration of the merits of an expedited election action concerning an issue or candidate on an election ballot because it involves the propriety of the *absentee voting* itself.” *Id.* at 115. “Under these circumstances, a consideration of the merits of the claim is warranted.” *Id.* at 116. Similarly, in *Stokes*, 120 Ohio St. 3d 250, the question was whether Ohio law allowed observers at polling locations during early absentee voting. Again the respondents raised a laches defense, and again this Court rejected it on the same basis as in *Colvin*, noting the crucial difference between cases about whether to place “an issue or candidate on an election ballot” and cases about the very system of “voting itself.” *Id.* at 252 (quoting *Colvin*, 120 Ohio St. 3d at 115).

This case involves questions even more important than those raised in *Colvin* and *Stokes*, and nothing like those raised in the cases Respondents cite. The questions raised here are not about one candidate, one ballot measure, or one election. This case will determine whether 11 million Ohioans will have to live for the next decade in districts that were gerrymandered for partisan ends in direct contravention of Article XI. Invoking laches to avoid an issue of such significance would be both unjust and directly contrary to “the fundamental tenet of judicial review in Ohio . . . that courts should decide cases on their merits.” *Becker*, 93 Ohio St. 3d at 505; *see also O’Reilly v. Town of Glocester*, 621 A.2d 697, 703 (R.I. 1993) (“[C]ourts have taken the position that when public rights are at stake, courts should disfavor the defense of laches.”).

**B. Respondents Cannot Prevail on Laches in A Motion for Judgment on the Pleadings.**

Respondents' invocation of laches comes in the form of a motion for judgment on the pleadings under Civil Rule 12(C). But a motion for judgment on the pleadings is not an appropriate vehicle for raising the uniquely *fact-based* equitable defense of laches in this case.

“Civ. R. 12(C) motions are specifically for resolving *questions of law*.” *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St. 3d 565, 570 (1996) (emphasis added); *see also Peterson*, 34 Ohio St. 2d at 166 (“Civ. R. 12(C) is a continuation of the former statutory practice and presents only questions of law.”). But “[w]hether the four elements of laches are applicable is ultimately a factual determination.” *Hara*, 75 Ohio St. 3d at 64. Respondents never address or even acknowledge this fundamental flaw in their motion.

Moreover, in evaluating a motion for judgment on the pleadings, a court may look “solely to the allegations in the pleadings” and must construe “all reasonable inferences to be drawn therefrom” in Relators’ favor. *Peterson*, 34 Ohio St. 2d at 165-66. Respondents ignore this rule as well, citing “facts” beyond the pleadings and asking the Court to draw inferences in their favor. For example, Respondents contend that Relators cannot justify the date of their filing based at all on “the need for expert review of the districts” in the enacted plan. Motion at 5. That claim finds no support in the pleadings, and certainly could not be reached drawing all reasonable inferences in Relators’ favor. Even if the Court chose to look beyond the pleadings, it would see that the claim is simply false. *See Murray Aff.* ¶¶ 3-4. Respondents also claim that “Relators had knowledge of the alleged wrong on September 30, 2011,” Motion at 6, ignoring that Relators did not become aware of their potential Open Meeting Act claim until the OCAR report was released in December and were not sure which subdivision splits in the enacted plan actually violated Article XI until completing their analysis in December. *Murray Aff.* ¶ 3, 6.

Of course, the amount of time that passed between Respondents’ adoption of the Plan and Relators’ complaint is clear on the face of the pleadings, but that does nothing to resolve this motion. To begin with, Relators strenuously dispute that they had sufficient knowledge at the moment of the Plan’s adoption to pursue either of their claims. But even if they did, laches can only apply where there is prejudice, and this Court has consistently emphasized that “[p]rejudice is not inferred from a mere lapse of time.” *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St. 3d 143, 145 (1995) (citing *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Educ.*, 71 Ohio St. 3d 26, 35 (1994)). And the mere date of Relators’ filing, more than two

months before the upcoming election, is certainly not sufficient to show prejudice. *See, e.g., State ex rel. Rife v. Franklin Cty. Bd. of Elections*, 70 Ohio St. 3d 632, 635 (1994) (declining to apply laches when complaint was filed “more than two months before an election”).

In short, the application of laches depends crucially on the facts, and motions for judgment on the pleadings, like this one, “are specifically for resolving questions of law.” *Midwest Pride IV*, 75 Ohio St. 3d at 570. Looking at the pleadings and construing all reasonable inferences in Relators’ favor, there is no basis for applying laches here. As a result, Respondents’ motion should be denied.

