
KENNEDY and DEWINE, JJ., dissenting.

{¶ 59} The majority decrees electoral chaos. It issues an order all but guaranteed to disrupt an impending election and bring Ohio to the brink of a constitutional crisis. It does so through an edict that finds no grounding in the text of the Constitution but instead is merely the latest manifestation of the majority's shifting whims.

{¶ 60} Three times now, the Ohio Redistricting Commission has enacted a General Assembly–district plan. And three times now this court has struck down the enacted plan. In the last go-round, we pointed out that the majority had shifted the goalposts by imposing new requirements found nowhere in the Ohio Constitution and not suggested in its first opinion. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, ___ Ohio St.3d ___, 2022-Ohio-342, ___ N.E.3d ___, ¶ 115 (Kennedy and DeWine, JJ., dissenting) ("*LWV II").* Today, the majority tears down those goalposts altogether. It ignores the standards set forth in the Constitution. And now that the rationales manufactured in its previous opinions counsel in favor of upholding the latest plan ("the second revised plan"), *see League of Women Voters of Ohio v. Ohio Redistricting Comm.*, ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___ ("*LWV I*"); *LWV II*, the majority ignores those too. Its latest command to the commission is simply this: *What the Constitution says doesn't matter—bring us a map that will achieve the political outcomes we desire. We'll know it when we see it.*

{¶ 61} The majority gives two reasons for invalidating the second revised plan, neither grounded in the Constitution. First, it complains that the seven commissioners did not cooperate and jointly draft the plan. And second, even

though the plan perfectly reflects the statewide distribution of votes between Republicans and Democrats, the majority finds it defective because it contains some competitive districts that favor the Democratic Party by 2 percent or less. The Constitution does not require all seven members to jointly operate the map-drawing software. Instead, it expressly provides that if the members fail to achieve bipartisan consensus, then the commission may introduce and adopt a General Assembly–district plan by a party-line majority vote, with the consequence being that the plan lasts for only four years. Article XI, Section 8(C)(1)(a). And the Constitution details a formula to measure proportionality based on the number of districts that "favor" a political party. Section 6(B). Nowhere does the Constitution ordain that competitive districts that favor a political party by less than 2 percent don't count.

{¶ 62} No one at this point can fairly call what the majority is doing the act of judging. It does not assess the plan against constitutional standards. Rather, it has commandeered the redistricting process—only instead of moving the redistricting software to the Thomas J. Moyer Ohio Judicial Center, it has forced the commission to attempt to draw the map of the majority's mind's eye. Alexander Hamilton promised that judges would exercise "neither force nor will, but merely judgment." The Federalist No. 78. The majority proves Hamilton overly optimistic.

{¶ 63} Through its actions today, the majority undermines the democratic process, depriving the voters of the constitutional amendment they enacted and leaving in its place only the majority's policy preferences. In so doing, it threatens the very legitimacy of this court.

{¶ 64} We adhere to our view that this court's review is not so far reaching as the majority believes and would hold that a General Assembly–district plan cannot be invalidated absent a violation of the express and objective map-drawing requirements of Article XI, Sections 2, 3, 4, 5, and 7. Because the majority goes far beyond these guardrails, we dissent.

I. The majority tears down the goalposts it erected and imposes new standards found nowhere in the Constitution

{¶ 65} At the outset, it is important to reiterate that we should not be here at all. Article XI, Section 9(D)(3) of the Ohio Constitution is explicit in providing that the Supreme Court may order the commission to adopt a new map only if it "determines that a general assembly district plan adopted by the commission does not comply with the requirements of Section 2, 3, 4, 5, or 7 of this article." The majority finds violations of only Section 6, so it has no authority to invalidate the second revised plan. It's that simple.

{¶ 66} In our dissents in *LWV I* and *LWV II*, we repeatedly detailed the court's lack of authority to do what the majority keeps doing, so we will save further discussion on that point for Part III of this dissent. Instead, we start by explaining that even putting aside the court's lack of authority to order yet another new map, what the majority does today is inconsistent with both the text of the Constitution and the goalposts set by its previous opinions.

A. Seven hands on the computer mouse

{¶ 67} Perhaps the most remarkable thing about the majority's opinion today is its new "seven drafters working together" requirement. One of the majority's principal justifications for finding the second revised plan unconstitutional has nothing to do with the plan itself; rather, the majority deems the plan unconstitutional because "the commission did not follow the process that [Section 1 of] Article XI requires." Majority opinion, ¶ 25. Although the majority represents that it will not address arguments related to Article XI, Section 1, it plainly cannot pass up an opportunity to micromanage the commission.

