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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE COURT'S QUESTIONS	5
A. <u>Question 1</u> : The Court's Jurisdiction	5
B. <u>Question 2</u> : Whether The Board May Consider Partisan Factors	9
C. <u>Question 3</u> : The Burden Of Proof.....	14
D. <u>Question 4</u> : The Interaction of Sections 3, 7, and 11.....	19
III. CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bd. of Cmmr's of Warren Cty. v. City of Lebanon</i> , 43 Ohio St.3d 188 (1989).....	7
<i>Bretton Ridge Homeowners Club v. DeAngelis</i> , 51 Ohio App.3d 183 (Ohio Ct. App. 1988)	6
<i>Carroll v. Wash. Township Zoning Comm'n</i> , 56 Ohio St.2d 164 (1978).....	7
<i>Holt v. 2011 Legislative Reapportionment Comm'n</i> , 2012 WL 375298 (Pa. Feb. 3, 2012).....	passim
<i>In re Colorado General Assembly</i> , 2011 WL 5830123 (Colo. S. Ct. Nov. 15, 2011).....	2, 11, 17
<i>In re Legislative Districting of State</i> , 370 Md. 312 (Md. 2002).....	passim
<i>In re Reapportionment of Colorado General Assembly</i> , 45 P.3d 1237 (Colo. 2002).....	3, 15
<i>In re: Senate Joint Resolution of Apportionment 1176</i> , No. SC12-1 (Fla. S. Ct. March 9, 2012)	passim
<i>Peterson v. Teodosio</i> , 34 Ohio St.2d 161 (1973).....	8
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006).....	1, 24
<i>Schrage v. State Bd. of Elections</i> , 430 N.E.2d 483 (Ill. 1981).....	18
<i>State ex rel. Colvin v. Brunner</i> , 120 Ohio St. 3d 110 (2008).....	8, 23
<i>State ex rel. Dix v. Celeste</i> 11 Ohio St.3d 141 (1984).....	18
<i>State ex rel. Grendell v. Davidson</i> , 86 Ohio St.3d 629 (1999).....	8
<i>State ex rel. Hackworth v. Hughes</i> , 97 Ohio St.3d 110 (2002).....	8

TABLE OF AUTHORITIES
(continued)

	Page
<i>State ex rel. Herbert v. Bricker</i> , 139 Ohio St. 499 (1942).....	1, 2, 9, 11
<i>State ex rel. LetOhioVote.org v. Brunner</i> , 125 Ohio St.3d 420 (2010).....	8
<i>State ex rel. Madison v. Cotner</i> , 66 Ohio St.2d 448 (1981).....	8
<i>State ex rel. Pirman v. Money</i> , 69 Ohio St.3d 591 (1994).....	7
<i>State ex rel. Pressley v. Indus. Comm'n</i> , 11 Ohio St.2d 141 (1967).....	7
<i>Twin Falls County v. Idaho Comm'n on Redistricting</i> , 2012 WL 130416 (Idaho S. Ct. Jan. 18, 2012)	passim
<i>Voinovich v. Ferguson</i> , 62 Ohio St.3d 1224 (1992).....	5, 6
<i>Voinovich v. Ferguson</i> , 63 Ohio St.3d 198 (1992).....	passim
 CONSTITUTION, STATUTES, AND CODES	
Ill. Const. Article IV, § 3(b).....	18
Ohio Const., Article XI.....	passim
Ohio Rev. Code § 2721.12.....	2, 6, 7, 8
Ohio Civ. R. 15(A).....	8
Ohio Civ. R. 21	9

I. INTRODUCTION

“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The framers of our State’s Constitution sought to ensure the fairness of apportionment, and thus confidence in our state Legislature, by imposing detailed, neutral requirements in Article XI, requirements aimed at “the prevention of gerrymandering.” *State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 509 (1942). These requirements are not mere suggestions that can be tossed aside when politically convenient; rather, they are “mandatory.” *Id.* This is with good reason: “A fairly apportioned legislature lies at the very heart of representative democracy.” *In re Legislative Districting of State*, 370 Md. 312, 320 (Md. 2002); *see also In re: Senate Joint Resolution of Apportionment 1176*, No. SC12-1, slip op. at *6 (Fla. S. Ct. March 9, 2012) (“[T]he right to elect representatives—and the process by which we do so—is the very bedrock of our democracy.”).

As Relators have shown, Respondents unfortunately chose to ignore many of Article XI’s requirements. As their own documents show, they did so with full knowledge that their violations were unnecessary, and to achieve partisan political ends. The Court has now asked for additional briefing as to its jurisdiction, whether Respondents were allowed to consider political factors, the burden of proof, and appropriate reconciliation of Article XI’s provisions. Relators address each question in brief here and in detail below.

The Court has jurisdiction. Article XI, Section 13 gives the Court “exclusive, original jurisdiction in *all cases* arising under this Article” (emphasis added). The provision does not require naming the Apportionment Board as a party, and the Court has never before imposed such a requirement. *See, e.g., Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992); *Bricker*, 139 Ohio St. 499. The provision also does not require naming all members of the Board as respondents, and all members of the Board were not named as respondents in *Voinovich*, 63 Ohio St.3d 198, but the Court still reached the merits despite considering many other jurisdictional issues. Moreover, the Legislature may not by statute limit jurisdiction granted

to this Court by the Constitution. Even if it could, no statute bars the Court's jurisdiction here. To the extent Respondents intend to argue that Relators had to name additional parties under R.C. § 2721.12, that is simply incorrect, as that provision applies only to actions brought under Chapter 27, not to actions brought under Article XI, Section 13. In addition, Relators seek both declaratory *and injunctive* relief, and Section 2721.12 applies *only* to declaratory relief. Even if the Court did conclude that Relators' complaint should have named additional parties, the appropriate remedy would not be dismissal, but rather for the Court to allow Relators to file an amended complaint naming those parties. Relators will soon file a conditional motion to amend their complaint and an amended complaint that they would ask the Court to accept if it concludes that such amendment is necessary.