### **C. Relators’ Claims Are Not Barred By Laches.**

Even if the Court chooses to look beyond the pleadings and were to conclude that laches could apply in a case of such public importance, Respondents’ argument would still fail because none of the elements of laches is present here. Respondents’ principal argument is that Relators waited too long to file their Complaint. *See, e.g.,* Motion at 2 (“Relators’ complaint is barred by the doctrine of laches because Relators waited an unreasonable amount of time to bring this lawsuit, knowing that the March 6, 2012 election was approaching.”). But that argument simply misrepresents the facts and relies entirely on easily distinguishable cases.

#### **1. Relators Did Not Have Knowledge of All of Their Claims Until Just Weeks Before Filing.**

Respondents place great emphasis on the fact that the Plan was adopted on September 30, 2011. But that is not when the clock started running for laches purposes. To avoid laches, plaintiffs must bring their claims within a reasonable amount of time *after they have knowledge of the basis of their claims*. *See, e.g., State ex rel. SuperAmerica Group v. Licking Cty. Bd. of Elections*, 80 Ohio St. 3d 182, 186 (1997) (relator’s claim ripened when “it had knowledge of the basis of its claims”); *see also White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (“An inexcusable or unreasonable delay may occur only after the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action.”).

As explained above, Relators did not know which of their Article XI claims were viable until they had carefully analyzed, with the help of expert assistance, which apparent violations were avoidable and which were not. Though Relators retained two experts to analyze potential claims, and their work began in October, it was not until early December that their work was sufficiently advanced to allow Relators to understand the full scope and breadth of the Plan's breathtaking unconstitutionality. Murray Aff. ¶ 3. Thus, only then did Relators know what they needed to know to make their constitutional claims in good faith. And again, Relators had no knowledge of the basis of their claims under the Open Meeting Act until the OCAR report was issued in mid-December. *Id.* ¶ 6. The upshot is that Relators were obligated to file their Complaint within a reasonable time after mid-December, which they undoubtedly did. *See, e.g., Stoll*, 117 Ohio St. 3d at 79 (delay of several months from notice of challenged action was reasonable in light of relators' need to investigate case and secure counsel).

**2. Relators Did Not Unreasonably or Inexcusably Delay In Filing This Lawsuit.**

Even if the clock started running for laches purposes on September 30, 2011, Relators' claims would still be timely. Respondents insinuate that Relators simply slept on their rights from September 30, 2011 (when the Plan was adopted), to January 4, 2012 (when Relators' Complaint was filed), "knowing that the March 6, 2012 election was approaching." Motion at 2. That is misleading at best. In fact, Relators were diligently preparing this case from the moment the Plan was adopted. But this is no simple lawsuit. The legal rules governing apportionment in Ohio are detailed and extensive, and the number of divided subdivisions around the state was staggering, requiring Relators to engage in an intensive and time-consuming review of all of the districts affected by the Plan before deciding which to challenge. Many aspects of that review required expert analysis. *See* Murray Aff. ¶¶ 3-4.<sup>5</sup> In addition, after some Relators identified the

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<sup>5</sup> Respondents contend that "Relators cannot argue that the delay was caused by the need for expert review of the districts" because the "conclusory affidavit filed simultaneously in support of the complaint did not provide any detail about individual districts and what facts made those districts unconstitutional." Mot. at 5. This argument is, with all due respect, frivolous. Relators' detailed, 7-page affidavit is hardly "conclusory." And in any event, whether the affidavit is

Plan's unlawful districts, they could not bring suit until voters within all of those districts who were willing to bring suit to challenge them came forward. Not surprisingly, that took longer than it might have because of the notoriety of the case, the fact that Respondents are high-ranking and powerful public officials, and the extremely high number of unlawful districts created by the Plan. *See id.* ¶ 5. Ultimately, 36 Relators living in virtually all of the Plan's unlawful districts came forward, but that took time and continued up until the very moment of filing. *See id.* ¶ 8.

Moreover, it was not until mid-December that previously unavailable information about Respondents' violation of the Open Meeting Act came to light in the form of a report published by OCAR. Relators then investigated that claim as quickly as possible and incorporated it into their Complaint. *See id.* ¶ 6.

All of those events unfolded against a backdrop in which the date for Ohio's 2012 primary was constantly shifting, first to May, then to March, then potentially to June, then possibly to early May, before finally, in mid-December, settling at March again. *See id.* ¶ 7.

