

ORIGINAL

IN THE SUPREME COURT OF OHIO

CHARLES E. WILSON, et al.,	:	
	:	Case No. 2012-0019
Relators,	:	
	:	
v.	:	Original Action
	:	
GOVERNOR JOHN KASICH, et al.,	:	
	:	
Respondents.	:	

**MERIT BRIEF OF RESPONDENTS GOVERNOR JOHN KASICH,
SENATE PRESIDENT THOMAS E. NIEHAUS, AND AUDITOR DAVID
YOST**

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I. INTRODUCTION

To understand Ohio's complex reapportionment process, one must envision a map of Ohio changed into a giant jig-saw puzzle. The exact size and shape of certain pieces are expressly set by Article XI of the Ohio Constitution. Article XI further limits the manner in which the size and shape of other pieces may be drawn. Once these pieces are drawn, Article XI, with limited exceptions, requires that they be combined in a manner which creates exactly 99 House of Representatives districts ("house districts") and 33 Senate districts ("senate districts") within a five percent population deviation. These districts must also comply with the Fourteenth Amendment to the United States Constitution and the federal Voting Rights Act. This is no simple task.

Asserting that the legislative districts were drawn on purely partisan grounds is both incorrect and understates all of the restrictions placed upon the reapportionment process by the Ohio Constitution, the United States Constitution, and federal law. In fact, Ohio is so restrictive that it is one of the most difficult and complex states in the country in which to draft legislative districts. The individuals charged with apportioning the state must often reconcile competing interests under the Ohio Constitution, while satisfying federal requirements. Relators would have the individuals responsible for reapportioning the state rectify one alleged violation, though it may create others. But, as recognized by this Court, the Ohio Constitution vests discretion in the five individuals assigned with the task of reapportionment under Article XI, Section 1 ("Apportionment Board") to reconcile these competing provisions. *Voinovich v. Ferguson*, 63 Ohio St.3d 198, 200, 586 N.E.2d 1020 (1992).

The plan adopted by the Apportionment Board on September 30, 2011 (the "2012 Plan") fully complies with Article XI of the Ohio Constitution with the exception of one violation in

northeast Ohio, which Relators are not challenging, and which no plan submitted to Apportionment Board was able to reconcile. Relators' claims that the 2012 Plan violates Article XI essentially fall into three categories: (1) districts said to violate Section 7(A) because they are not comprised of one or more whole counties; (2) districts claimed to violate Sections 7(B) and/or (C) because they unnecessarily divide governmental units, divide more than one governmental unit between any two house districts, or fail to follow the hierarchy of dividing townships, then city wards, then cities, then villages; and (3) districts that allegedly violate Section 7(D) because they are not similar to the prior districts from the 2001 apportionment plan. Each of these claims fails.

First, the 2012 Plan complies with Section 7(A)'s requirement that, where possible, "the boundary lines of districts shall be drawn so as to delineate an area containing one or more whole counties." Each of Ohio's 99 house districts and 33 senate districts cannot be created simply by combining one or more whole counties; some counties must be divided. Such divisions are both contemplated by the express language of Article XI, and, in some cases, required by Article XI.

Second, the legislative districts do not violate Sections 7(B) or (C). The 2012 Plan divides only 15 governmental units. Each of these divisions was required by population requirements, or other provisions of Article XI. Thus, the legislative districts do not violate Section 7(B). Additionally, the 2012 Plan does not divide more than one governmental unit between any two districts in violation of Section 7(C). Because of annexation, Ohio has numerous governmental units that are non-contiguous; portions of the governmental unit are wholly surrounded by another governmental unit. Most of Relators' claims for violations of Section 7(C) relate to governmental units where the non-contiguous portions are drawn into more than one house district. These non-contiguous portions of governmental units were not

divided by the 2012 Plan, but were divided by local government officials. Since the amendments to Article XI in 1967, no court or apportionment board in Ohio has treated the failure to reunite all non-contiguous portions of a governmental unit into a single house district as a division under Section 7(C). Only division of a *contiguous* portion of a non-contiguous governmental unit has counted as a division under Section 7(C). The 2012 Plan followed this traditional approach. Construing Section 7(C) to require the 2012 Plan to always reunite these non-contiguous portions would wreak havoc on the reapportionment process and run contrary to over 40 years of precedent by both Democratic and Republican controlled apportionment boards.

Finally, the 2012 Plan attempted, where feasible, to maintain boundaries from the 2001 apportionment plan ("2001 Plan"). But, over 60 of Ohio's 99 house districts have grown or shrunk to the extent that they no longer comply with the population requirements of Article XI, Section 3. Thus, some districts had to be changed to comply with Ohio's ever changing population. The other plans submitted to the Apportionment Board and the plans Relators' now suggest fail miserably on district continuity compared to the 2012 Plan.

The gist of Relators' argument is that the plans offered by their affiant, Michael McDonald ("McDonald Plans"), are better. But, the McDonald Plans were never presented to the Apportionment Board. And, Article XI vests the responsibility for reapportioning the state in five individuals, four of whom are Respondents in this case. Absent an express unavoidable violation of Article XI, which Relators have not shown, the 2012 Plan should not and cannot be disturbed. Relators' assertion that the violations they allege can be reconciled without creating other violations under Article XI is simply wrong. The McDonald Plans in many instances simply trade adherence to Section 7(B) with non-adherence to Section 7(D). The McDonald Plans also blatantly violate Section 7(C) by dividing more than one contiguous governmental

unit between two districts in both Hamilton and Franklin Counties. The McDonald Plans are not the panacea Relators claim, nor should this Court consider them, as Relators failed to submit them for consideration by the September 23, 2011 deadline.

Finally, Relators' Open Meetings Act claim fails. Relators present no evidence that any meetings or deliberations regarding the 2012 Plan were conducted outside of public meetings. There were four full meetings of the Apportionment Board and eleven regional hearings throughout the state, where public testimony was submitted, and suggestions from that testimony were incorporated into the plan that was adopted. The process was not secret.

II. STATEMENT OF FACTS

A. The Reapportionment Process and the Constraints of Article XI.

Following each decennial census, the State of Ohio must be reapportioned into 99 house districts and 33 senate districts. The apportionment process is set forth in Article XI of the Ohio Constitution and assigned to five individuals: (1) the governor, (2) the auditor of state, (3) the secretary of state, (4) one person chosen by the speaker of the House of Representatives and the leader in the Senate of the political party of which the speaker is a member, and (5) one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member (collectively, the "Apportionment Board"). Ohio Constitution, Article XI, Section 1. Additionally, the Legislative Task Force on Redistricting, Reapportionment, and Demographic Research ("Task Force"), a body created in R.C. 103.51, assists the Apportionment Board as requested to help it fulfill its duty to provide for the apportionment of this state for members of the general assembly. R.C. 103.51(C)(2).

The process of reapportionment begins by taking the total population of the state of Ohio and dividing it by 99, which yields the ratio of representation (i.e. the target population for each

house district). Ohio Constitution, Article XI, Section 2. (Affidavit of Raymond E. DiRossi (“DiRossi Aff.”) at ¶ 32, Evid. Vol. I, Ex. A). Counties that are within 95% to 105% of the target population must be designated as a single house district under Ohio Constitution, Article XI, Section 10(A). (*Id.* at ¶ 33). The only county that met this requirement based upon the 2010 census data was Wayne County, House District 1. (*Id.* at ¶ 33).

After that, any county between 90% and 95%, or 105% and 110%, of the target population may be designated as a single house district under Article XI, Section 10(B). (*Id.* at ¶ 34). There were four counties that met this requirement based upon the 2010 census: Richland, Wood, Allen, and Columbiana Counties. They are House Districts 2-5, respectively. (*Id.* at ¶ 34; *see also* Ex. B.19). Then, proceeding in ordered succession from the most to the least populous county, each county containing more than one whole ratio of representation shall be divided into house districts. After this step, any remaining territory within one of these counties must be combined with adjoining territory in one or more counties to form single house districts under Ohio Constitution, Article XI, Section 10(C). (*Id.* at ¶ 35). The remaining territory of the state shall be combined into house districts under Article XI, Section 10(D). (*Id.*). These limitations render Ohio one of the most restrictive states in the country when it comes to reapportionment. (Affidavit of Clark Bensen at ¶ 2, Evid. Vol. VII, Ex. S).

B. Other Federal Requirements.

Aside from the constraints of the Ohio Constitution, the reapportionment plan must also comply with the United States Constitution, including the 14th Amendment, as well as the provisions of the Voting Rights Act, 42 U.S.C. § 1973, et seq. Section 2 of the Voting Rights Act ensures that minority voters have an equal opportunity to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

C. The 2011 Apportionment Timeline.

The Ohio Constitution requires the Apportionment Board to convene every ten years between August 1st and October 1st to adopt a plan to be published no later than October 5th. Ohio Constitution, Article XI, Section 1. Preparation for the apportionment process must necessarily begin soon after data is released by the United States Census Bureau in March to meet the October 5 deadline. Once the census data was released, the Task Force worked with both Cleveland State University and Ohio University pursuant to an existing contract to obtain the data necessary for drawing a plan. The Joint Republican and Joint Democratic caucuses each received an equal amount of funding from the Task Force to use for reapportionment and redistricting efforts in 2011. (DiRossi Aff. at ¶ 8; Affidavit of Heather Mann (“Mann Aff.”) at ¶ 10, Evid. Vol. II-III, Ex. B). All receipts and invoices for these expenditures are matters of public record. (*Id.*).

To help prepare for the apportionment process, Ms. Heather Mann, Deputy Legal Counsel and Redistricting Director for the Republican caucus of the Ohio House of Representatives at the time, assisted in coordinating a group meeting in June, 2011 with Mark Braden, counsel to the Task Force, and Auditor Yost, Governor Kasich, Senate President Niehaus, Speaker Batchelder, and Secretary Husted, or their various staff. (Mann Aff. at ¶ 24). She also assisted in coordinating meetings with Auditor Yost, Governor Kasich, Senate President Niehaus, Speaker Batchelder, and Secretary Husted, or their staff, with Mark Braden and his consultant, John Morgan, on July 7, 2011. (*Id.*). These initial meetings in June and July were for the purpose of obtaining general legal advice on the Congressional redistricting and apportionment processes. (Mann Aff. at ¶ 24). At this time, it would not have been possible to prepare any plan since no computers had been purchased, and no final data required for mapping

had been received. (*Id.*). Additionally, the Apportionment Board had not yet been convened pursuant to Article XI, Section 1, and two of its five members had not yet been designated. (*Id.*).