As to the Court's second question, Article XI's purpose was "the prevention of gerrymandering," and it must be interpreted by looking "not only to the letter of the constitutional provisions but to their spirit and purpose." *Bricker*, 139 Ohio St. at 508, 509. The Ohio Constitution specifically and clearly enumerates the elements that are to be considered in apportionment; partisan political advantage is not among them. The Apportionment Board should therefore not be allowed to consider political factors. But even if the Board is allowed to consider political factors, at the very least those factors may not override the express requirements of Article XI, as occurred here. As countless other states have held: "The constitution 'trumps' political considerations. Politics or non-constitutional considerations never 'trump' constitutional requirements." *In re Legislative Districting of State*, 370 Md. at 369-70; *accord In re Colorado General Assembly*, 2011 WL 5830123, at *3 (Colo. S. Ct. Nov. 15, 2011) ("[N]onconstitutional considerations . . . may be considered only after all constitutional criteria have been met.").

The Court also requested briefing as to the burden of proof. Where, as here, an apportionment plan appears on its face to contravene a constitutional requirement—e.g., by dividing a county—states across the country agree that it is the *defendant's* burden to prove

that this apparent violation was required by some other, more important rule, such as complying with federal law. *See, e.g., In re Legislative Districting of State*, 370 Md. at 368 (“We hold that the State has failed to meet its burden to establish the constitutionality of the Plan and, in particular, that in its formulation, due regard was given to natural boundaries and the boundaries of political subdivisions.”); *In re Reapportionment of Colorado General Assembly*, 45 P.3d 1237, 1249 (Colo. 2002) (requiring apportionment commission to justify division of county by “showing that less drastic alternatives could not have satisfied the equal population requirement of the Colorado Constitution”). Similarly, this Court held in *Voinovich* that a violation of one provision of Article XI may only be justified on a showing by respondents that the provision is “irreconcilable” with a “co-equal” provision of Article XI. 63 Ohio St. 3d at 200. Thus, once Relators show an apparent violation of any part of Article XI, it is Respondents’ burden to show that the violation was required by another, co-equal part of Article XI (or by federal law). *See, e.g., Twin Falls County v. Idaho Comm’n on Redistricting*, 2012 WL 130416, at *3 (Idaho S. Ct. Jan. 18, 2012) (“If one plan that complies with the Federal Constitution divides eight counties and another that also complies divides nine counties, then the extent that counties must be divided in order to comply with the Federal Constitution is only eight counties. It could not be said that dividing one more county was necessary to comply with the Constitution.”).

If the Court finds, however, that Relators bear the burden even where there is an apparent violation of law, Relators’ burden should be to show, by a preponderance of the evidence, that Respondents could have adopted a plan that contained fewer violations of Article XI. *See, e.g., id.; Holt v. 2011 Legislative Reapportionment Comm’n*, 2012 WL 375298, at *35 (Pa. Feb. 3, 2012) (striking down apportionment plan because alternative “plan shows that a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation . . . while employing significantly fewer political subdivision splits”). Given the importance of valid legislative districts, courts across the

country have rejected the idea that plaintiffs must prove a plan's invalidity beyond a reasonable doubt. *See, e.g., In re: Senate Joint Resolution of Apportionment 1176*, No. SC12-1, slip op. at *22 (Fla. S. Ct. March 9, 2012) (“We reject the assertions of the Attorney General and the House that a challenger must prove facial invalidity beyond a reasonable doubt.”). But regardless of the standard of proof and who bears it, Relators have shown this plan invalid, for Respondents themselves conceded that they committed many unnecessary violations of Article XI. *See* Appendix to Affidavit of Lloyd Pierre-Louis (“LPL Aff.”) at 828 (summary contrasting subdivisions that had to be split—labeled “Must”—with those that did not). To uphold their plan in the face of such an admission would be to abdicate the Court’s role of enforcing the law and to render Article XI a nullity.

Finally, the Court asked whether tension exists among sections 3, 7, and 10 of Article XI, and, if it does, how these sections should be harmonized. Properly read, there is little if any tension between these provisions, for the provisions themselves say how they should be reconciled. Section 3 establishes a clear rule as to the population of House districts. Section 7 meanwhile, says that, “[t]o the extent consistent with the requirements of section 3,” districts shall be composed of whole counties or other subdivisions, Art. XI, §7(a)-(c) (emphasis added), and that “district boundaries established by the preceding apportionment shall be adopted *to the extent reasonably consistent with the requirements of section 3.*” Art. XI, § 7(d). And Section 10 is expressly subordinate to sections 3 and 7, providing the order of creation and numbering of districts “*to the extent that such order is consistent with*” sections 3 and 7. In other words, Section 3 establishes a clear, dominant rule of population equality, Section 7 requires avoiding splitting political subdivisions “[t]o the extent consistent with the requirements of section 3,” and Section 10, by its terms, is subordinate to both 3 and 7. Here, not a single violation alleged by Relators was necessary to achieve compliance with another provision of Article XI.

II. THE COURT'S QUESTIONS

A. Does the Supreme Court of Ohio have jurisdiction over this case when only four of the five members of the apportionment board have been named as respondents and the board has not been named as a party?

Yes. This Court has subject matter jurisdiction over this matter under Section 13 of Article XI of the Ohio Constitution. Section 13 provides, in pertinent part:

The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any section of this Constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid.