{¶ 68} In the majority's view, Article XI, Section 1 requires that all seven commissioners gather around a computer with the redistricting software and jointly draft a plan. Because this did not happen, the majority finds that the commission failed to comply with a sentence in Article XI, Section 1(C) providing that "[t]he commission shall draft the proposed plan in the manner prescribed in this article." *See* majority opinion at ¶ 25; *see also id.* ("The commission has *adopted* three plans so far, but it still has not *drafted* one"). And with minimal analysis, the majority

declares that the commissioners' failure to collectively "draft" the second revised plan *dispositively* establishes that it was drawn primarily to favor the Republican Party.

{¶ 69} This, of course, is ludicrous. Go back to the sentence the majority finds all important: "The commission shall draft the proposed plan in the manner prescribed in this article." Section 1(C). For the majority's reading to even begin to make sense, "commission" would instead need to say "commissioners." But more to the point, the majority ignores the last clause of the sentence it relies on: "in the manner prescribed in this article." *Id.*

{¶ 70} Article XI prescribes in Section 1(A) that the "Ohio redistricting commission shall be responsible for the redistricting of this state for the general assembly." To discharge that duty, the commission "shall adopt" a General Assembly–district plan. Section 1(C); *see also* Section 9(D)(1) (requiring that all plans be "approved by the commission"). Article XI then provides that some actions of the commission require a bipartisan vote. There must be bipartisan agreement to approve a map that lasts ten years. Section 8(B). There also must be bipartisan agreement to adopt rules, hire staff, and expend funds. Section 1(B)(2). Pursuant to this delegation, the commission unanimously adopted Commission Rule 09: "Any member of the Ohio Redistricting Commission, person, or organization may submit for the consideration of the Commission a proposed general assembly district plan." *Ohio Redistricting Commission Rules, Rule 09, Redistricting plans,* https://redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-august-31-2021-16/ohio-redistricting-commission-rules.pdf#page=1 (accessed March 15, 2022) [https://perma.cc/F6DM-D4EW].

{¶ 71} Nonetheless, the commission is composed of partisan elected officials, and therefore Article XI anticipates that bipartisan agreement may not always be possible to obtain. It creates a default rule that (save for specific, contrary provisions), "a simple majority of the commission members is required for any action by the commission." Article XI, Section 1(B)(1). Although the majority faults the commission for not hiring "an independent map drawer * * * who

answers to all commission members," majority opinion at ¶ 30, the Constitution left that decision to the commission. Where agreement eludes the commissioners, each co-chairperson may "expend one-half of the [commission's] funds." Section 1(B)(2)(b). A co-chairperson hiring a map drawer, as happened here, is a permissive expenditure.

{¶ 72} Nor is the commission required to draft all plans as a body. Instead, if the commission reaches an impasse, it "shall introduce a proposed general assembly district plan by a simple majority vote of the commission." Article XI, Section 8(A)(1). Section 8(A)(3) permits the commission to "adopt a final general assembly district plan * * * by a simple majority vote of the commission." A plan that lacks bipartisan support and that is passed by a simple majority cannot be one that has been drafted by all seven commissioners. Doing that does not invalidate the plan; rather, the sole consequence is that it lasts four years rather than ten. Article XI, Section 8(C)(1)(a).

{¶ 73} The majority's rule is patently ridiculous. It never explains how a plan that is introduced and adopted by a simple majority can somehow have been collectively drafted. The Constitution provides for the impasse procedure exactly because such agreement is not always—or even likely—possible when the balance of political power is at stake.

{¶ 74} The second revised plan was introduced and approved by the commission. Article XI, Section 1 requires nothing more. The second revised plan was adopted "in the manner prescribed in [Article XI]." Section 1(C).

{¶ 75} If one needs further proof of the folly of the majority's reasoning, consider that pursuant to the commission's rules, several members of the public submitted plans to the commission. Under the majority's position today, had the commission decided to adopt one of the public proposals, that would have violated the Constitution because *the commission*—more precisely, its seven constituent members—must "draft" the plan. The same would hold true had the commission adopted Senator Sykes's proposed plan or *any* of the plans drafted by Dr. Jonathan Rodden, one of petitioners' experts.

{¶ 76} Indeed, anyone who has ever served on a committee recognizes that the work of a committee is rarely, if ever, done jointly by all the members of the committee. Legislative committees are routinely tasked with preparing reports. The members do not sit down together and jointly write the report. Instead, a report is drafted by legislative staff and voted on by the whole committee. Almost invariably, there are those who disagree—leading to majority and minority reports.

{¶ 77} The same is true for this court. The majority issues a per curiam opinion. But one can be sure that the four members in the majority did not sit down jointly at a computer and take turns keying in words. And of course, those of us in dissent played no part in writing today's per curiam opinion.

{¶ 78} We often celebrate the "drafters" of our federal Constitution. But no one believes its 39 signatories jointly worked through every word and clause. Rather, it is known from James Madison's Notes and other sources, *see* 2 Farrand, *The Records of the Federal Convention of 1787* (Rev.Ed.1966), that the convention delegates were assigned to various committees. Only five of our Founding Fathers served on the Committee of Style and Arrangement credited with producing the final draft, yet we still remember their 34 fellow delegates as "drafters" of the charter.