On July 6, 2011, GIS software licenses were purchased by the Joint Republican caucuses using funds allocated by the Task Force. (Mann Aff. at ¶ 6). On July 7-8, 2011, Mr. DiRossi and Ms. Mann, who eventually entered into contracts with the Republican members of the Task Force for consulting on the preparation of a plan, received training on GIS software from John Morgan, a consultant hired by the attorney to the Task Force. (DiRossi Aff. at ¶ 9; Mann Aff. at ¶ 7). On July 15, 2011, computer equipment was purchased using funds allocated by the Task Force for reapportionment and Congressional redistricting. (DiRossi Aff. at ¶ 10; Mann Aff. at ¶ 8). On July 17, 2011, using the same funds, a hotel room at the Doubletree Hotel in downtown Columbus was leased as an office space for redistricting and reapportionment. (DiRossi Aff. at ¶ 17, Ex. 1). A room at the Doubletree Hotel in downtown Columbus was also used as an office for redistricting and reapportionment in 2001. (DiRossi Aff. at ¶ 12).

Beginning in mid-July, 2011, Mr. DiRossi and Ms. Mann sought to coordinate weekly meetings with the staff of the leaders of the Ohio House of Representatives, the Ohio Senate, the Governor's office, and eventually the Auditor, to discuss both Congressional redistricting and reapportionment. (DiRossi Aff. at ¶ 13; Mann Aff. at ¶ 11). Ultimately, due to scheduling conflicts and the lack of need, the vast majority of those "weekly" meetings were cancelled and never held. In fact, those "weekly" meetings occurred no more than 3 times from July through October, 2011. (*Id.*).

On August 1, 2011, the Republican members of the Task Force executed a contract with Capital Advantage, LLC to consult on the preparation and formulation of an apportionment plan. (DiRossi Aff. at ¶ 14, Ex. 2). Mr. DiRossi is the President and sole owner of Capital Advantage,

LLC. (*Id.* at ¶ 3). A similar contract was executed on August 5, 2011 with Policy Widgets, LLC to provide consulting on redistricting and reapportionment. (Mann Aff. at ¶ 12, Ex. 2). Ms. Mann is the President and sole owner of Policy Widgets, LLC. (*Id.* at ¶ 3). Again, the Joint Democratic caucuses had the same allocation of funds to hire consultants for use in preparing an apportionment plan.

In late August and September, some individual members of the Apportionment Board, or their staff, would occasionally, but not often, come to the Doubletree Hotel office to monitor the progress of the draft of reapportionment and Congressional redistricting plans being prepared by Mr. DiRossi and Ms. Mann. (DiRossi Aff. at ¶ 27; Mann Aff. at ¶ 25). Mr. DiRossi and Ms. Mann could recall only one occasion where two members of the Apportionment Board were at the Doubletree Hotel office at the same time. (DiRossi Aff. at ¶ 28; Mann Aff. at ¶ 26). During one time in mid-September, Auditor Yost and Senate President Niehaus were at the Doubletree Hotel office in passing, as one was arriving, and the other was leaving. (*Id.*). But, Mr. DiRossi and Ms. Mann did not participate in, or witness any discussions between Auditor Yost and Senate President Niehaus about the specifics of an apportionment plan. (*Id.*). They could recall no other time when more than one member of the Apportionment Board was present at the Doubletree Hotel office at the same time. (*Id.*). Additionally, Governor Kasich never appeared at the hotel and the Secretary of State only made an appearance once. (DiRossi Dep. at 29).

Additionally, at the occasional meetings described above, the discussion mostly focused on educating the various members, or their staff, on the constraints of the Ohio Constitution, not discussing the specifics of any maps. (DiRossi Dep. at 120). Mr. DiRossi received very few requests to change the apportionment plan, but many more questions. (*Id.* at 160). In fact, Mr.

DiRossi testified that as of September 17th, less than one week prior to its official submission and publication, a full map had not been shown to anyone. (*Id.* at 171).

Additionally, House Minority Leader Armond Budish never requested to review the progress of the reapportionment prepared by Mr. DiRossi and Ms. Mann. (DiRossi Aff. at ¶ 29). And, neither Mr. DiRossi or Ms. Mann were ever provided with any information related to the reapportionment plan drafted by the Joint Democratic caucuses until it was submitted to the Apportionment Board on September 23, 2011. (*Id.* at ¶ 30). Nor were they invited to any meetings related to the Democratic Plan. (*Id.*).

D. Meetings of the Apportionment Board.

On August 4, 2011, the Apportionment Board held its initial organizational meeting. At this meeting, Mr. DiRossi and Ms. Mann (the “Joint Secretaries”) were appointed as the Joint Secretaries to the Apportionment Board. (DiRossi Aff. at ¶ 2; Mann Aff. at ¶ 2). Many of the Joint Secretaries’ initial responsibilities were administrative in nature including organizing and preparing for the reapportionment process, as well as planning and organizing the regional public hearings to be held throughout the state. (DiRossi Aff. at ¶ 16; Mann Aff. at ¶ 14). Also, the Joint Secretaries were responsible for drafting and modernizing the proposed rules for the Apportionment Board and maintaining the official records of its activities. (*Id.*).

From August 22, 2011 through August 26, 2011, the Apportionment Board held 11 regional hearings, more than any prior apportionment board, for public testimony. (*See* Transcripts from Regional Hearings, Evid. Vol. IV-V, Exs. D-N; *see also* DiRossi Aff. at ¶ 18; Mann Aff. at ¶ 15). As established at the initial meeting of the Apportionment Board on August 4, 2011, the deadline for submitting plans to the Apportionment Board for its consideration was September 23, 2011. (DiRossi Aff. at ¶ 19; Mann Aff. at ¶ 16). In accordance with the rules

adopted by the Apportionment Board on August 4, 2011, the Joint Secretaries immediately distributed copies of the submitted plans to designated agents for each of the five members on September 23, 2011. (*Id.*).

One of the plans submitted to the Apportionment Board on September 23, 2011 was the plan prepared by the Joint Secretaries. (DiRossi Aff. at ¶ 20; Mann Aff. at ¶ 17). Although that plan is referred to here as “Joint Secretaries’ Plan” for convenience, the plan was actually prepared by Mr. DiRossi and Ms. Mann in their role as contractors with the Republican members of the Task Force. (*See* DiRossi Aff. at Ex. 2; Mann Aff. at Ex. 2). Three other plans were submitted on or before September 23, 2011. (Evid. Vol. II, Exs. B.3 and B.5). Two were from the “winners” of the “Draw the Line Ohio” contest put on by the Ohio Campaign for Accountable Redistricting (“OCAR”). (*Id.* at Ex. B.3). These plans are referred to as the “Clarke Plan” and the “Fortner Plan.” The other plan was submitted by the Joint Democratic caucuses (the “Democratic Plan”). (Evid. Vol. II, Ex. B.5; DiRossi Aff. at ¶ 21; Mann Aff. at ¶ 18).

On September 26, 2011, the Apportionment Board heard testimony on all four of the submitted plans. (*See* 9.26.11 Transcript, Evid. Vol. VI, Ex. O; *see also* DiRossi Aff. at ¶ 22; Mann Aff. at ¶ 19). On September 28, 2011, the Apportionment Board considered amendments to the Joint Secretaries’ Plan. (*See* 9.28.11 Transcript, Evid. Vol. VI, Ex. P; *see also* DiRossi Aff. at ¶ 23; Mann Aff. at ¶ 20). The Apportionment Board voted 5-0 to adopt a technical amendment to the Joint Secretaries’ Plan. (Mann Aff. at ¶ 20). The technical amendment did not change the boundaries of any districts. (*See* Technical Amendment, Evid. Vol. II, Ex. B.6; *see also* DiRossi Dep. at 220). Amendment A relating to changes to senate districts in Cuyahoga County and other house districts was also proposed. (*See* Amendment A, Evid. Vol. II, Ex. B.7; *see also* DiRossi Aff. at ¶ 23; Mann Aff. at ¶ 20). Due to suggestions and considerable

discussion with House Minority Leader Armond Budish during the September 28 meeting, Amendment A was amended to remove the changes to the senate districts in Cuyahoga County and adopted on a 4-1 vote. (Mann Aff. at ¶ 20). The resulting plan was then adopted as amended on a 4-1 vote. (See 2012-2022 Ohio Apportionment Plan as amended and engrossed on September 28, 2011, Evid. Vol. VI, Ex. Q; *see also* DiRossi Aff. at ¶ 23; Mann Aff. at ¶ 20).

The Apportionment Board held an emergency meeting on September 30, 2011 to consider an amendment (Amendment B) dealing with two senate districts in Cuyahoga and Lake Counties. (See 9.30.11 Transcript, Evid. Vol. VI, Ex. R; Amendment B, Evid. Vol. II, Ex. B.8; DiRossi Aff. at ¶ 24; Mann Aff. at ¶ 21). This amendment was a specific request of Democratic Representative Sandra Williams, who also serves as the Chairwoman of the Ohio Legislative Black Caucus. (See 9.29.11 Press Release of Rep. Williams, Evid. Vol. II, Ex. B.10; *see also* DiRossi Aff. at ¶ 24; Mann Aff. at ¶ 21). The Apportionment Board adopted Amendment B and the 2012 Plan on September 30, 2011 on a 4-0 vote. (2012-2022 Ohio Apportionment Plan as amended and engrossed on September 30, 2011, Evid. Vol. I, Ex. A.3; DiRossi Aff. at ¶ 24; Mann Aff. at ¶ 21). House Minority Leader Armond Budish was unable to attend this meeting. (Minority Leader Budish Absence Letter, Evid. Vol. II, Ex. B.11).

Neither Relators nor anyone else initiated litigation against the 2012 Plan on September 30, 2011, or at any time in 2011. Indeed, this action was not commenced until January 2012, the same month that early voting begins (January 31) with ballots reflecting the 2012 Plan Relators now challenge. And, Boards of elections have already prepared ballots for military voters which was due by January 21, 2012 (45 days before the primary election). R.C. 3509.01; R.C. 3511.04.

The timeline for the 2011 reapportionment process is very similar to that used in 2001. (See Mann Aff. at Ex. 18). In 2001, there were only 2 days between the deadline for submission

of plans (September 24, 2001) and the Apportionment Board's meeting to hear testimony on the plans (September 26, 2001). (*Id.*). In 2011, there were three days. (*Id.*). Likewise, in 1991, there were only four days between the submission deadline (September 26, 1991) and the meeting to hear testimony (September 30). (*Id.*). Due to the complexity and constraints of Article XI, including the very constrictive timeframe, the reapportionment process does not permit a lengthy period for public review.

The meetings and deliberations of the Apportionment Board were all open to the public. (DiRossi Aff. at ¶ 25; Mann Aff. at ¶ 22). And, suggestions made at public meetings and hearings were incorporated into the 2012 Plan, including (1) requests to keep Columbiana and Allen Counties whole in single house districts, (2) requests to keep whole or minimize splits of political subdivisions such as Kettering, and (3) requests from the Ohio NAACP to protect and maintain the number of African-American seats in the legislature. (*Id.*). Later in the process, the Ohio Commission on Hispanic and Latino Affairs ("OCHLA") asked that special consideration be given to the Hispanic community in Lorain and Cuyahoga Counties. (*Id.*). In particular, the OCHLA wrote a letter to Auditor Yost stating:

the Commission advises that the Apportionment Board protect the integrity of the two largest concentrations of Latinos in Ohio – in Lorain County and close by western Cuyahoga County. OCHLA urges the Apportionment Board to keep them intact in their respective Ohio House districts.