Ohio Const. art. XI, § 13. Section 13 vests in this Court exclusive, original jurisdiction over disputes regarding “any plan of apportionment.” *Id.*; see also *Voinovich v. Ferguson*, 62 Ohio St.3d 1224, 1229 (1992) (Milligan, J., concurring in part and dissenting in part) (“The people of Ohio have invested specific, original, exclusive jurisdiction in the Ohio Supreme Court to resolve reapportionment cases.”).

This action fits comfortably within the scope of Section 13. Because it challenges a “plan of apportionment,” the suit clearly “aris[es] under” Section 13.

Moreover, the relief Relators seek is wholly within the Court’s Section 13 jurisdiction. The text of Section 13 expressly contemplates injunctive relief in the form of an order requiring “the persons responsible for apportionment . . . [to] ascertain and determine a [lawful] plan of apportionment.” Ohio Const., art. XI, § 13. The text of Section 13 also expressly contemplates declaratory relief. See *id.* (authorizing Court to “determine[] to be invalid” any portion of the Constitution relating to apportionment or “any plan of

apportionment”). As Justice Holmes explained in *Voinovich*, this Court has “the power to award declaratory relief” in a Section 13 action, and “[t]he fount of such authority is to be found in Section 13, Article XI of the Ohio Constitution.” *Voinovich*, 62 Ohio St.3d at 1225-26 (Holmes, J., concurring in part and dissenting in part); *see also Voinovich v. Ferguson*, 63 Ohio St.3d 198, 200 (1992) (granting declaratory relief in apportionment suit).

Relators’ complaint does not name the Apportionment Board as a party. Nor does it name one of the members of the Apportionment Board, Representative Armond Budish, as a respondent. Respondents may argue that the Court should therefore dismiss Relators’ complaint for lack of jurisdiction because Ohio’s declaratory judgment statute requires that “when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding.” Ohio Rev. Code § 2721.12. That argument would be wrong for at least three reasons: first, § 2721.12 is inapplicable here; second, even if § 2721.12 did apply, it would at most apply to Relators’ claims for declaratory relief, not their substantially identical claims for injunctive relief; and last, any technical defect in Relators’ complaint can be cured with minor amendments.

1. Section 2721.12 is inapplicable to this action.

Ohio courts have held that “[t]he absence of a necessary party . . . is a jurisdictional defect” when § 2721.12 applies. *Bretton Ridge Homeowners Club v. DeAngelis*, 51 Ohio App.3d 183, 185 (Ohio Ct. App. 1988). That rule is immaterial here, however, because § 2721.12 does not apply to this case for two reasons.

First, § 2721.12 applies only to actions arising “under this chapter.” R.C. § 2721.12. This case does not arise under Chapter 27. Rather, it arises directly under Section 13 of Article XI of the Ohio Constitution, the text of which grants this Court original and exclusive jurisdiction over apportionment cases and authorizes this Court to grant declaratory relief in such cases. *See* Ohio Const. art. XI, § 13 (expressly authorizing this Court to “determine[] to

be invalid” any portion of the Constitution relating to apportionment or “any plan of apportionment”); *see also infra*. The General Assembly has no power to limit or alter this Court’s original and exclusive constitutional jurisdiction. *See, e.g., State ex rel. Pirman v. Money*, 69 Ohio St.3d 591, 593 (1994) (habeas corpus statute “should not be construed as controlling [this Court’s] exercise of original jurisdiction” in habeas corpus); *State ex rel. Pressley v. Indus. Comm’n*, 11 Ohio St.2d 141, 149 (1967) (explaining that the “constitutionally granted original jurisdiction of this court . . . in mandamus cannot be abridged or limited by statutory enactment or by a rule based upon a statutory enactment”). Thus, § 2721.12 has no effect on the Court’s jurisdiction over this case.

Second, by its plain terms, § 2721.12 applies only to declaratory judgment actions challenging statutes, ordinances, or franchises. *See* R.C. § 2721.12; *see also Bd. of Cmmr’s of Warren Cty. v. City of Lebanon*, 43 Ohio St.3d 188, 189 (1989) (Section 2721.12 “applies only to cases seeking declaratory judgment which are filed . . . for the purpose of challenging the constitutionality of a statute, ordinance, or franchise.”). The apportionment plan at issue in this case is not a statute, ordinance, or franchise. Thus, § 2721.12 is inapplicable. *See Carroll v. Wash. Township Zoning Comm’n*, 56 Ohio St.2d 164, 168 (1978) (§ 2721.12 inapplicable to action challenging the constitutionality of a township resolution).

Case law confirms that § 2721.12 did not require Relators to name the Apportionment Board (nor every other conceivable individual with an interest in this case) to seek declaratory relief under Section 13. For example, in *Voinovich*, relators challenged Ohio’s 1991 apportionment plan. The relators’ complaint did not name the Apportionment Board as a respondent or as a party. Nevertheless, this Court concluded that it had jurisdiction over the suit and granted declaratory relief in the relators’ favor. *See Voinovich*, 63 Ohio St.3d at 200.

2. Section 2721.12 is inapplicable to Relators' requests for injunctive relief.

Section 2721.12's requirements apply at most to requests for declaratory relief, not requests for injunctive relief. *See State ex rel. Madison v. Cotner*, 66 Ohio St.2d 448, 449 (1981). As a result, even if § 2721.12 required dismissal of Relators' requests for declaratory relief (which it does not), *the Court would retain jurisdiction over Relators' requests for injunctive relief*. And because Relators may obtain all of the relief they seek in the form of a Section 13 injunction (which presupposes a determination of unconstitutionality, *see* Ohio Const., art. XI § 13), there is no need to consider whether § 2721.12 bars Relators' separate requests for declaratory relief. Indeed, any opinion on that score would be purely advisory. *See, e.g., State ex rel. LetOhioVote.org v. Brunner*, 125 Ohio St.3d 420, 425-426 (2010) (noting this Court's "general rules precluding advisory opinions" and preference for "judicial restraint").