Given those facts, Respondents cannot plausibly claim that Relators waited too long to sue. Relators could not have brought their constitutional claims any sooner because of the time it took to lay the necessary legal and evidentiary groundwork and investigate and confirm the claims of the 36 relators. *See, e.g., Stoll*, 117 Ohio St. 3d at 79 (delay of several months from notice of challenged action reasonable in light of relators' need to investigate case and secure counsel); *see also Jeffers v. Clinton*, 730 F. Supp. 196, 202 (E.D. Ark. 1989) ("This sort of case takes an enormous amount of preparation, and it is to plaintiffs' credit that they took time to prepare it thoroughly before coming to court."). Moreover, Relators did not even know about the facts underlying their Open Meeting Act claim before the OCAR report was published in mid-December. *See Beins v. Dist. of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122,

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sufficiently detailed for Respondents' taste is beside the point; the fact remains that Relators had to engage in a substantial amount of expert analysis in order to have a good-faith basis to bring their claims.

126 (D.C. 1990) (“The period during which petitioners had no actual or constructive knowledge of the [challenged action] . . . cannot be held against them.”). It was thus more than reasonable for Relators to file their Complaint on January 4 under the circumstances and more than a little disingenuous for the Respondents to contend otherwise, for surely they would have challenged a complaint filed any sooner as insufficient, incomplete, and unsupported.

Respondents try to escape that conclusion by relying on the “expedited election cases” discussed above. *See, e.g., Owens*, 125 Ohio St. 3d 130; *Fishman*, 116 Ohio St. 3d 19; *Rust*, 108 Ohio St. 3d 139; *Landis*, 88 Ohio St. 3d 187. But this argument collapses at the very outset, with Respondents’ own admission that this is not an expedited election case. Motion at 3. But even if those cases were relevant, they are vastly different from this one in every important way. Those cases involved straightforward legal claims, simple facts, and matters of local and limited concern. *See, e.g., Rust*, 108 Ohio St. 3d at 139 (relator sought writ of mandamus to compel Lucas County Board of Elections to certify him as candidate for the Toledo Board of Education); *Fishman*, 116 Ohio St. 3d at 19 (relator sought writ of prohibition to prevent Lucas County Board of Elections from placing candidate’s name on ballot for office of Toledo municipal court judge); *Landis*, 88 Ohio St. 3d 187 (relator sought writ of mandamus to require Morrow County Board of Elections to certify him as candidate for sheriff). In contrast, this case involves a complicated factual background, complex and far-reaching claims that required extensive pre-filing investigation and analysis, important public interests affecting every eligible voter in Ohio, and a lasting impact on 11 million Ohioans over the coming decade. Given these differences, it would make little sense to look to Respondents’ cases when deciding whether Relators unreasonably delayed in filing their Complaint. Put simply, the notion that Relators could have prepared and filed this case within days or even weeks is absurd on its face and should be firmly rejected by this Court. *See* Motion at 3 (emphasizing that “[t]his Court has ‘held that a delay as brief as nine days can preclude . . . consideration of the merits’”) (quoting *Landis*, 88 Ohio St. 3d at 189).

Moreover, the relevant case law *rejects* Respondents' position. Notably, Respondents fail to identify a single case in which this Court has applied the exacting "diligence" standards articulated in its expedited election cases to dismiss an Article XI apportionment case (or any case alleging a statewide violation of Ohioans' constitutional rights). Nor have Relators discovered such a case. The reason is simple: there is no basis in law or logic for requiring parties challenging statewide apportionment plans under Article XI to bring their claims as swiftly as a party seeking to compel a local election official to discharge a ministerial duty. Indeed, it would be irresponsible to require parties to bring such complicated claims in such a short amount of time. *See Jeffers*, 730 F. Supp. at 202 ("This sort of case takes an enormous amount of preparation, and it is to plaintiffs' credit that they took time to prepare it thoroughly before coming to court.").

**3. Respondents' Claims of Prejudice Are Unpersuasive and Unsubstantiated.**

Lastly, Respondents insist that they will suffer unfair prejudice if the Court fails to dismiss Relators' claims on laches grounds. But this argument is easily dispatched. The typical grounds for a finding of prejudice in election cases are that a relator's delay in filing causes a case to fall under Supreme Court Rule 10.9 and thereby impacts the respondent's ability to reply, or that the relator's delay has interfered with the respondent's ability to prepare absentee ballots. *See, e.g., Colvin*, 120 Ohio St. 3d at 115. Neither factor is present here.