(9.26.11 OCHLA letter to Auditor Yost, Evid. Vol. II, Ex. B.12). The 2012 Plan did seek to accommodate that request. (DiRossi Aff. at ¶ 25; Mann Aff. at ¶ 22).

Although agenda scripts were provided to staff members of the Republican members of the Apportionment Board prior to the public meetings, the Apportionment Board members

deviated from the agenda scripts on multiple occasions. (DiRossi Aff. at ¶ 26; Mann Aff. at ¶ 23). This included small deviations dealing with process or order of the agenda, but also included some significant deviations. (DiRossi Aff. at ¶ 26). Thus, contrary to Relators' assertion, the outcomes of these meetings were not preordained. (Relators' Br. at 7).

Relators begin their brief with the statement that Ohio's new legislative apportionment plan is "Blatant partisan gerrymandering." Like much of the Relators' brief, it is a bold conclusory statement followed by no supporting evidence. There have been many methods proposed to the courts to identify partisan gerrymandering. See *Vieth v. Jubelirer*, 541 U.S. 267, 281-91 (2004); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 417-20 (2006) (discussing test proposed in *Vieth*, a presumption of gerrymandering when a plan "is adopted solely for partisan motivations," and a "symmetry standard" that asks "how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote"); Bernard Gorfman, *Political Gerrymandering and the Courts*, Agathon Publishing (1990). Relators provide this Court with no analysis using any of these, or any other approaches.

Relators trumpet that the 2012 Plan was "a huge victory for partisan Republican interests." (Relators' Br. at 12). This Court has been provided no evidence of a partisan gerrymander of the legislative districts. Indeed, to review the census block details of the McDonald Plans proffered by Relators, one must access the Democratic National Committee's law firm's website. As Mr. DiRossi testified, partisan interests were "much less of a consideration" and "secondary" to all the other constraints and requirements including the requirements of Article XI of the Ohio Constitution. (DiRossi Dep. at 56-57). And, whether the 2012 Plan is more favorable to Republicans will be decided by Ohio voters when they elect their respective state representatives and senators. A Republican majority apportionment board

approved the 2001 Plan, but the Republicans lost control of the House of Representatives during the ensuing decade. (Mann Dep. at 71; DiRossi Dep. at 100).

III. ARGUMENT

A. **Proposition of Law No. 1: Relators' Claims are Barred by the Doctrine of Laches.**

As explained in Respondents' Motion for Judgment on the Pleadings, Relators are not entitled to any requested relief because their Complaint is barred by the doctrine of laches. The Court should therefore rule on Respondents' Motion at the outset without reaching the merits of Relators' claims. However, in the alternative, and for the reasons stated below, Relators' claims fail on the merits.

B. **Proposition of Law No. 2: The 2012 Plan Does Not Violate Article XI of the Ohio Constitution.**

When provisions of Article XI of the Ohio Constitution are irreconcilable, the public officials designated to apportion the state by Article XI, Section 1 have the duty to choose the proper course. *Voinovich*, 63 Ohio St.3d at 200, 586 N.E.2d 1020. As the Ohio Supreme Court previously stated, it "will not order them to correct one constitutional violation by committing another." *Id.* As then Chief Justice Moyer stated in concurrence,

the apportioning persons who are required, pursuant to Section 1, Article XI of the Ohio Constitution, to draw the boundaries for legislative districts may use their discretion with respect to the application of these two sections of Article XI. Because both sections are of equal priority, there is no reason for this court to second-guess what is clearly and properly under the Constitution a political judgment by the apportioning persons.

Id. at 202 (Moyer, C.J. concurring).

Despite this clear admonition, Relators would have this Court substitute its judgment for that of the Apportionment Board. Whether a plan exists that is better in Relators' opinion is not a relevant issue. The only proper issue is whether the 2012 Plan meets the requirements of Article XI. Simply put, it does.

At times, the Apportionment Board must balance competing provisions of Article XI. (DiRossi Dep. at 135; Mann Dep. at 57). For example, Relators complain that certain house districts in the 2012 Plan violate Section 7(B) because they unnecessarily divide governmental units, whereas the McDonald Plans ostensibly demonstrate such divisions were unnecessary. But, in many instances, to avoid dividing governmental units, the McDonald Plans drastically change the borders from the 2001 Plan in violation of Section 7(D), whereas the 2012 Plan keeps them intact. The Apportionment Board has been given the discretion to determine how to reconcile these competing interests and its decisions should not be second guessed.

Likewise, the Apportionment Board must ensure that no federal rights are violated, including the Voting Rights Act. *Legislative Redistricting Cases*, 331 Md. 574, 613-614, 629 A.2d 646 (1993); *McNeil v. The Legislative Apportionment Comm'n of N.J.*, 177 N.J. 365, 379-80, 828 A.2d 840 (2003); *Nadler v. Schwarzenegger*, 41 Cal. Rptr. 3d 92, 100 (Cal. Ct. App. 2006), citing *Wilson v. Eu*, 4 Cal. Rptr. 2d 379 (Cal. 1992).

Finally, Relators ask that this Court look through a microscope at a particular district, and sometimes even a particular city, to find a violation of one particular provision of Article XI. But, the constitutionality of the 2012 Plan cannot be determined by looking at a single house district in isolation. Oftentimes, the boundaries of one district are based upon decisions that were made under a different provision of Article XI, or in a different part of the state. The Ohio Constitution provides for an ordered process for creation of districts under Section 10. The

boundaries of districts created at the end of the process are greatly affected by decisions on districts created earlier. The Apportionment Board must choose the proper course in preparing an apportionment plan, and, their exercise of that discretion does not render the 2012 Plan unconstitutional. *Voinovich*, 63 Ohio St.3d at 200, 202.

1. The 2012 Plan does not violate Ohio Constitution, Article XI, Section 7(A).

The first group of Relators' alleged violations relate to Article XI, Section 7(A). As the language of this section indicates, the Apportionment Board should strive to draw house districts that are comprised of one or more whole counties. But, by including the language "*to the extent consistent with the requirements of section 3 of this Article,*" the Ohio Constitution expressly recognizes that this is not always possible. (Emphasis added).

Section 7(A) cannot be analyzed in isolation. (DiRossi Aff. at ¶ 49). Rather, it must be analyzed in conjunction with the need to divide counties statewide to maintain population equality as required by Section 3, which states that no district shall contain a population of less than 95% nor more than 105% of the ratio of representation in the House of Representatives. (*Id.*). The population of Ohio's counties is not such that they can be combined evenly to create Ohio's legislative districts. (*Id.*). Counties must sometimes be divided to meet population requirements. (*Id.* at ¶ 50). Certain counties must be divided to create the remainder of Ohio's house districts. (*Id.* at ¶ 49). But, each house district challenged by Relators under Section 7(A) contains one or more whole counties. (*Id.*).

Section 10(A) mandates that counties with a population between 95-105% of the target population must be designated as a single house district. Normally, a house district must have a population within the five percent deviation from the target population under Section 3. But, Section 10(B) permits counties with a population between 90-110% of the target population to be

designated as a single house district. Following these rules, many house districts in northwest Ohio are light in population. (*Id.*; *see also* DiRossi Dep. at 238 (“And in northwest Ohio there are a number of districts that are drawn extremely, extremely light in their population.”)). For example, Allen County was made into a single house district under Section 10(B) though its population was 8.8 percent less than the target population. (DiRossi Aff. at ¶ 50). When certain districts are “light” in population, others must be drawn “heavy” to avoid creating more than the 99 permitted house districts. (*See* Counties with Rights Map, Evid. Vol. III, Ex. B.17).

In the 2012 Plan, because of many “light” districts in northwest Ohio, more population needed to be drawn into house districts in southeast Ohio. (*Id.*; *see also* DiRossi Dep. at 238). Portions of some counties in southeast Ohio needed to be divided to make the house districts correspondingly “heavy.” (*Id.*). This is just one example of how requirements in one part of the state, combined with the ordering process of Section 10, have a trickledown effect on districts in other parts. The specific house districts challenged by Relators under Section 7(A) are discussed more specifically below.

a. House District 70.

In House District 70, Ashland County is whole in compliance with Section 7(A). Additionally, Section 10(C) requires Medina County to be divided with the remainder joined with territory from another county(s) to make a whole house district. (Mann Aff. at ¶ 88). Pursuant to Section 10(D) and in compliance with Section 7(D), the remainder of the house district is territory from Holmes County necessary to achieve population requirements. (*Id.*).

b. House District 78.

In House District 78, Hocking and Morgan Counties are whole in compliance with Section 7(A). (Mann Aff. at ¶ 89). Additionally, Section 10(C) requires Fairfield County to be

divided and the remainder of Fairfield County to be joined with territory from another county(s) to make a whole house district. Pursuant to Section 10(D), the remainder of the house district is territory from other counties necessary to achieve population requirements. (*Id.*).

c. House District 84.

In House District 84, Mercer County is whole in compliance with Section 7(A). (Mann Aff. at ¶ 90). Pursuant to Section 10(D), the remainder of the house district is territory from other counties necessary to achieve population requirements. (*Id.*).

d. House District 91.

In House District 91, Clinton, Highland, and Pike Counties are all whole in compliance with Section 7(A). (Mann Aff. at ¶ 89). The remaining territory in Ross County is combined with House District 91 in accordance with Section 10(D). (*Id.*). If House District 91 did not include territory from Ross County, House District 92 would be too heavy in population and violate Section 3.

e. House Districts 94 and 95.

In House District 94, Meigs County is whole in compliance with Section 7(A). (Mann Aff. at ¶ 92). The remaining territory in Athens, Vinton, and Washington Counties is combined to form a whole house district in accordance with Section 10(D). (*Id.*). In House District 95, Carroll, Harrison, and Noble Counties are all whole in compliance with Section 7(A). (*Id.* at ¶ 93). The remaining territory in Belmont and Washington Counties is combined to form a whole house district in accordance with Section 10(D). (*Id.*).

2. The 2012 Plan does not violate Ohio Constitution, Article XI, Section 7(B) or (C).

The next category of alleged violations relates to Sections 7(B) and 7(C), which are largely interrelated. Section 7(B) specifies that “[w]here the requirements of section 3 of this

Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.” Section 7(C) further requires that “[w]here the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in section (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.”