3. If the Court has any doubt as to whether the Apportionment Board and Representative Budish must be made parties, it need only permit Relators to amend their complaint.

Finally, even if § 2721.12 did apply here, the omission of the Apportionment Board and Representative Budish would amount to a mere technical deficiency. That is no reason to dismiss a case of great public importance. *See, e.g., Peterson v. Teodosio*, 34 Ohio St.2d 161, 175 (1973) ("The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies."); *see also State ex rel. Colvin v. Brunner*, 120 Ohio St. 3d 110, 115-16 (2008) ("The fundamental tenet of judicial review in Ohio is that courts should decide cases on their merits."). Thus, if the Court has any doubt as to the necessity of joining the Apportionment Board and Representative Budish, it should resolve that doubt by allowing Relators to amend their complaint and join the Apportionment Board and Representative Budish. *See* Ohio Civ. R. 15(A) (leave to amend "shall be freely given when justice so requires"); *see also State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 113-14 (2002) (granting leave to amend relators' complaint); *State ex rel. Grendell v. Davidson*, 86

Ohio St.3d 629, 631-32 (1999) (same); Civ. R. 21 (“Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.”). Relators will soon file a conditional motion to amend their complaint and a proposed amended complaint that names both the Apportionment Board and Representative Budish in case the Court concludes that they must be named.

B. Does the Ohio Constitution mandate political neutrality in the reapportionment of house and senate districts?

The Ohio Constitution is best read as barring the Apportionment Board from considering partisan factors in reapportionment. At the very least, the express constitutional requirements of Article XI cannot be overridden by political factors, as occurred here. “Politics . . . never ‘trump’ constitutional requirements.” *In re Legislative Districting*, 370 Md. at 369-70.

“Prior to the Constitution of 1851, the apportionments of legislative districts had been made by the General Assembly, with the result that oftentimes political advantage was sought to be gained by the party in power.” *Bricker*, 139 Ohio St. at 508. But Ohioans rejected this system, and “Article XI was incorporated in the Constitution for the purpose of correcting the evils of former days.” *Id.* “The objective sought by the constitutional provisions was the prevention of gerrymandering.” *Id.* at 509. Moreover, the plain language of Article XI imposes a variety of mandatory considerations for drawing legislative districts; nowhere does it allow the consideration of partisan indices or other political factors.

Given this Court’s longstanding interpretation of Article XI’s “objective,” and that the provision must be read in accordance with its “spirit and purpose,” *Bricker*, 139 Ohio St. at 508, Article XI should be understood to bar the Apportionment Board from pursuing partisan goals. There can be no meaningful dispute that Respondents improperly pursued such goals here.

The direct evidence, including Respondents’ correspondence with the Board Secretaries as well as the deposition testimony and exhibits of the Board Secretaries, reflects

far more consideration of partisan goals than of any effort to comply with Article XI. *See, e.g.,* LPL Aff. 421-25 (email from Board Secretary Mann to Respondent Yost providing political indices for every district in proposed plan); 348 (email from Secretary Mann to Respondents' staff providing "a helpful analysis of pre and post proposed House Districts" and showing how many more districts in the new apportionment plan would be safe Republican seats, noting that the new plan would create a "majority of seats that lean Republican (50% or better) on 2008 Presidential numbers," and: "Previously, to retain a 50+ seat majority under 2008 Presidential year conditions, we had to win all seats above a 49.14%; now we only have to hold 50 or more seats that are 50.94% or better."); 206 (email from Secretary DiRossi to Respondents' staff circulating "a document that I am using and thought you and others may want," which showed "all 99 house seats ranked according to our unified index" and noted that Democrats "hold 6 of *our* 50%+ seats . . . , at least they do now . . .") (emphasis added); 345-47 (email from Mann to DiRossi showing change in "political index" for every district in the old and new plans); First Affidavit of Michael McDonald ("First McDonald Aff.") Exh. B at 105-06 (email from DiRossi reviewing how much the Republican Party had spent on elections in each Ohio legislative district over the past decade and saying: "[W]e have made significant improvements to many HDs on this list," "hopefully saving millions over the coming years"); DiRossi Dep. 89-90 (Board Secretary use of database to include past and future opponents of Republican State Representatives); DiRossi Dep. 97-98 (acknowledging intent to change partisan index from Democratic to Republican in certain districts); Mann Dep. 72-74 & DiRossi Dep. 171-74, Exh. 36 (Board Secretaries demonstrating how their use of partisan indices were intended to affect future elections); DiRossi Dep. at 163-64. The Constitution's framers did not intend the reapportionment process to advantage a privileged group of political incumbents and insiders at the expense of whole communities. When these sworn statements and exhibits are

considered with the plan the Board actually passed, it is clear that the Board's partisan considerations trumped the Constitution's mandates.

Even if the Court reads Article XI as allowing consideration of partisan goals, those goals plainly cannot justify violations of Article XI, as occurred here. Article XI establishes "mandatory" criteria governing apportionment. *Bricker*, 139 Ohio St. at 509. While the Board occasionally may have to compromise those criteria to comply with other Article XI criteria, or to satisfy federal law, it may not do so to achieve its members' own, non-constitutional objectives, such as partisan gain. For example, Article XI allows counties to be divided where doing so is necessary for population reasons; it does not allow counties to be divided to achieve the Board majority's partisan preferences or any other goal outside the Constitution. To hold otherwise would be to override the express will of Ohio citizens in adopting Article XI and to create a loophole wide enough to fit the most gerrymandered district through.