This case is not subject to the procedural restrictions of Rule 10.9 and would not have been regardless of when Relators filed. Only cases filed under Article IV, § 2 of the Constitution may be designated as expedited election cases, *see* S. Ct. R. 10.1, and this case was filed under Article XI, § 13. *Cf. Owens*, 125 Ohio St. 3d at 134 (finding no prejudice because earlier filing would have had no effect on whether case was governed by Rule 10.9). And as Respondents' discretionary motion demonstrates, the schedule set by this Court has given Respondents ample time to defend against Relators' claims.

As to Respondents' claim that reviewing this case on the merits will prejudice their ability to print and prepare ballots for the upcoming election, there are at least five responses.

First, Relators filed their Complaint more than two months before the election, *see Rife*, 70 Ohio St.3d at 635 (declining to apply laches when complaint was filed “more than two months before an election”), and the Court set a schedule that will give it sufficient time to decide the case without interfering with the election schedule unnecessarily. Of course, reaching the merits will have no effect on any deadlines if the Court ultimately rules in Respondents’ favor on the merits. And if the Court instead rules in Relators’ favor on the merits, then any burdens Respondents may have to bear will be traceable to their own conduct in enacting an unconstitutional reapportionment plan.

Second, while it is true that the January 21 deadline for preparing *military* absentee voter ballots has passed, *see* Motion at 2, 5, Relators are unaware of any case treating that deadline as dispositive. Nor would it make sense to do so, as that deadline falls a full 45 days before an election. The general absentee voter ballot deadline, which falls later, is the one this court has sometimes found relevant. But unlike past cases where this Court found prejudice, Relators here filed their complaint four weeks before the January 31 absentee ballot deadline, and briefing will be virtually complete by that deadline. *Cf. State ex rel. City of Chillicothe v. Ross Cty. Bd. of Elections*, 123 Ohio St. 3d 439, 442 (2009) (applying laches in part because general absentee ballot deadline passed *before briefing began*); *State ex rel. Carberry v. Ashtabula*, 93 Ohio St. 3d 522, 524 (2001) (applying laches where “the statutory deadline to have absentee ballots printed and ready for use . . . passed before *any merit brief* was filed”) (emphasis added). Indeed, the only brief that will remain to be filed after that deadline here (per the Court’s scheduling order) is Relators’ reply brief. And if the Court considers it material to the laches analysis, Relators are willing to forego that brief.

Third, Respondents’ claims of unfair prejudice are speculative, conclusory, and unsubstantiated. *See* Motion at 1 (bare assertion that considering merits of Relators’ claims would “create electoral chaos”); *id.* at 3 (same). It would be grossly unjust to dismiss Relators’ claims outright simply because Respondents *argue* that they *might* have to bear some unspecified burdens. *See State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St. 3d 386, 395 (2008)

(“Because the Franklin County appellants’ assertion of prejudice is at best speculative and unsupported by credible evidence or record citation, laches does not bar appellees’ mandamus claim.”); *see also Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 502 (7th Cir. 1991) (“Defendants did submit an affidavit . . . stating that confusion and additional costs would be imposed if a second primary election were required. This prejudice, even if credited, does not outweigh the plaintiffs’ right to a hearing on the merits.”).

Fourth, even if Respondents were correct that reaching the merits in this case might cause some prejudice in the March primary, they have not asserted and could not assert that it would cause prejudice in the 19 future elections—primary and general every two years—that could be governed by their unconstitutional plan. This is a fundamental and crucial distinction between this case and the cases Respondents cite—here, there is not even a claim of prejudice as to the vast majority of elections that could be affected by a merits ruling. *Cf., e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (refusing to apply laches to challenge to apportionment plan filed years after it was enacted “[b]ecause of the ongoing nature of the violation”).

Finally, Respondents’ claims of prejudice must be measured in context against the interests asserted by Relators. This is not a case about esoteric procedural rules or the outcome of a single local election. Relators allege a statewide deprivation of Ohioans’ constitutional and statutory rights on a sweeping scale involving literally dozens of improperly drawn legislative districts affecting millions of our citizens for a decade into the future. The prejudice necessary to defeat such claims assuredly must be greater than the unsupported, speculative concerns identified by Respondents. *See, e.g., Colvin*, 120 Ohio St. 3d at 115-16 (rejecting laches claim because the case “involve[d] the propriety of the *absentee voting* itself,” so “a consideration of the merits of the claim is warranted”); *O’Reilly*, 621 A.2d at 703 (courts disfavor laches “when public rights are at stake”); *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988) (“We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of

a statute as to its future operation, especially where the legislation involves a fundamental question going to the very roots of our representative form of government.”).