Relators assert that numerous house districts violate these sections because the 2012 Plan (1) unnecessarily divides governmental units where no division was necessary, (2) divides more than one governmental unit between two house districts, or (3) fails to follow the proper hierarchy for division. Each of these claims also fails. First, a majority of Relators’ claims are related to divisions of non-contiguous governmental units. As discussed below, these *non-contiguous* governmental units were not divided by the 2012 Plan but through annexation. Second, the 2012 Plan did not unnecessarily divide *contiguous* governmental units. If any governmental unit was divided, such division was necessary to either meet population requirements, or to satisfy other requirements under Article XI including Section 7(D)’s requirement to keep boundaries similar to the prior apportionment plan.

a. The 2012 Plan did not divide the non-contiguous portions of governmental units.

To understand why a vast majority of Relators’ claims regarding their alleged violations of Sections 7(B) and (C) fail, one must first understand Ohio’s political geography. In many of Ohio’s rural areas, the co-existence of townships, cities and villages has not altered the traditional checkerboard-like design of Ohio’s geographical boundaries. (DiRossi Aff. at ¶ 36).

In many of Ohio's urban areas (and a growing number of rural areas), however, the traditional political subdivision squares have been changed significantly by annexation. (*Id.*)

Consider the contrast between Cuyahoga and Franklin Counties. In Cuyahoga County, there are approximately 57 distinct townships, cities or villages and every single one has an uninterrupted, definable border comprised of a single continuous line. (DiRossi Aff. at ¶ 37). More importantly, every precinct in those 57 governmental units is contiguous to the rest of that specific governmental unit. (*Id.*). Cuyahoga County is the state's most populous county, but none of its 11 house districts is challenged by Relators. (*Id.*). By contrast, annexation has run wild in Franklin County where there are now more than 325 non-contiguous pieces of approximately 55 distinct townships, cities, and villages. (*See* Map of Non-Contiguous Portions of Franklin County, Evid. Vol. III, Ex. B.25; DiRossi Aff. at ¶ 37). In an extreme case, Perry Township in Franklin County by itself is in 34 distinct non-contiguous pieces. (*See* Map of Perry Township, Vol. III, Ex. B.36; DiRossi Aff. at ¶ 37). These little pieces of land are wholly circumscribed by other governmental units, and trying to reunite a non-contiguous jurisdiction would lead to dividing several other governmental units. (*Id.*)

Many of Relators' asserted violations of Sections 7(B) and (C) occur when two or more non-contiguous portions of a governmental unit are in separate house districts. The 2012 Plan, however, did not divide these governmental units; the decisions to divide them were made by the local government officials over decades of annexations. (DiRossi Aff. at ¶ 39). The Apportionment Board must adopt a plan based on the geography that exists at the time of the census, which geography included numerous non-contiguous governmental units. (*Id.*), citing Ohio Constitution, Article XI, Section 6.

Relators falsely assert that construing Article XI to relieve the Apportionment Board from a duty to reunite non-contiguous portions of governmental units invites “unprecedented judicial activism.” (Relators’ Br. at 17). The 2012 Plan’s approach on this issue is consistent with all previous apportionment plans since the amendment to Article XI in 1967. (DiRossi Aff. at ¶ 41; *see also* Historical Precedent, Evid. Vol. I, Ex. A.4). In the 2001 Plan, 34 house districts had non-contiguous portions of governmental units that were not considered divided. (*Id.*). The 2001 Plan was heavily litigated (with counsel for Relators representing the plaintiffs in that litigation) and ultimately upheld, but this specific issue was never raised in that, or any other litigation. (*Id.*). In the 1991 Plan, 25 house districts had non-contiguous portions of governmental units that were not counted as divided. (*Id.*). In 1981, there were 16 similar house districts. (*Id.*). This approach was also taken in the 1971 apportionment plan. (*Id.*).

As the Affidavit of James Tilling, the Secretary to the Apportionment Board in 1991, states: “non-contiguous governmental units had been separated through annexation, especially in urban counties such as Franklin and Montgomery County” and the “1991 Ohio Apportionment Board did not interpret these non-contiguous governmental units to be divided by the process of apportionment, but rather, divided by the process of annexation.” (Tilling Aff. at ¶¶ 3-4, Evid. Vol. VII, Ex. T). Thus, this issue has confronted every single apportionment board since the current version of Article XI was adopted in 1967. These previous apportionment boards have had both Republican and Democratic majorities and they all took the same approach. The 2012 Plan follows 40 years of precedent.

Additionally, counting two non-contiguous portions of a governmental unit drawn into different house districts as a division under Sections 7(B) and (C) would not only reverse 40 years of precedent, but would wreak havoc on the apportionment process now and in the future.

The 2012 Plan contains a number of house and senate districts constructed in careful accordance with the Federal Voting Rights Act. (DiRossi Aff. at ¶ 44). If Relators' position is accepted, the delicate balance of creating these districts while simultaneously adhering to constitutional population and geographical restrictions will (1) result in fewer majority-minority districts (a district with a non-Hispanic African-American voting age population greater than 50%) being drawn, (2) jeopardize Ohio's compliance with the Federal Voting Rights Act, and (3) diminish minority communities' ability to elect candidates of their choice. (*Id.*). For example, in Hamilton County where three house districts are being challenged, the 2012 Plan constructed two majority-minority house districts barely reaching 50+ percent while adhering to all of Article XI's provisions. (*Id.*). The two majority-minority house districts are 50.46 percent and 50.43 percent, respectively. Using the more restrictive and unprecedented criteria that Relators suggest would make construction of these majority-minority districts difficult, if not impossible, and could lead to a claimed violation of the Voting Rights Act. (*Id.*). The same situation would likely result in Franklin County, which is home to two majority-minority house districts that could be in jeopardy under Relators' interpretation. (DiRossi Aff. at ¶ 45). The Relators' claims would substantially upset these federally required outcomes. (*Id.*).

Another example of how reuniting the non-contiguous governmental units could cause additional problems can be found in The Fortner Map, one of the two "winning" maps from the OCAR "Draw The Line Ohio" competition. (DiRossi Aff. at ¶ 46). The Fortner Map was the only map submitted to the Apportionment Board that managed to keep all but one (Perry Township) of the Franklin County governmental units with non-contiguous pieces in the same house districts. (*Id.*). In doing so, however, the Fortner Plan purposely divides a great number of

contiguous Columbus City wards in nine house districts in direct violation of Section 7(C)¹. (*Id.*; *see also* Fortner Map of Franklin County, Evid. Vol. I, Ex. A.9). And, the Fortner Plan only created one majority-minority district whereas the 2012 Plan created two. (*Id.*). Thus, it would be difficult, if not impossible, to reunite the non-contiguous portions of a governmental unit into the same house district in all cases while also meeting all other requirements under Article XI and federal law. Therefore, the Court should not accept Relators' interpretation and reject 40 years of precedent from prior Republican and Democratic drawn apportionment plans. Each of the allegations of Section 7(B) and (C) violations involving non-contiguous subdivisions fail. In each of the named districts, the 2012 Plan divides only one governmental unit between any two districts, or no governmental unit at all. (Mann Aff. at ¶¶ 37-85).

b. Alleged 7(B) and (C) violations of contiguous governmental units.

The 2012 Plan, consistent with previous apportionment plans, granted the *contiguous* portions of a non-contiguous governmental unit the constitutional protections of Article XI. (DiRossi Aff. at ¶ 40). That is, if a contiguous portion of a non-contiguous governmental unit is divided, it is considered divided by the Apportionment Board under Article XI of the Ohio Constitution, and no other governmental unit was divided in that house district. (*Id.*). But, Relators assert that the 2012 Plan inappropriately (1) divides contiguous governmental units when no division was necessary in violation of Section 7(B), (2) divides more than one contiguous governmental unit between two house districts in violation of Section 7(C), or (3) fails to follow the hierarchy in Section 7(C) when a division is necessary. Each of these claims

¹HD 16 splits 8 Columbus City wards; HD 17 splits 16 Columbus City wards; HD 18 splits 7 Columbus City wards; HD 19 splits 9 Columbus City wards; HD 20 splits 5 Columbus City wards; HD 21 splits 4 Columbus City wards; HD 23 splits 14 Columbus City wards; HD 24 splits 10 Columbus City wards; HD 25 splits 11 Columbus City wards. (Fortner Plan, Evid. Vol. II, Ex. B.3).

fails. Further, despite Relators' assertion, the McDonald Plans do not reconcile these alleged violations without creating additional violations of the Ohio Constitution. In most cases, though the McDonald Plans constructed a map without some of these divisions, the McDonald Plans drastically alter the boundaries of the house districts from the 2001 Plan potentially violating Section 7(D). And, in Franklin County, the McDonald Plans do not even correct the alleged violations. (McDonald Aff. at Exs. A-18 and B-18).

(i) House Districts 55 and 57 – North Ridgeville.

Section 10(C) requires Lorain County to be split into two house districts because of its population. (*See* Reference Sheet of 88 Counties Ratios of Representation (“Reference Sheet”), Evid. Vol. III, Ex. B.20). To form three complete house districts and one senate district, and in order to comply with Section 7(A), Huron County in its entirety was combined with Lorain County. The population of these two counties is a combined 360,982 and is over the target population for three house districts by 11,392. (*Id.*) To achieve three house districts within the permitted population deviation, each district had to be drawn on average 3.25% heavy. If any one district was drawn only 1% heavy, one of the other districts might have gone over the 5% permitted deviation. Finding combinations that would create three districts each within the required population deviation was exceedingly difficult. The 2012 Plan solves this problem by dividing North Ridgeville.

In these two challenged house districts, there is another factor that Relators completely ignore. There is a concentrated Hispanic community in Lorain City and in Lorain and Cuyahoga Counties in general. The Apportionment Board received correspondence from the Ohio Hispanic and Latino Affairs commission asking for special consideration of that minority population. (*See* OCHLA Letter, Evid. Vol. II, Ex. B.12). House District 56 comprises all of

Lorain City and is represented by Representative Dan Ramos, the sole Hispanic member of the House of Representatives. In the configuration adopted in the 2012 Plan, the other two districts, House Districts 55 and 57, are the two house districts that share the split of North Ridgeville, which was necessary to satisfy population requirements to honor such a request.

Similarly, the 2001 Plan divided one governmental unit in Lorain County, Elyria City, which was split on wards. (2001 Plan, Evid. Vol. I, Ex. A.8). In seeking to comply with Section 7(B), the 2012 Plan made Elyria whole. After keeping Elyria whole, and in an attempt to keep the districts similar to the 2001 plan in compliance with Section 7(D), all other geography that was in House District 56 in the 2001 Ohio Apportionment Plan was retained in new House District 56. (2012 Plan, Evid. Vol. I, Ex. A.3). Other whole governmental units were added to House District 56 to meet the population requirements of Section 3. (*Id.*). The population deviations of the other two house districts are 1.69% heavy and 4.91% heavy, respectively. (*Id.*). This configuration was used to further another goal of keeping the Hispanic community intact. The Hispanic percentage of House District 56 is 13.14%.