That is why courts around the country agree that even if an apportionment body is allowed to consider political factors, those factors may not override constitutional requirements. *See, e.g., In re Legislative Districting*, 370 Md. at 369-70 ("The constitution 'trumps' political considerations. Politics or non-constitutional considerations never 'trump' constitutional requirements."); *In re Colorado General Assembly*, 2011 WL 5830123, at *3 ("[N]onconstitutional considerations, . . . may be considered only after all constitutional criteria have been met."); *Holt*, 2012 WL 375298, at *27 ("It is true, of course, that redistricting has an inevitably legislative, and therefore an inevitably political, element; but, the constitutional commands and restrictions on the process exist precisely as a brake on the most overt of potential excesses and abuse.").

Here, however, Relators have demonstrated that political factors did "trump" constitutional rules. For example, House District 78 in the Board's plan divides Athens, Pickaway, and Muskingum Counties. First McDonald Aff. Exh. C at 43-44. These counties

do not need to be divided for any valid reason. Indeed, Muskingum and Pickaway Counties are listed as split for no valid reason *in Respondents' own analysis*, LPL Aff. at 828, and that analysis omits Athens County altogether, even though it is undeniably split in Respondents' plan. First McDonald Aff. Exh. C at 43. Moreover, Professor McDonald drew two alternative plans in which all of these counties were left whole without creating any new constitutional violations. Second Affidavit of Michael McDonald ("Second McDonald Aff.") ¶ 14, Exhs. A-5, B-5. *See also* Slagle Aff. ¶ 9 (listing District 78 as one of several drawn in violation of 7(A)). District 78's bizarre shape and multiple split counties were not motivated by any valid reason; rather, the evidence shows that Respondents and Board Secretaries Mann and DiRossi had extensive discussions about altering this and surrounding districts to achieve political objectives, including increasing Republican presence in surrounding districts and ensuring that Republican Representative Hottinger would soon have an open seat to run for the Senate. *See, e.g.*, LPL Aff. at 659-60 (DiRossi testimony that District 78 was modified at Rep. Hottinger's request to create an open Senate seat for him); *id.* at 430-31 (showing political indices for alternative versions of District 78 and surrounding districts).

Similarly, House Districts 55 and 57 in Respondents' plan both unnecessarily divide contiguous portions of the city of North Ridgeville in Lorain County. First McDonald Aff. Exh. C at 29-30. Respondents' own analysis reached this same conclusion, describing North Ridgeville as a "Contiguous Split Subdivision." LPL Aff. at 828; *see also id.* at 461 (Respondents' analysis showing that their plan "splits 15 [contiguous] political subdivisions," only five of which—"Columbus, Akron, Dayton, Toledo, Cleveland"—had to be split for population reasons). Respondents' admission is confirmed by Professor McDonald's work. Both example maps he developed not only keep North Ridgeville whole, they also avoid splitting any other political subdivisions in Lorain County and introduce no other constitutional violations. Second McDonald Aff. ¶ 9, Exhs. A-11, B-11. So why was

North Ridgeville split? Because Respondents were “looking for Republicans in Lorain County for Boose,” i.e., Republican Representative Terry Boose, who represents part of Lorain County, and “splitting North Ridgeville” was one way to ensure that they could get enough Republicans into his district to render it a safe seat. LPL Aff. at 340-41. *See also* Slagle Aff. ¶ 10 (listing districts drawn in violation of 7(B)).

As a final example, Respondents violated Section 7(D) in reapportioning the two House districts in Lake County. In the prior apportionment, Lake County contained House Districts 62 and 63. The 2010 Census showed that both of those districts fell within 5% of the ideal population for a House district in the new apportionment plan, and thus should have been left alone pursuant to Section 7(D). LPL Aff. at 92 (Redistricting Handbook for Ohio). Nonetheless, Respondents substantially revised those districts, which are renumbered 60 and 61 in the new plan. This change was not required in order to comply with any other provision of Article XI, as it was easily possible to draw a plan that would have left districts 62 and 63 intact, as demonstrated by both of Professor McDonald’s alternative plans. Second McDonald Aff. ¶ 11, Exhs. A-2, B-2. *See also* Slagle Aff. ¶ 12 (listing Districts 60 and 61 as violating Section 7(D)). Respondents nonetheless made this change, apparently to ensure that new District 61 would be a safer Republican seat than prior District 63 had been—indeed, the new district is substantially more Republican than the prior district. First McDonald Aff., Exh. B-1 at 114. Respondents’ partisan purpose was transparent: they were aware that Republicans had spent several million dollars over the prior decade helping Republican candidates in District 63, and they thought this change would “hopefully sav[e] millions” for the Republican Party this decade. *Id.* at 106 (email from DiRossi to Speaker Batchelder’s Chief of Staff).

In short, the Ohio Constitution is best read as barring the Apportionment Board from considering partisan political factors. Even if this Court determines that political factors may be considered, however, they cannot take precedence over the express mandates of Article

XI. So, for example, Article XI mandates keeping governmental units whole to the maximum possible extent. Relators have submitted two maps demonstrating that a constitutional map can be drawn with fewer than 100 divisions to governmental units. Second McDonald Aff. ¶ 4. If Respondents' map also divided governmental units fewer than 100 times, while providing more favorable partisan districts for Republicans, perhaps an argument could be made that the map was constitutional. But in this case, the Respondents gave primacy to political considerations above and in lieu of the constitutional mandates, slicing and dicing political subdivisions an unbelievable 256 times. Under no interpretation of the Ohio Constitution should Respondents' map stand.