**D. Dismissing This Case On Laches Grounds Would Violate Fundamental Tenets of Judicial Review in Ohio and the Ohio Constitution.**

This Court has repeatedly recognized that the “fundamental tenet of judicial review in Ohio” is that “courts should decide cases on their merits.” *Owens*, 125 Ohio St. 3d at 135 (declining to apply laches in election case); *see also State ex rel. Brinda v. Lorain Cty. Bd. of Elections*, 115 Ohio St. 3d 299, 302 (2007) (same). That tenet is even more compelling in cases involving significant issues of public interest. *See, e.g., Colvin*, 120 Ohio St. 3d at 115-16. It would therefore be extremely difficult to square that fundamental tenet with a dismissal of Relators’ claims on laches grounds.

This is particularly true given that Respondents invoke the *equitable* defense of laches. “It is fundamental that he who seeks equity must do equity, and that he must come into court with clean hands.” *Christman v. Christman*, 171 Ohio St. 152, 155 (1960). Respondents plainly do not come to this Court with clean hands. Their own documents, revealed in discovery in this case, demonstrate that they were aware of many of the constitutional violations alleged here. Appendix of Exhibits to Affidavit of Lloyd Pierre-Louis at 828 (summary prepared by Respondents showing unnecessary splits of political subdivisions in enacted plan). And Respondents sought to hide these violations and the partisan considerations that motivated them by making decisions in secret, violating the Open Meeting Act.

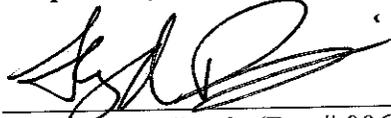
Moreover, dismissing Relators’ claims on laches grounds would undermine Article XI, § 13 of the Ohio Constitution, which vests in this Court exclusive and original jurisdiction over all apportionment cases. As this case illustrates, the nature of statewide apportionment claims makes them difficult if not impossible to file within the short time period this Court has sometimes allowed for “expedited election cases.” Thus, accepting Respondents’ unprecedented invitation to apply the strict laches standards from this Court’s “expedited election cases” in this reapportionment case would render Article XI, § 13 a nullity.

Lastly, dismissing this case on laches grounds would severely undermine Article I, § 16 of the Ohio Constitution, which “expresses the fundamental principle that wherever there is a right, there is a remedy.” *Clay v. Harrison Hills City School Dist. Bd. of Ed.*, 102 Ohio Misc. 2d 13, 19 (Ohio Ct. Com. Pl. 1999); *see also* Art. I, § 16 (“All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”).

#### IV. CONCLUSION

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *Wesberry v. Sanders*, 376 U.S. 1, 17, (1964). A case about the legality of legislative districts therefore “‘touches a sensitive and important area of human rights,’ and ‘involves one of the basic civil rights of man.’” *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942)). Respondents should not be allowed to evade questions going to “the basic civil rights” of Ohioans because they think Relators should have rushed to the courthouse without fully developing their claims. The issues in this case are too important and far reaching to rush, and too important to dismiss without evaluating on the merits, especially based on this procedurally improper motion. The rights at stake here go beyond whether to place “an issue or candidate on an election ballot” for one election, and go to the very heart of how our democracy will operate for the next decade, so “a consideration of the merits of the claim is warranted.” *Colvin*, 120 Ohio St. 3d at 115-16. “[T]he fundamental tenet of judicial review in Ohio is that courts should decide cases on their merits.” *Id.* at 116 (quoting *Becker*, 93 Ohio St. 3d at 505). This is not the case to abandon or diminish that principle.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing opposition brief and affidavit was served via e-mail this 27<sup>th</sup> day of January 2012, upon the following:

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IN THE SUPREME COURT OF OHIO

Charles E. Wilson et al.,

Relators,

v.

Governor John Kasich et al.,

Respondents.