McDonald Plans A and B use the same two counties, Huron and Lorain, to form three house districts. (McDonald Aff. at Exs. A-18, B-18). But, those plans put adherence to the provisions of Section 7(B) over those in Section 7(D). (*Id.*). The 2012 Plan modified former House District 56 by dividing it into only two house districts (new House Districts 55 and 56) whereas McDonald Plans A and Plan B would both trifurcate former House District 56 into three districts (new House Districts 55, 56, and 57) and further add and remove territory from their 2001 borders. (*Id.*; 2001 Plan, Evid. Vol. I, Ex. A.8). And, the Hispanic voting age population (“VAP”) in House District 56 in Plan A is only 12.65% and under Plan B is 12.72%, thus diluting the Hispanic vote. (McDonald Aff. at Ex. A-17).

(ii.) House Districts 58 and 59 – Austintown Township.

Section 10(C) requires Mahoning County to be divided into two house districts because of its whole ratio of representation calculation. (Reference Sheet, Evid. Vol. III, Ex. A.20). The population of Mahoning County is 238,823, which is over the target population of two districts by 5,763. (*Id.*). To achieve two house districts within the permitted population deviation, each district had to be drawn on average 2.47% heavy. Relators allege that the two house districts in Mahoning County could have been drawn without dividing any governmental units. (Relators' Br. at 19). While looking at these districts in isolation, that is possible. To accomplish that purpose, however, would ignore the guidance of Section 7(D).

Since the 2001 Plan, Mahoning County and House District 60 (now House District 58) have lost considerable population. (List of Population Deviation after 2010 Census, Evid. Vol. III, Ex. B.22). After the census, it stood 18.34% or 21,372 people short of the target population. (*Id.*). In the 2001 Plan, Austintown Township was divided on precincts with just a few precincts being a part of then House District 60. (2001 Plan, Evid. Vol. I, Ex. A.8). The 2012 Plan keeps the boundaries of the entire district the same with the exception of Austintown Township. The 2012 Plan adds as many precincts of the previously divided Austintown Township into new House District 58 as allowable under population constraints. (*See Map Comparing 2001 HD 59 and 60 with 2012 HD 58 and 59*, Evid. Vol. III, Ex. B.69).

McDonald Plan A would again ignore Section 7(D) to satisfy Section 7(B). McDonald Plan A trades significant geography between the two districts in Mahoning County by switching Beaver Township, Columbiana City, New Middletown Village, Poland Township, Poland Village, and Springfield Township. (McDonald Aff. at Ex. A-18). McDonald Plan B is worse. This plan would trade the following territory between the two house districts: Alliance, Beaver

Township, Beloit Village, Columbiana, Goshen Township, Green Township, New Middletown Village, Poland Township, Salem City, Sebring Village, Smith Township, Springfield Township and Washington Township. (*Id.* at Ex. B-18).

(iii.) House Districts 69 and 70 – Brunswick City.

The vast majority of Medina County under the 2001 Plan was contained in former House District 69. (2001 Plan, Evid. Vol. I, Ex. A.8). With population changes, however, former House District 69 was unconstitutionally heavy in population at 12.33%. (List of Population Deviation after 2010 Census Data, Evid. Vol. III, Ex. B.22). In adjusting the boundaries of House District 69 to comply with Section 3, the 2012 Plan combines incorporated areas of the county that were more urban in population, including the cities and villages of Medina, Wadsworth, Lodi, Westfield, Seville, and Rittman, and the townships that were becoming more urban and had experienced high population growth between 2000 and 2010, such as Harrisville Township which grew by 40.59% in population and Westfield Township which grew by 30.64% in population. (DiRossi Dep. at 231-32; *see also* Evid. Vol. III, Ex. B.22).

In a growing theme, McDonald Plans A and B again trade adherence to Section 7(D) to satisfy Section 7(B). House District 69 in the 2001 Plan contained all of Ashland and Holmes Counties in addition to the remainder of the population in Medina County. (2001 Plan, Evid. Vol. I, Ex. A.8). While the 2012 Plan maintains all of Ashland County to satisfy Section 7(A), a portion of Holmes County is also retained. McDonald Plans A and B completely remove all of Holmes County from the district. (McDonald Aff. at Exs. A-18 and B-18). The 2012 Plan did not retain all of Holmes County in new House District 70 because it would have violated the population requirement of Section 3.

Also, under the 2012 Plan, new Senate District 22, which comprises these two challenged house districts, is geographically similar to former Senate District 22 under the 2001 Plan in compliance with Section 7(D). One of the other consequences of McDonald Plans A and B is that the proposed Senate District 22 would stretch from the southern border of Cuyahoga County all the way to the southernmost party of Guernsey County in Appalachia Ohio in violation of Section 7(D). (McDonald Aff. at Exs. A-19 and B-19).

(iv.) House Districts 48 and 49 – Plain Township.

Relators claim that House Districts 48 and 49 in Stark County “unnecessarily divide *contiguous* portions of Plain Township in Stark County.” (Emphasis added) (Relators Br. at 19). This is a factually incorrect statement. As stated in Ms. Mann’s affidavit, the 2012 Plan divides a contiguous portion of Plain Township between House Districts 48 and 50. (Mann Aff. at ¶ 58). The portions of Plain Township in House District 49 are *non-contiguous* to the other areas of Plain Township and are not divided by the 2012 Plan. (See Map of Plain Township, Evid. Vol. III, Ex. B.55; Mann Aff. at ¶ 58). The 2012 Plan divided contiguous portions of Plain Township between House Districts 48 and 50 for population reasons. Both of these districts are drawn on the light side (4.43% and 4.1% light, respectively), and therefore Plain Township could not have been made whole in either of these districts without creating unconstitutionally unbalanced populations.

McDonald Plans A and B concede these population issues and the need for a division. McDonald Plans A and Plan B split the City of Canton. (McDonald Aff. at ¶ 8). While Relators seemingly acknowledge that a division of some governmental unit is necessary between these districts, Relators would hold that a division of Canton City, as done by McDonald Plans A and B, was proper, but a division of Plain Township, as done by the 2012 Plan, was improper.

Conceding that division is necessary, the McDonald Plans ignore the hierarchy rules in Section 7(C) by dividing a city before a township.

Relators also state that the 2012 Plan divides four contiguous portions of governmental units in Stark County. (Relators' Br. at 19). This is also factually incorrect. Canton Township and Bethlehem Township are *non-contiguous* and were not divided by the 2012 Plan. (See Maps of Canton Township and Bethlehem Township, Evid. Vol. III, Exs. B.51 and B.52; Mann Aff. at ¶ 57). The 2012 Plan only divides two *contiguous* portions of governmental units in Stark County, Plain Township and Massillon City. (Mann Aff. at ¶¶ 57-58).

(v.) House Districts 34, 36, 37, 38 and 40 – Cuyahoga Falls and Massillon City.

Relators allege that the 2012 Plan unnecessarily divides contiguous portions of Cuyahoga Falls (Summit County) into House Districts 34, 36, and 37 and Massillon City (Stark County) into House Districts 39 and 49. (Relators' Br. at 20). The divisions of these two cities are best understood together in the larger context of all other districts drawn between the two counties – Stark and Summit – paired in both the 2012 Plan and the McDonald Plans.

Section 10(C) requires Summit County to be divided into 4+ house districts because of its whole ratio of representation calculation. (Reference Sheet, Evid. Vol. III, Ex. B.20). Neighboring Stark County is also required by Section 10(C) to be divided into 3+ house districts because of its whole ratio of representation calculation. (*Id.*). Again, Relators have an isolated focus on the division of Cuyahoga Falls, asserting that, as with the McDonald Plans, Akron is the only city that should have been divided. In urban counties with a large city core surrounded by a ring of suburbs, however, how a plan divides the city (assuming it is too big to be in one house district) and complies with Section 7 impacts the construction of districts in adjacent counties.

In Summit County, the 2012 Plan barely altered the contours of former House District 45 with new House District 35, in compliance with Section 7(D). Keeping House District 45 intact (along with minimizing the divisions of Akron) required a division of Cuyahoga Falls. The McDonald Plans ignore Section 7(D) to satisfy Section 7(B) and divides Akron into three house districts. (McDonald Aff. at Exs. A-18 and B-18). Instead of dividing Akron a third time with House District 38 (a district that straddles Summit and Stark Counties) as the McDonald Plans do, the 2012 Plan divides Massillon City on the western side of Stark County with House District 38 in compliance with Section 7(C). (2012 Plan, Evid. Vol. I, Ex. A.3).

Relators' contradict their Summit County example of the "ideal" approach in an urban county in their later discussion of Franklin County. As Relators state: "In Franklin County * * * Columbus is too populous to be contained in one Ohio House district and therefore must be divided, but Respondents created far more divisions than necessary in Franklin County." (Relators' Br. at 22). But the McDonald Plans created far more divisions of Akron in Summit County than necessary in a manner that ignored Section 7(D).

(vi) House Districts 60 and 61 – Mentor City.

Lake County contains 1.974 house district ratios of representation, and, therefore, under Section 10(C) can entirely contain two whole house districts. (Reference Sheet, Evid. Vol. III, Ex. B.20). As the population barely changed between the 2000 and 2010 census, the 2012 Plan was also able to again draw two whole districts entirely within Lake County – House Districts 60 and 61. (List of Population Deviation after 2010 Census Data, Evid. Vol. III, Ex. B.22). In doing so, it also kept Lake County whole in accordance with Section 7(A).

Section 3 directs that each house district "shall be drawn *substantially* equal to the ratio of representation." By making minor changes to the district boundaries in Lake County, the

2012 Plan achieves more equal populations between these two districts. Former House District 62 had a population deviation of -4.07%, and former House District 63 had a population deviation of 1.48%. (Population Deviation from 2010 Census, Evid. Vol. III, Ex. B.22). New House District 60 has a population deviation of -3.48% and new House District 61 has a population deviation of 0.89%. This balancing of population was done without making major changes to the geography of the former house districts in accordance with Section 7(D). (See Map Comparing 2001 HD 62 and 63 with 2012 HD 60 and 61, Evid. Vol. III, Ex. B.86).

This configuration also helped bolster the Non-Hispanic Black voting age population (“VAP”) percentage in House District 60, simultaneously making Senate District 23 a stronger minority influence district. In the 2012 Plan, Senate District 25 is 37.46%, whereas McDonald Plans A and B create a senate district that is only 34.5% and 35.62%, respectively. (McDonald Aff. at Ex. A-17 and B-17). This combination of house districts to form senate districts was done with guidance from and request of Rep. Sandra Williams, Chair of the Legislative Black Caucus. (See 9.28.11. Transcript, Evid. Vol. VI, Ex. P; DiRossi Aff. at ¶ 24; Mann Aff. at ¶ 21).

(vii) House Districts 94 and 95 – Marietta City.