To be clear, Relators need not prove that every—or even any—Article XI violation in the adopted plan was motivated by political goals, for an inadvertent violation of Article XI is just as unconstitutional as a violation for partisan ends. But the partisan ends that so obviously motivated many of the Article XI violations in Respondents' plan make clear that there was no valid, constitutional justification for these violations.

C. What is relators' burden in showing that a reapportionment plan is unconstitutional?

Before discussing the burden of proof, two points are critical. First, if the Court agrees with Relators that Article XI, Section 7 includes no unwritten exemption for non-contiguous subdivisions, there is no dispute that the enacted plan is invalid regardless of the burden of proof, for Respondents concede that they made no effort to avoid dividing such subdivisions and did so repeatedly and unnecessarily throughout Ohio. Thus, if the Court adheres to Section 7's plain language, it need not reach the burden of proof question. Second, Relators' claim should prevail regardless of the burden of proof because *Respondents' own documents* show that they knowingly violated Article XI by dividing political subdivisions unnecessarily. LPL Aff. at 828. To uphold the plan in the face of such evidence would be to render Article XI a nullity.

If, however, the Court finds that it must clarify the burden of proof, the proper standard is clear. Respondents admit that there are many parts of their apportionment plan that appear to violate Article XI by dividing political subdivisions or changing prior districts where no change was required, but they claim that every such apparent violation was actually required by law. In such circumstances, state supreme courts across the country agree that it is the defendant's burden to prove that the apparent violation was in fact required by some other rule, such as compliance with federal law or another element of state law. *See, e.g., In re Legislative Districting of State*, 370 Md. at 368 (“We hold that the State has failed to meet its burden to establish the constitutionality of the Plan and, in particular, that in its formulation, due regard was given to natural boundaries and the boundaries of political subdivisions.”); *In re Reapportionment of Colorado General Assembly*, 45 P.3d 1237, 1249 (Colo. 2002) (requiring apportionment commission to justify division of county by “showing that less drastic alternatives could not have satisfied the equal population requirement of the Colorado Constitution”). This Court took a similar approach in *Voinovich*, holding that a violation of one provision of Article XI may only be justified on a showing that the provision is “irreconcilable” with a “co-equal” provision of Article XI. 63 Ohio St. 3d at 200.

As these cases indicate, the proper allocation of the burden of proof is that once Relators make a prima facie showing that a district violates a provision of Article XI, the burden shifts to Respondents to show that the apparent violation was required by co-equal or more important parts of Article XI (or by federal law). *See, e.g., In re Legislative Districting of State*, 370 Md. at 368; *In re Reapportionment of Colorado General Assembly*, 45 P.3d at 1249. States that have rejected such an approach have typically done so only because their constitutional provisions—unlike Article XI, Section 13—expressly placed the burden of proof on those challenging a plan. *See, e.g., Holt*, 2012 WL 375298, at *19 (“The plain language of the Constitution requiring appellants to establish that the Final Plan is contrary to

law does not leave the door open for a shift of the burden of production or persuasion to the LRC.”).

If the Court finds, however, that Relators bear the burden even where there is an apparent violation of law, Relators’ burden should be to show, by a preponderance of the evidence, that Respondents could have adopted a plan that contained fewer violations of Article XI. *See, e.g., id.* at *35 (striking down apportionment plan because an alternative “plan shows that a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation . . . while employing significantly fewer political subdivision splits”); *Twin Falls County*, 2012 WL 130416, at *3 (“If one plan that complies with the Federal Constitution divides eight counties and another that also complies divides nine counties, then the extent that counties must be divided in order to comply with the Federal Constitution is only eight counties. It could not be said that dividing one more county was necessary to comply with the Constitution.”). Courts widely agree that in making this assessment, they may look to alternative plans presented by the parties. *See, e.g., id.; In re: Senate Joint Resolution of Apportionment 1176*, No. SC12-1, slip op. at *30-31 (Fla. S. Ct. March 9, 2012) (“The Legislature is not obligated to accept alternative plans; this Court, however, may review them to evaluate whether the Legislature’s adopted plans are contrary to law.”); *Holt*, 2012 WL 375298, at *35 (striking down adopted plan because alternative “plan show[ed] that a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation . . . as the Final Plan, while employing significantly fewer political subdivision splits”).

Here, the two alternative plans offered by Professor McDonald (as well as Respondents’ own documents) demonstrate that many of the Article XI violations in the adopted plan are utterly unnecessary. In House districts alone, the adopted map splits political subdivisions 256 times, but McDonald’s alternative maps demonstrate that there are several ways to draw a plan that splits subdivisions fewer than 100 times. Second McDonald

Aff. ¶ 4. McDonald's alternative maps contain only 95 and 99 splits. The adopted map splits counties 52 times; McDonald's maps contain only 30 county splits. The adopted map splits townships 105 times; McDonald's maps contain only 21 and 22 township splits. The adopted map splits cities 58 times; McDonald's contain only 34 and 37 city splits. And the adopted map splits city wards 41 times, while McDonald's plans each split wards only 10 times. Even if the Court accepts Respondents' view that Article XI, Section 7 contains an unwritten exception for non-contiguous subdivisions, the adopted plan contains 143 divisions of contiguous subdivisions, compared to only 74 and 75 such divisions in Professor McDonald's alternative maps. In short, regardless of the burden, it is clear that Respondents split subdivisions for partisan gain, not for any valid reason. *See, e.g.,* DiRossi Dep. 163-64 and Exh. 33 (admitting that objective was to draw more Republican-leaning districts that would save millions in Republican campaign spending).