Case No. 2012-0019

**Affidavit of Dennis E. Murray, Jr.**

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

1. I am one of the counsel for Relators in this matter and a member of the Ohio General Assembly.
2. As soon as the Apportionment Board adopted the final apportionment plan for the General Assembly on September 30, 2011, my co-counsel and I began investigating whether the Plan violated Article XI of the Ohio Constitution, the federal Voting Rights Act, and the federal requirement that districts possess roughly equal population (i.e., the one-person, one-vote principle of the Fourteenth Amendment).
3. Co-counsel and I were familiar with Article XI's requirements and this Court's cases applying Article XI. We believed that we had an obligation, before filing suit, to determine which parts of Article XI Respondents had violated and which of those violations were avoidable. This required careful investigation and analysis. For example, to determine whether

a city or county had to be divided, it was often necessary to prepare alternative maps of the same region to ensure that fixing one district did not cause unconstitutional ripple effects elsewhere. This required expert analysis, and we worked with experts beginning in October to conduct such analysis. By early December, our experts had concluded that the vast majority of the apparent Article XI violations could have been avoided, though they continued refining their work and alternative maps after that. Later, after filing the complaint, Relators found through discovery that Respondents had themselves identified many of the districts where they unnecessarily violated Article XI. Appendix of Exhibits to Affidavit of Lloyd Pierre-Louis at 828 (Summary document showing unnecessary splits of political subdivisions). But, of course, this document had not previously been available to Relators, and Respondents obviously had not admitted previously that any of the Article XI violations in the enacted plan were avoidable.

4. At the same time, we were also working with our experts to analyze potential claims under federal law, including claims under the Voting Rights Act and Fourteenth Amendment. Stating a claim under the Voting Rights Act requires establishing three “preconditions”: (1) the minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) the minority group must be “politically cohesive”; and (3) the majority must vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Our experts worked actively from October through December to analyze these factors, which required compilation and analysis of large amounts of Ohio election data.

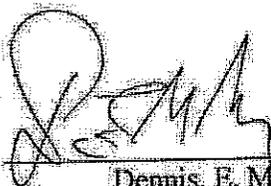
5. Our Article XI investigation had revealed by early December over three dozen districts that we believed violated the Constitution. To satisfy standing requirements, we understood that Relators would have to come forward from each of those districts. This took a great deal of time.

Many potential relators were wary of participating in a suit against Respondents, four powerful elected officials. Indeed, there are districts in the enacted plan that we believe violate Article XI but have not challenged because no one came forward in those districts who was willing to file suit against Respondents and subject themselves to potential public scrutiny.

6. As Relators were coming forward to pursue the Article XI claim, the Ohio Campaign for Accountable Redistricting (“OCAR”) published on December 12 a report and substantial evidence obtained through public record requests indicating that the enacted plan was adopted in violation of the Open Meeting Act. *See* First Affidavit of Michael McDonald, Exh. B. We had been unaware of this potential claim until the OCAR report was published, as the report exposed previously secret communications between the Joint Secretaries of the Board and the Board’s Republican members. Relators chose to investigate this claim and incorporate it into the complaint along with the constitutional claims, believing it more efficient to bring all of the challenges to the plan in one case at the same time.

7. Throughout this research and investigation, the date of the 2012 primary was constantly changing or threatened with changing. As a member of the General Assembly, I closely followed deliberations regarding the primary date. When the apportionment plan initially passed, the primary was scheduled for May. But at the end of October, the Assembly passed a bill moving the state legislative primary to March and the federal primary to June. Both dates were up in the air, however, as the Assembly debated extensively whether to move both primaries to the same date, possibly in May or June. As late as early December, leaders in the House discussed consolidating both primaries in late April or early May. It was not until December 14, when the Assembly passed a bill consolidating both primaries in March, that it became clear that the primary would actually occur then.

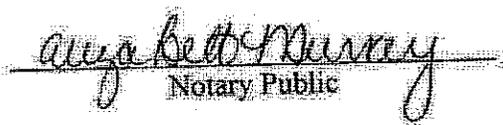
8. When the March primary date became clear, Relators were in the midst of finalizing our Article XI claims, confirming participation of Relators in all the districts challenged, and analyzing our potential Open Meeting Act claim. We knew that in an original action in this Court, the opportunities for discovery and factual development after filing would be limited, so it was crucial that we be sure of our claims and have our evidence largely compiled before filing. As soon as we had completed the legal research and expert analysis necessary to support our claims and the necessary Relators had come forward, we filed our complaint. Indeed, additional relators came forward up to and including the day we filed the complaint. Had we filed sooner, there is simply no way that we could have prepared and presented the evidence necessary to support our claims.



Dennis, E. Murray, Jr.

Signed at Sandusky,  Erie ,  Ohio   
City County State

Sworn to and subscribed before me this 26<sup>th</sup> day of January, 2012.

  
Notary Public

ELIZABETH MURRAY  
Notary Public, State of Ohio  
My Commission Expires 5/1/2012