Relators would have the Court simply compare the city of Marietta in both McDonald Plans A and B and the city of Marietta in the 2012 Plan. But, again, this Court cannot examine this or other specific districts or areas under a microscope lens. In these largely rural areas, examining just one county will not even provide the full picture. The way house districts are drawn in one part of the state may have a profound impact on how districts are drawn in another. And, the Ohio Constitution expressly establishes the order in which house districts are to be drawn in Section 10. Under Section 10(D), house districts with less than one whole ratio of

representation, are drawn at the end of the process and are most subject to the decisions made in constructing districts in other parts of the state.

For example, a number of house districts in northwest Ohio are drawn extremely light in population for numerous geographic and constitutional reasons. The major example is Allen County which is a single county house district under Section 10(B), but is 8.8% light in population. (Reference Sheet, Evid. Vol. III, Ex. A.20). A number of other house districts in northwest Ohio are also light in population: House District 82 is 4.96% light, House District 85 is 4.46% light, and House District 87 is 4.02% light. (2012 Plan, Evid. Vol. I, Ex. A.3). Since the state can only have 99 house districts, the districts in southeast Ohio, which are some of the last district to be drawn in order per Section 10(D), must be drawn correspondingly heavy in population.

The three house districts that make up Senate District 30 (including House Districts 94 and 95) are some of the heaviest in the state. House District 96 is the heaviest house district in the state that is not a single county house district at 4.95%. House District 95 is 4.63% heavy and House District 94 is 3.54% heavy. (*Id.*). Precise geographical “surgery” is necessary to balance population in this area of the state. For this reason, dividing municipalities composed of more populous wards is more feasible than dividing townships composed of few precincts, and, often unpopulated land to balance these districts.

McDonald Plans A and B take a very different approach to solving the issues in northwest Ohio and southeast Ohio, demonstrating why viewing districts in isolation is inappropriate. McDonald Plans A and B ignore some of the longstanding and traditional constructions of house districts and senate districts throughout the state to eliminate this population crunch. Since at least 1991, the three counties of Clark, Greene and Madison have

comprised three house districts and one senate district. (1991 & 2001 Plans, Evid. Vol. I, Exs. A.7 and A.8). Under McDonald Plans A and B, this is no longer true. (McDonald Aff. at Ex. A-18 and B-18). Likewise, since at least 1981, Montgomery County has been paired with Miami County to primarily form six house districts and two senate districts. (1981, 1991, and 2001 Plans, Evid. Vol. I, Exs. A.6, A.7, and A.8). Again that is no longer true under McDonald Plans A and B. (McDonald Aff. at Ex. A-18 and B-18). These drastic changes to longstanding construction of districts elevate adherence to Section 7(B), in lieu of Section 7(D).

(viii.) House Districts 17, 18, and 19 – Columbus City Wards.

First, Relators incorrectly state that the 2012 Plan divides contiguous portions of Hilliard City. (Relators' Br. at 23). A close examination of the geography of Hilliard City shows that Hilliard City Ward 4, Precincts C & D are "touch point" contiguous to the rest of Hilliard City. The U.S. Supreme Court has noted that point-contiguity is not "contiguous" for the purposes of redistricting. *Shaw v. Reno*, 509 U.S. 630, 636 (1993). (See Map of Hilliard City, Evid. Vol. III, Ex. B.30).

Second, the 2012 Plan divided only one governmental unit, the City of Columbus, in all of Franklin County, which Relators admit in their merit brief is necessary because Columbus is too populated to be contained in one house district. (Relators' Br. at 22). Unlike McDonald Plans A and B, nowhere in Franklin County did the 2012 Plan divide any contiguous portions of townships, villages, or cities other than Columbus. (2012 Plan, Evid. Vol. I, Ex. A.3).

Highlighting the inconsistencies in Relators' arguments, 5 of the 10 house districts in Franklin County in McDonald Plans A and B form districts that contain non-contiguous portions of governmental units in addition to dividing the City of Columbus (McDonald Aff. at Exs. A-18

and B-18). Relators allege that the 2012 Plan violates Section 7(C) by not re-uniting these non-contiguous portions, but proffer a plan with the same features in Franklin County.

Furthermore, McDonald Plans A and B form districts in Franklin County that divide more than one *contiguous* governmental unit in direct violation of Section 7(C), something the 2012 Plan does nowhere in the state. House Districts 17 and 26 divide contiguous portions of the City of Columbus and Madison Township. (McDonald Aff. at A-18 and B-18). In addition, under McDonald Plan B, House Districts 19 and 20 each divide contiguous portions of the cities of Columbus and Whitehall. (*Id.* at Ex. B-18).

3. The 2012 Plan does not violate Ohio Constitution, Article XI, Section 7(D).

The 2012 Plan attempts, where feasible, to keep district boundaries similar to the 2001 Plan, while at the same time complying with population requirements, the other requirements of Article XI of the Ohio Constitution, and the requirements of the Voting Rights Act. (DiRossi Aff. at ¶ 51). But, at least 60 of the 99 house districts from the 2001 apportionment plan have either grown or shrunk to an extent that they are no longer within the Ohio Constitution's allowable five percent population deviation; thus, under Section 3, their boundaries had to be adjusted. (*Id.*). Additionally, Relators' argument that "if a preexisting district's population meets the equal population requirements of Section 3, the boundaries of that preexisting district 'shall be adopted' in the new apportionment" is incorrect. (Relators' Br. at 29). Section 7(D) has no such requirement. It only requires that boundaries established by the preceding apportionment shall be adopted to the extent "reasonably consistent with the requirements of section 3."

a. House District 91.

Former House District 86 from the 2001 Plan is almost identical to new House District 91; both plans contain all of Clinton, Highland and Pike counties. (See Map Comparing 2001 HD 86 with 2012 HD 91, Evid. Vol. III, Ex. B.88; Mann Aff. at ¶ 97). The only change is the addition of two townships in Ross County. (*Id.*). The additional townships were needed to balance population requirements of adjacent districts. (*Id.*).

b. House Districts 60 and 61.

The change in House Districts 60 and 61 helped achieve a more equal population. (Mann Aff. at ¶ 95). Former House District 62 had a population deviation of -4.07% and former House District 63 had a population deviation of 1.48%. (*Id.*). New House District 60 has a population deviation of -3.48% and new House District 61 has a population deviation of 0.89%. (*Id.*). This configuration also increased the African-American VAP percentage in House District 60, and concurrently helped to make Senate District 25 a stronger minority influence district. (*Id.*). Also, the shape of new House District 60 (2011 Apportionment) is not substantially different from previous House District 62 (2001 Apportionment). (*Id.*; see also Map Comparing 2001 HD 62 and 63 with 2012 HD 60 and 61, Evid. Vol. III, Ex. B.86).

c. House District 84.

A significant portion of former House District 77 remains in new House District 84 – all of Mercer County and a significant portion of Darke County. (Mann Aff. at ¶ 96). House districts are formed in the specific order established in Section 10. (*Id.*). House District 84 is a district (as its high number would suggest) that is formed at the end of apportionment using the “leftovers” or in the words of the Ohio Constitution, “the remainder of the state.” (*Id.*). Because previous territory was already used for other constitutionally mandated purposes, it became more

difficult to satisfy Section 7(D) with these high number districts that are drafted at the end of the process. (*Id.*). The 2012 Plan was able to retain all of Mercer county and a good portion of Darke County from the 2001 Plan. (*Id.*; *see also* Map Comparing 2001 HD 77 with 2012 HD 84, Evid. Vol. III, Ex. B.87).

4. The McDonald Plans Are Not The Panacea Relators' Claim.

Relators' brief repeatedly references the plans prepared by Mr. McDonald. These plans, however, were *not* submitted to the Apportionment Board, even though their author was an advisor to an organization that submitted two plans. (DiRossi Aff. at ¶ 46; McDoanld Affidavit filed in support of Complaint at ¶ 2). Thus, the Apportionment Board did not have the opportunity to evaluate these new plans. Now, four months later, Relators trumpet that the new McDonald Plans would solve all of the alleged constitutional deficiencies of the 2012 Plan without creating any new violations. This is simply false. While the 2012 Plan had to *balance* competing constitutional interests, it did not violate Article XI except for one place in northeast Ohio that no plan was able to reconcile. The same is not true for the McDonald Plans.

In urban areas in Franklin and Hamilton Counties, McDonald Plans A and B blatantly violate Article XI, Section 7(C). House of Representatives District 30 (Hamilton County) in both plans splits ***TWO*** contiguous political subdivisions between two house districts, Ward 23 of Cincinnati and contiguous portions of Springfield Township, something the 2012 Plan did nowhere in the state. (McDonald Aff. at Exs. A-18 and B-18; 2012 Plan, Evid. Vol. I, Ex. A.3). The same violation occurs in McDonald Plans A and B in Franklin County, where House Districts 17 and 26 divide contiguous portions of the City of Columbus and contiguous portions of Madison Township. (McDonald Aff. at Exs. A-18 and B-18). In McDonald Plan B, House Districts 19 and 20 each divide contiguous portions of the cities of Columbus and Whitehall. (*Id.* at Ex. B-18).

The McDonald Plans also have detrimental effects on minority populations in direct violation of the Voting Rights Act. Plan B creates only one majority-minority district, House District 32, in Hamilton County. Plan A creates no majority minority districts, and draws an African-American incumbent legislator with a white incumbent legislator in a district no longer a majority-minority. (See McDonald Aff. at Ex. A-17 and B-17). By contrast, the 2012 Plan draws two majority minority districts in Hamilton County without any constitutional violations.

The McDonald plans are indifferent to the requirements of Section 7(D) which Relators hide through misinterpretation. Relators' incorrectly state that Section 7(D) requires that all existing districts presently within population range be maintained in any new apportionment. (Relator's Br. at 29). Since 1967, no prior apportionment board has even interpreted this provision in this manner. Relators ask this Court again to ignore 40 years of prior practice to adopt their novel view. This argument is a diversionary tactic to mask the failures of the alternative plans presented to the Apportionment Board and the new MacDonalD Plans under Section 7(D). This provision is designed to encourage consistent representation for Ohio citizens throughout the entire plan, not single selected districts. There are simple standard mathematical measures of representational continuity which Relators not surprisingly ignore. The following two charts compare various plans in this Court's record, using three common measurements: (1) Incumbent Pairings; (2) District Core Retention; and (3) Representational Continuity.² The 2012 Plan is significantly better on each measurement.

²Descriptions – Incumbent Pairings: Districts which include the residence of more than one current member. Term-limited members are excluded from the pairs. Core Retention: the proportion of the current member's previous district that follows them to the new/proposed districts expressed as an average for all incumbents. Representational Continuity: The percentage of the population in the state that is offered an opportunity to continue representation with their current incumbent in a non-paired district. Term-limited members are designated as non-continuous and as non-pairs.