In the face of much less evidence, courts across the country have consistently invalidated enacted apportionment plans to ensure compliance with their state constitutions. *See, e.g., Holt*, 2012 WL 375298, at *35 (striking down apportionment plan where an “alternative plan splits seven fewer counties, 81 fewer municipalities, and 184 fewer wards”); *Twin Falls County*, 2012 WL 130416, at *5 (striking down enacted plan because alternative plans showed that it was possible to draw a legal plan that split fewer counties); *In re Colorado General Assembly*, 2011 WL 5830123, at *3-4 (striking down enacted plan because Defendants' justifications for splitting counties could not withstand scrutiny and alternative plans showed that fewer county splits could have been achieved). Where, as here, an alternative plan demonstrates that greater compliance with the Constitution was possible, courts have consistently rejected attempts—like Respondents' here—to cast aspersions on minor details of an alternative plan. *See, e.g., Holt*, 2012 WL 375298, at *36 (“Turning to the LRC's complaint that the Holt [alternative] plan increases population deviation in some specific districts, even though it achieves greater population parity overall, we fail to see how

this diminishes the power of the Holt plan as proof that the Final Plan was contrary to law.”). In short, in the face of evidence even less compelling than the evidence here, courts have consistently rejected illegal apportionment plans, and this Court should do the same.

Respondents may argue that this Court should treat the apportionment plan like a statute enacted by the General Assembly and strike it down only if Relators prove beyond a reasonable doubt that the plan violates the Constitution. *See, e.g. State ex rel. Dix v. Celeste* 11 Ohio St.3d 141 (1984). That standard is inappropriate for several reasons and has been rejected by courts across the country.

First, the apportionment plan is not a statute, and because it “is not an act of the General Assembly, i.e., it was not a bill subject to legislative disclosure and debate, a general vote, adoption and presentation to the Governor for approval, or passage by a super-majority if vetoed,” “[t]here is no basis for indulging a presumption of constitutionality in these circumstances.” *Holt*, 2012 WL 375298, at *17. Second, unlike many other states, nothing in Ohio law grants an apportionment plan a presumption of validity that may be overcome only by a showing beyond a reasonable doubt. *See, e.g., id.* (rejecting deferential review because “nothing in Article II, Section 17 [the Pennsylvania provision governing judicial review of apportionment plans] requires such deference”); *cf.* Ill. Const. art. IV, § 3(b) (“An approved redistricting plan filed with the Secretary of State shall be presumed valid.”); *Schrage v. State Bd. of Elections*, 430 N.E.2d 483, 487 (Ill. 1981) (invalidating plan despite presumption of validity because district violated compactness requirement and Board offered no valid justification for the district’s shape). Finally, because the people have given this Court the responsibility to determine if an apportionment plan is lawful, the Court should not shirk that responsibility by allocating the burden of proof such that the Court must uphold a plan it believes is more likely than not illegal whenever it harbors any doubt. *See, e.g., In re: Senate Joint Resolution of Apportionment 1176*, No. SC12-1, slip op. at *22 (Fla. S. Ct. March 9, 2012) (“It is this Court’s duty, given to it by the citizens of Florida, to enforce

adherence to the constitutional requirements and to declare a redistricting plan that does not comply with those standards constitutionally invalid. We reject the assertions of the Attorney General and the House that a challenger must prove facial invalidity beyond a reasonable doubt.”).

Ultimately, whatever the Court decides as to the burden of proof and who bears it, Relators have shown this plan unconstitutional. Professor McDonald’s alternative plans make abundantly clear that there are ways Respondents could have drawn a plan that contained fewer constitutional violations, and Respondents themselves conceded that they committed many unnecessary violations of Article XI. *See* LPL Aff. at 828 (summary contrasting subdivisions that had to be split—labeled “Must”—with those that did not). To uphold their plan in the face of such an admission would be to abdicate the Court’s role of enforcing the law and to render Article XI a nullity. The Board certainly has some discretion in adopting an apportionment plan, but not the discretion to trample on Article XI. *See, e.g., Twin Falls County*, 2012 WL 130416, at *5 (invalidating plan because although “the commission must exercise discretion in various matters,” the Constitution “does not give the commission unbridled discretion in deciding how many counties to divide,” and in light of the evidence showing that fewer divisions were necessary, “this Court must observe its imperative duty fearlessly to interpret the law as made, and never permit, if it be in our power to prevent, any infraction of the Constitution which we are sworn to uphold, support and maintain”).

D. Does tension exist among sections 3, 7 and 10 of Article XI of the Ohio Constitution, and if so, how are these sections to be harmonized?

There is little if any tension between Sections 3, 7, and 10 of Article XI because the provisions themselves say how they should be harmonized. And to the extent there is any tension, it is irrelevant here, as Relators have challenged only those violations of Article XI committed by Respondents that could have been avoided without creating other violations.

Section 3 establishes a clear rule as to the population of House districts: “The

population of each house of representatives district shall be substantially equal to the ratio of representation [i.e., ideal population] . . . , and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the” ideal population, except that a district may vary from 90 to 110 percent of the ideal population if doing so allows a district to be created from a single whole county. Art. XI, §§ 3, 9.

Section 7 imposes several restrictions on drawing districts, but by its own terms it often gives way to Section 3. Section 7(A) says: “*To the extent consistent with the requirements of Section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties*” (emphasis added). Thus, the Apportionment Board must keep counties whole, *unless* they have to be divided to comply with the population requirements of Section 3, e.g., in Franklin County, where the population is too large to fit in one district.

Similarly, Section 7(B) says: “*Where 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*” (emphasis added). Thus, here again, the Board must keep political subdivisions whole *unless* they have to be divided to comply with Section 3.

Section 7(C) says: “*Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (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*” (emphasis added). The bottom line of sections A through C is that a political subdivision may be split only where doing so is necessary to comply with Section 3’s population requirements, only one such subdivision may be divided within a

single House district, and this must be done in the order stated.

Finally, Section 7(D) says: “In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted *to the extent reasonably consistent with the requirements of section 3 of this Article*” (emphasis added). In other words, while complying with Sections 7(A)-(C), a new plan must retain boundaries from the prior plan unless doing so is inconsistent with Section 3 in that the district now falls outside that Section’s population requirements.

Turning to Section 10, it, too, explains how it operates with the other provisions of Article XI, saying: “The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of House of Representatives districts, which shall be created and numbered in the following order *to the extent that such order is consistent with the foregoing standards*” (emphasis added). Thus, Section 10 is expressly subordinate to Sections 3 and 7.

Section 10 then lays out several rules, but even if those rules could conflict with Sections 3 and 7 in some instances, Respondents have shown no such conflict here. Section 10(A) provides that each county with a population between 95% and 105% of the ideal population for a House district “*shall be designated a representative district*” (emphasis added). The only county meeting that standard, Wayne County, is kept whole and designated as House District 1 in the enacted plan and both McDonald plans, and Relators do not challenge it. Section 10(B), meanwhile, provides that each county with a population between 90% and 110% of the ideal population for a House district “*may be designated a representative district*” (emphasis added). The four counties that meet this standard—Richland, Wood, Allen, and Columbiana—are kept whole and designated as House Districts 2 through 5 in the enacted plan and both McDonald plans, and Relators do not challenge those districts either. Finally, Section 10(C) says: “Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining

territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county,” and Section 10(D) adds that: “The remaining territory of the state shall be combined into representative districts.” Crucially, not only are these provisions expressly subordinate to Section 7, but they say nothing at all about *how* territory must be combined, only the order in which districts should be created.

In short, Section 3 lays out a nearly absolute rule of district population (with its only exception being to achieve compliance with Section 9), Section 7 sets out stringent rules that give way only to the extent necessary to comply with Section 3, and Section 10 sets out rules for the order of creating and numbering districts, rules that are—by their own terms—subordinate to Sections 3 and 7, and that, in any event, create no conflict with Sections 3 and 7 here.

If there were any doubt as to whether Sections 3, 7, and 10 created any irreconcilable conflicts relevant to this case, it would be dispelled by Respondents’ own documents. Respondents prepared a document showing “Split Counties” in the “2011 Final House and Senate Map” and distinguishing between those that had to be split for some legal reason (marked “must”) and those that did not. LPL Aff. at 828. The same document shows other “Contiguous Split Subdivisions” in the plan, and Respondents publicly admitted that their plan “splits 15 [contiguous] political subdivisions,” only five of which—“Columbus, Akron, Dayton, Toledo, Cleveland”—had to be split for population reasons. *Id.* at 461. Thus, Respondents’ own documents show that they were aware that their plan violated Article XI in many ways that were not necessary to comply with other aspects of Article XI.

In sum, the violations Respondents committed here are not like those alleged in *Voinovich*, 63 Ohio St.3d 198. There, this Court held that Sections 4, 9, and 11 of Article XI are “coequal,” and that where such “coequal” requirements “are irreconcilable,” the Apportionment Board has “the duty to choose the proper course, and this court will not order

them to correct one constitutional violation by committing another.” *Id.* at 200. Here, Relators have only challenged decisions made by the Apportionment Board where the provisions of Article XI were plainly “reconcilable” by following the terms of the Constitution. Every one of the violations alleged could have been avoided without creating another violation of Article XI, as demonstrated by Respondents’ own documents and the alternative maps created by Professor McDonald.

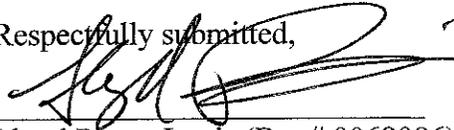
Given that these violations were avoidable, allowing them to stand would give the Apportionment Board *carte blanche* to ignore Article XI. As courts around the country have noted, “to interpret this constitutional provision as to subjugate it or any of its component constitutional requirements to lesser principles and non-constitutional considerations or factors would be to amend the constitution without the involvement of the most critical players: the State’s citizens. This we cannot, and are not willing, to do.” *In re Legislative Districting of State*, 370 Md. at 373; *see also Twin Falls County*, 2012 WL 130416, at *5 (invalidating plan because the Constitution “does not give the commission unbridled discretion in deciding how many counties to divide,” and “this Court must observe its imperative duty fearlessly to interpret the law as made, and never permit, if it be in our power to prevent, any infraction of the Constitution which we are sworn to uphold, support and maintain”).

III. CONCLUSION

“The fundamental tenet of judicial review in Ohio is that courts should decide cases on their merits.” *Colvin*, 120 Ohio St. 3d at 115-16. That fundamental tenet is especially important here, for “[a] fairly apportioned legislature lies at the very heart of representative democracy.” *In re Legislative Districting of State*, 370 Md. at 320. The Court has jurisdiction and should reach the merits. When it does, it should find that the Board is barred from considering political factors, or at least cannot do what it did here—allow political factors to override constitutional requirements. Whatever burden of proof the Court deems

appropriate, Relators have met that burden and ask this Court to reject Respondents' numerous, admittedly unnecessary violations of Article XI. To uphold such blatant violations would be to undermine voters' "[c]onfidence in the integrity of our electoral processes," which "is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4.

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