SENATE

Incumbent Pairings				
	Board	Joint-Dems	McDonald-A	McDonald-B
D-D	1	3	1	1
R-R	0	5	2	2
D-R	0	0	2	2
D-R-R	0	0	0	0
Pairs	1	8	5	5
Members	2	16	10	10

Core Retention				
	Board	Joint-Dems	McDonald-A	McDonald-B
Average	77.5	67.9	65.3	65.1

Representational Continuity				
	Board	Joint-Dems	McDonald-A	McDonald-B
% Continuity	70.7	33.5	44.2	42.8

HOUSE

Incumbent Pairings				
	Board	Joint-Dems	McDonald-A	McDonald-B
D-D	2	2	3	3
R-R	1	6	3	2
D-R	2	6	2	5
D-R-R	0	0	1	0
Pairs	5	14	9	10
Members	10	28	19	20

Core Retention				
	Board	Joint-Dems	McDonald-A	McDonald-B
Average	71.2	64.2	68.2	67.3

Representational Continuity				
	Board	Joint-Dems	McDonald-A	McDonald-B
% Continuity	58.0	41.5	50.3	50.0

(See 2012 Plan, Evid. Vol. I, Ex. A.3; McDonald Aff. at Ex. A-18 and B-18; Democratic Plan, Evid. Vol. II, Ex. B.5). Apportionment plans which combine nearly one third of the sitting members of an Ohio legislature chamber into common districts may be acceptable for an academic exercise, but not for a constitutionally determined apportionment that is part of a wider political structure.

C. Proposition of Law No. 3: Relators' Open Meetings Act Claim Fails.

Relators also fail to establish a violation of the OMA. The OMA requires public officials “to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.” R.C. 121.22(A). The OMA further provides that “a resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purposes specifically authorized” by the OMA. R.C. 121.22(H). Thus, to prevail on their OMA claim, Relators must show: (1) that the Apportionment Board simultaneously conducted a “meeting”; (2) where they “deliberated” over public business; and (3) causation: i.e., that the apportionment plan adopted by the Apportionment Board in an open meeting “*results from* deliberations in a meeting not open to the public.” (Emphasis added). R.C. 121.22(H); *accord Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 192 Ohio App.3d 566, 2011-Ohio-703, 949 N.E.2d 1032, at ¶ 11 (1st Dist.); *Berner v. Woods*, 9th Dist. No. 07CA-9132, 2007-Ohio-6207, at ¶ 17; *Bd. of Trustees of the Tobacco Use Prevention and Control Foundation v. Boyce*, 185 Ohio App.3d 707, 2009-Ohio-6993, 925 N.E.2d 641, ¶ 74 (10th Dist.) (hereinafter “*TUPCF*”) (“Besides the act of deliberation, there must be proof of causation.”), quoting *Springfield Loc. Sch. Dist. Bd. of Educ. v. Assn. of Public Sch. Employees, Local 530*, 106 Ohio App.3d 855, 865, 667 N.E. 2d 548 (9th Dist. 1995).

Relators' OMA claim fails because they cannot meet their burden of establishing by a preponderance of evidence any one of these three elements. *See Steingass Mechanical, Inc. v. Warrensville Hts. Bd. of Educ.*, 151 Ohio App.3d 321, 2003-Ohio-28, 784 N.E.2d 118, ¶ 30 (8th Dist.) (plaintiff bears the burden of proving an OMA violation by a "preponderance of the evidence"); *DeVere v. Miami Univ. Bd. of Trustees*, 12th Dist. No. CA 85-05-065, 1986 Ohio App. LEXIS 7171, *13 (June 10, 1986) (noting that it is the plaintiff that bears the initial burden of proving a violation and not the burden of the public body to prove compliance).

1. The Apportionment Board did not conduct a "meeting" out of public view.

The OMA defines a "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members." R.C. 121.22(B)(2). Thus, a "meeting" depends on three elements: (1) a prearranged discussion, (2) of the public business of the public body, and (3) the presence at the discussion of a majority of the members of the public body. *State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 543, 668 N.E.2d 903 (1996). The Court has further clarified that the OMA "does not prohibit member-to-member prearranged discussions. The statute concerns itself only with situations where a majority meets." *Id.* at 544.

Relators have presented no facts establishing that a majority of the five Apportionment Board members convened in person at the same time to discuss apportionment business in a non-public meeting. The adoption of the 2012 Plan and amendments thereto took place in four public meetings on August 4, September 26, September 28, and September 30, 2011. (*See* Transcripts of Meetings, Evid. Vol. IV, Ex. C., Vol. VI, Exs. O, P, R; DiRossi Aff. at ¶ 25). Proposals and amendments to the 2012 Plan were submitted to extensive and vigorous public questioning, including from Minority House Leader Armond Budish. (*See, e.g.*, Transcript of 9/26/11 Meeting, Evid. Vol. VI, Ex. O, pp. 57-88). From August 22 to August 26, 2011 there were

eleven regional hearings to hear public testimony. (DiRossi Aff. at ¶ 18; Evid. Vol. IV-V, Exs. D-N). The official record of proceedings demonstrates that the 2012 Plan received full public consideration before any formal action was taken.

Relators contend that a hotel room leased by the Joint Secretaries for office space “facilitated secret meetings” of the Apportionment Board members to develop the apportionment plan out of public view. (Compl. at ¶ 71). But, Governor Kasich never made an appearance at the hotel. (DiRossi Dep. at 29). Secretary Husted appeared only once. (*Id.*). And, the Joint Secretaries recall only one occasion where two members of the Apportionment Board – Auditor Yost and Senate President Niehaus – were in the hotel room at the same time. (DiRossi Aff. at ¶ 28; Mann Aff. at ¶ 26). Even then, they appeared only in passing, with one leaving as the other was arriving. (*Id.*). Neither Joint Secretary witnessed any discussion between Auditor Yost and President Niehaus about the specifics of the apportionment plan. (*Id.*). At no other time between July 17, 2011 to October 15, 2011 (the duration of the lease) was more than one member of the Apportionment Board present at the hotel while the Secretaries were in the room. (*Id.*). Relators utterly fail to establish a prearranged discussion of a majority of the Apportionment Board and thus fail to meet the requisite elements of a “meeting” under the OMA.

Moreover, the hotel was not used for the purpose of circumventing the requirements of the OMA or developing the apportionment plan in secrecy. The use of a hotel room for the apportionment process was also not a secret or new practice. The same hotel was used in the 2001 apportionment process. (DiRossi Aff. at ¶ 12; DiRossi Dep. at 24). Payment for the room came from funds made available in equal amounts to both the Republican and Democratic caucuses for apportionment and redistricting. (DiRossi Aff. at ¶ 8; Mann Aff. at ¶ 10 and Ex. 1). All receipts and invoices for such expenditures are matters of public record. (DiRossi Aff. at ¶

11; Mann Aff. at ¶ 9). In contrast to *Cincinnati Post*, there is no evidence in the record that non-public meetings were scheduled in the hotel (or anywhere else) to evade the requirements of the OMA. Cf. *Cincinnati Post*, 76 Ohio St.3d at 540, 668 N.E.2d 903 (deposition testimony established that “the reason for having fewer than a majority of members * * * at a meeting is so that we wouldn’t violate” the OMA).

In the absence of any evidence that a majority of the Board members simultaneously attended any “meetings,” Relators attempt to argue that a majority of the Respondents met separately but consecutively in back-to-back meetings with Mr. DiRossi and Ms. Mann and/or legal counsel, Mark Braden, to deliberate in secret about the plan. (Relators’ Br. at 33) (citing *Cincinnati Post*, at 542). That argument suffers from various evidentiary infirmities.

First, no evidence in the record shows that any of these alleged non-public, back-to-back meetings regarding the specifics of the 2012 Plan actually took place.³ The only evidence

³Respondents object to the Affidavit of Lloyd Pierre-Louis and its 833 pages of attachments on the grounds that the affidavit is insufficient to authenticate its attachments or to lay a foundation that they meet any exception to the ban on hearsay. See Evid.R. 901 (authentication); Evid.R. 802 (hearsay ban); Evid.R. 803 (exceptions to hearsay ban). Evidence filed in original actions in the Supreme Court must comport with the Rules of Evidence. *State ex rel. Columbia Reserve, Ltd. v. Lorain County Bd. of Elections*, 111 Ohio St.3d 167, 2006-Ohio-5019, 855 N.E.2d 815, ¶ 25; *State ex rel. Taft v. Franklin Cty. Court of Common Pleas*, 63 Ohio St.3d 190, 192-193, 586 N.E.2d 114 (1992) (granting motion to strike). In the affidavit, Mr. Pierre-Louis states only that all of the attached records, as a group, were received through discovery requests and subpoenas served on Relators and unidentified third parties. (LPL Affidavit at ¶ 2). Given that Relators fail to identify even the source of each document with particularity, Respondents will not speculate as to which hearsay exceptions Relators might invoke. Although Respondents can identify some documents, that information does not resolve the hearsay problem. For example, LPL 712 constitutes unsigned, handwritten notes. While Respondents can determine from the bates-stamp at the bottom that these notes were produced from the Auditor, Relators nonetheless must lay an evidentiary foundation to show that the notes are not hearsay. As Relators fail to identify the author or purpose of the notes, they are not admissible in evidence in this action. Relators bear the burden to establish that their evidence is admissible. *Stinson v. England*, 69 Ohio St.3d 451, 456, 633 N.E.2d 532 (1994).

submitted by Relators of back-to-back meetings relate to meetings on July 7 (Relators' Br. at 34), but no maps or plans could have been discussed at that meeting. At that time, no computer equipment had been purchased, the finalized data had not been input into any software, and the Apportionment Board had not even convened.

Other documents submitted by Relators also fail to establish that the Apportionment Board had non-public "meetings." Relators cite to various calendar entries for the proposition that "[f]rom late August to mid-September, Braden, DiRossi, and/or Mann met with each Respondent to discuss [apportionment] decisions and the resulting shape of specific districts." (Relators' Br. at 34). While these documents show that someone attempted to plan a meeting, they do not establish that any meeting took place, that Apportionment Board members attended, or that apportionment business was discussed. (*Id.* at 34-35) (citing LPL 302, 303, 311, 319-21, 330, 335-38, 349-50, 353, 721, 725, 727, 729). Indeed, testimony establishes that many meetings were cancelled, including those originally scheduled on a weekly basis to set up logistics for the apportionment and redistricting processes. (DiRossi Dep. at 33; DiRossi Aff. at ¶ 13; Mann Dep. at 16-17; Mann Aff. at ¶ 11). Because Relators fail to show by affirmative evidence that non-public meetings took place attended by any Apportionment Board member, let alone a majority, their OMA claim fails.

Finally, Relators recognize that Governor Kasich, Auditor Yost, President Niehaus, and Secretary Husted did not attend most of these alleged non-public meetings. (Relators' Br. at 35 n 3). Thus, their OMA claim rests on the theory that attendance by staff members or designees of the office holders is the same as attendance by the office holders themselves. However, the OMA requires in-person attendance at meetings and deliberations between members of the public body, not discussions that may occur among members of their respective staff. *See R.C.*

121.22(C) (“A member of a public body shall be present *in person* at a meeting open to the public to be considered present * * *”) (Emphasis added). A violation of the OMA does not occur unless there is an exchange of words, comments or ideas by the *members* of a public body *with one another*. *Cincinnati Enquirer*, 192 Ohio App.3d 566, 2011-Ohio-703, at ¶ 11; *Berner v. Woods*, 2007-Ohio-6207, at ¶ 15 (9th Dist.); *Devere* 1986 Ohio App. LEXIS 7171. Additionally, Relators’ theory would require Relators to show several things that they have not established: (1) that staff members for a majority of the Apportionment Board members attended a “meeting,” (2) that those staff members engaged in “deliberations” on the apportionment plan, (3) that they conveyed or communicated those deliberations or decisions to the Apportionment Board members themselves, and (4) that the Apportionment Board member’s own vote or decision resulted from those communications. An OMA violation requires a direct nexus with the board members themselves. Even in the context of back-to-back meetings, like the ones reviewed in *Cincinnati Post*, an OMA violation occurred because a majority of the council members *personally attended* non-public meetings where deliberations took place. 76 Ohio St.3d at 541, 668 N.E.2d 903. Thus, even if Relators could establish (which they have not) that staff members or designees of Apportionment Board members attended the purported meetings in question, attendance by such persons does not constitute a “meeting” or “deliberations” of the Apportionment Board itself.

2. The Apportionment Board did not engage in non-public “deliberations” regarding the adopted apportionment plan.

Relators also fail to establish that members of the Apportionment Board engaged in non-public “deliberations” in violation of the OMA. While the OMA does not define the term “deliberations,” courts have explained that “deliberations involve more than information-gathering, investigation, or fact-finding.” *Springfield Loc. Sch. Dist.*, 106 Ohio App.3d at 864;

TUPFC, 185 Ohio App. 3d 707, 2009-Ohio-6993 at ¶ 72. Rather, “deliberations involve a decisional analysis, i.e., an exchange of views on the facts in an attempt to reach a decision.” *TUPFC* at ¶ 72; *see also Springfield Loc. Sch. Dist.* at 864 (deliberation is “the act of weighing and examining the reasons for and against a choice or measure” or “a discussion and consideration by a number of person of the reasons for and against a measure”), citing Webster’s 3rd Int’l. Dictionary 596 (1961).

Relators mischaracterize various documents and emails as evidence of “deliberations” and decisions made out of public view. (Relators’ Br. 34-35). For example, Relators reference the July 7 meetings between various Apportionment Board members, or their staff, and Ms. Mann, Mr. DiRossi and Mr. Braden, and claim that they met to discuss the “content of the plan.” But, as of July 7, software licences had just been purchased the day before, and no computer equipment had been purchased, so no data had been loaded and Mr. DiRossi and Ms. Mann could not have even begun to prepare any maps. (Mann Aff. at ¶ 24). And, “the maps and data sets” provided at these initial meetings only showed the current population deviations of the 2001 House of Representatives districts. (Mann Dep. at 31). These maps and data sets were given to the public at the first meeting of the Apportionment Board on August 4, 2011. (Mann Dep. at 31).

Additionally, some of these documents were never shared with Apportionment Board members. Relators point to a September 4th email from Mr. DiRossi to “Respondents’ staff” as evidence that Respondents had “the goal of making final decisions about the plan well before the board official met and the plan would be unveiled.” (Relators’ Br. at 35) (citing LPL 314). However, that email was sent only to Matt Schuler and Troy Judy, chiefs of staff for the Senate and House, at that time, respectively. It does not memorialize or evidence any decisions or

deliberations made by any Apportionment Board member. The “final decisions” being referenced referred to feedback from legislative leadership who had contracted with Mr. DiRossi and Ms. Mann to prepare one of several plans to be considered by the Apportionment Board. (Mann Dep. at 52).

Relators also refer to a document that they call “DiRossi document listing decisions.” (Relators’ Br. at 34) (citing LPL 742-43). Deposition testimony establishes that this document consists of Mr. DiRossi’s own notes and thought processes. (DiRossi Dep. at 206, 210). There is no evidence in the record showing that the document was shared with Apportionment Board members. Notwithstanding Relators’ misleading title for the document, it also does not memorialize a discussion or decision by the Apportionment Board members.

Relators also point to an email dated September 1st from Ms. Mann to Mr. DiRossi stating: “attached is one of the displays that Mark Braden wants to show the principals in the meeting tomorrow.” (Relators’ Br. 34) (citing LPL 311). Relators argue that this email shows that “Braden, DiRossi, and/or Mann met with each Respondent to discuss decisions and the resulting shapes of specific districts.” (*Id.*) However, this email was not directed to any members of the Apportionment Board and relates to a draft section of the Congressional map, not the apportionment plan. (DiRossi Dep. at 128). In another email cited by Relators, Mr. DiRossi specifies that his “principals” were House Speaker Bill Batchelder and Senate President Niehaus, who contracted for Mr. DiRossi and Ms. Mann’s services on behalf of the Republican caucus of the Task Force. (DiRossi email, LPL 19; Consulting Agreements, DiRossi Aff. at Ex. 2, Mann Aff. at Ex. 2).

Furthermore, the Joint Secretaries provided script agendas before meetings to the staff of the Republican members of Apportionment Board to give procedural guidance; they do not

evidence any deliberations or decisions about apportionment. (Relators' Br. at 35-36) (citing LPL 398-401). One court found that no OMA violation occurred where two board members met with an architect in a private meeting, but the only topic discussed was what procedure would be used to introduce the architect's proposal at public meeting. *Berner*, 2007-Ohio-6207, ¶ 18. In the same way, the script agendas served a procedural function: they provided guidance as to the manner in which motions and proposals should be introduced. The script agendas did not direct the content of witness testimony or the outcome of decisions or votes made by the Apportionment Board members. (See, e.g., Script for 9/26/11 meeting, Evid. Vol. VI, Ex. O). On one occasion, a Republican member of the Apportionment Board voted with Minority Leader Budish on a proposed amendment to the rules at the August 4, 2011 meeting that other Republican members opposed. (*Id.*; see also DiRossi Aff. at ¶ 26).

3. Relators fail to establish that the adoption of the apportionment plan "resulted from" non-public deliberations.

Finally, Relators fail to establish causation: that the plan adopted by the Apportionment Board in an open meeting resulted from deliberations in a meeting not open to the public. Courts have made it clear that "[b]esides the act of deliberation, there must be proof of causation." *TUPFC*, 185 Ohio App. 3d 707, 2009-Ohio-6993 at ¶ 74, citing *Springfield Loc. Sch. Dist.* 106 Ohio App. 3d. at 865. "There must be evidence in the record that the public body arrived at its decision on the action *as a result of* non-public deliberations." (Emphasis sic.). *Springfield Loc. Sch. Dist.*, at 864-65, citing *Moraine v. Bd. of Commsrs.*, 67 Ohio St.2d 139, 145, 423 N.E.2d 184 (1981); *TUPFC*, at ¶ 74.

The record establishes that amendments to the 2012 Plan were made as a result of debate and public testimony, not private deliberations. The Apportionment Board convened in four public meetings on August 4, September 26, September 28, and September 30, 2011. The

Apportionment Board heard public testimony at all but one of those meetings. (DiRossi Dep. at 81). The Apportionment Board also held eleven regional hearings around the state to hear public testimony. (DiRossi Aff. at ¶ 18). As a result of suggestions made at these hearings, multiple changes were incorporated into the 2012 Plan. Columbiana County was kept whole and in a single house district as result of testimony from former Democrat State Representative Sean Logan (DiRossi Aff. at ¶ 25; DiRossi Dep. at 82). Allen County was also kept whole and in a single house district. (*Id.*). Political subdivisions like Kettering were kept whole or apportioned to minimize splits. (DiRossi Aff. at ¶ 25). The plan also incorporated changes as a result of requests from the Ohio NAACP to protect and maintain the number of African-American seats in the legislature. (*Id.*). Changes were also made in Lorain County in response to a request from the Ohio Commission on Hispanic and Latino Affairs, expressed by letter to Auditor Yost, asking that special consideration be given to the Hispanic community in that area. (*Id.*; 9.26.11 letter to Auditor Yost, Evid. Vol. II, Ex. B.12).

In contrast, Relators have failed to establish that any private “deliberations” resulted in changes to or the adoption of the 2012 Plan. They imply causation through circumstantial evidence – that there must have been private deliberations and prearranged acquiescence because of the lack of questions at meetings from Republican members. (Relators’ Br. at 35) (citing LPL 577-613). However, for the purposes of determining whether there is an OMA violation, “the absence of discussion on a particular issue at a public meeting does not mean the board discussed the issue privately,” particularly when the matter is an issue of public concern and discussion. *DeVere*, 1986 Ohio App. LEXIS 7171 at *11. When an issue is of widespread concern and debate, the mere fact that the subject is raised at a non-public session is “insufficient to prove

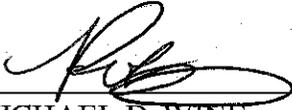
that the action was ‘deliberated to the extent that it was the cause of the public resolution.’”
Springfield Loc. Sch. Dist., 106 Ohio App.3d at 865-66.

Relators also point to the accelerated timeline for the apportionment process as evidence of prearranged decisions that obviated the need to hear testimony. Specifically, Relators argue that September 28, 2011 was “internally agreed upon long in advance” as the date at which a plan would be adopted regardless of whatever testimony might occur at the September 26th meeting. (Relators’ Br. at 35) (citing LPL 351-52). However, as explained in the same email (LPL 352), October 1 is the last date upon which the Board may convene for a meeting. *See* Ohio Constitution, Article XI, Section 1. And, the Jewish holiday of Rosh Hashanah began at sundown on September 28 and ran through September 30 so the plan needed to be adopted by September 28 in order to respect and accommodate the Jewish member of the Apportionment Board. Additionally, the timeline for the 2011 apportionment was nearly identical to that of the 2001 and 1991 apportionments. (*See* Evid. Vol. III, Ex. B.18). Thus, the goal of adopting a plan by September 28, 2011 was necessitated by this constitutional deadline, and not decided arbitrarily by the Joint Secretaries to truncate public testimony, as suggested by Relators.

IV. CONCLUSION

The Ohio Constitution provides that elected officials should reapportion the General Assembly. It is a duty they faithfully executed in 2011. For the reasons stated above, the Court should rule in favor of Respondents on all of Relators’ claims.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Merit Brief of Respondents Governor John Kasich, Senate President Thomas E. Niehaus, and Auditor David Yost* was served on this 30th day of January 2012, by electronic mail and U.S. mail, postage prepaid, to:

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