{¶ 79} What the majority demands belies common sense. One can just imagine seven people looking at a computer screen, each with their own ideas about which direction to move the cursor. Do the members vote on every toggle of the mouse? Solve disputes through games of rock, paper, scissors? Or is it more of a scrum, with the strongest prevailing?

{¶ 80} The majority's complaint is that the Republicans did not work together with the Democrats. But that lament is as old as our two-party system. Small wonder that the Constitution incentivizes bipartisanship and imposes a consequence for lack of cross-aisle cooperation. *See* Article XI, Section 8(C)(1)(a). If the parties do not work together—if a plan is passed by only a partisan majority vote—the plan lasts only four years. *Id.* In invalidating a plan for a lack of cooperation, the majority replaces the remedy set forth in the Constitution with one purely of its own making.

{¶ 81} Nothing in the Constitution requires the seven commissioners to sit down together to draft the plan—effectively handing each one of them an unbridled veto power. Nothing in the majority's previous opinions established this as a requirement to adopt a valid plan. And certainly nothing in the Constitution gives this court the authority to invalidate a plan for failure to comply with this made-up requirement. Under Section 9(D)(3), the court's remedial authority is triggered only by a violation of Section 2, 3, 4, 5, or 7. This court has no business micromanaging the procedures by which the commission discharges its duty to "adopt" a plan. This court has no business micromanaging the procedures by which the commission discharges its duty to "adopt" a plan. *See Youngstown City School Dist. Bd. of Edn. v. State*, 161 Ohio St.3d 24, 29, 2020-Ohio-2903, 161 N.E.3d 483, ¶ 20 (lead opinion of O'Connor, C.J.) ("It is not our role to police how the amended language came into existence"); *id*. at ¶ 36, quoting *Miller v. State*, 3 Ohio St. 475, 484 (1854) (Kennedy, J., concurring in part and concurring in judgment only in part) (courts are not "authorized to supervise every step of legislative action, and inquire into the regularity of all legislative proceedings that result in laws").

B. Perfect proportionality is not good enough for the majority

{¶ 82} Article XI, Section 6(B) provides that the commission "shall attempt" to draw a plan under which "[t]he statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party [and] correspond closely to the statewide preferences of the voters of Ohio." The statewide preference of Ohio voters is to prefer Republicans to Democrats by a margin of 54 to 46 percent. *LWV I*, ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, at ¶ 108. In the second revised plan, 54 percent of districts favor the Republican Party and 46 percent favor the Democratic Party. A reasonable person would likely conclude that because the plan achieves perfect proportionality, it satisfies Section 6(B). But, through a dizzying series of changing edicts, the majority concludes that even exact proportionality is not good enough.

1. Shifting the goalposts on statewide proportionality

{¶ 83} In *LWV I*, the majority read the word "attempt" out of Section 6(B) and held that the provision actually *mandates* that the commission draw a plan with a partisan makeup that closely corresponds with statewide voter preferences if it is possible to do so. *LWV I* at ¶ 88. In *LWV II*, the court read the word "closely" out of the provision and suggested that a plan needed to exactly correspond to statewide voter preferences. *LWV II*, ___ Ohio St.3d ___, 2022-Ohio-342, ___ N.E.3d ___, at ¶ 63, 64. That measure, it proclaimed, is "a foundational ratio created not by this court or by any particular political party but instead etched by the voters of Ohio into our Constitution." *Id.* at ¶ 64.

{¶ 84} In response, the commission did exactly what the majority demanded. It drew a plan in which "[t]he statewide proportion of districts whose voters * * * favor each political party" matched exactly the "statewide preferences of the voters of Ohio," Section 6(B). The second revised plan is perfectly proportional, matching the 54-46 percent partisan makeup of Ohio voters.

{¶ 85} Unbelievably, the majority now says that even perfect proportionality is not good enough. Given the standardless judging exhibited in *LWV I* and *LWV II*, it comes as no surprise that the majority introduces a new formula. Even though the Constitution says that statewide proportionality is to be assessed by comparing the proportion of districts that "favor" each political party, Section 6(B), the majority looks at individual districts and determines that those that favor a political party by less than 2 percent should be excluded from the calculation. It then holds that the plan is unconstitutional because if one replaces the formula set forth in the Constitution with the majority's new formula, the plan fails to meet the Constitution's proportionality requirement. Confused? We certainly are. High marks to the majority for creativity, but nothing in the Constitution supports the exclusion of competitive districts—Section 6(B)'s terms address *statewide* proportionality and therefore include *all districts*.

2. Shifting the goalposts on competitive districts

{¶ 86} The majority also shifts the goalposts on what counts as a competitive district. In *LWV I*, the majority held that Section 6(B) simply required

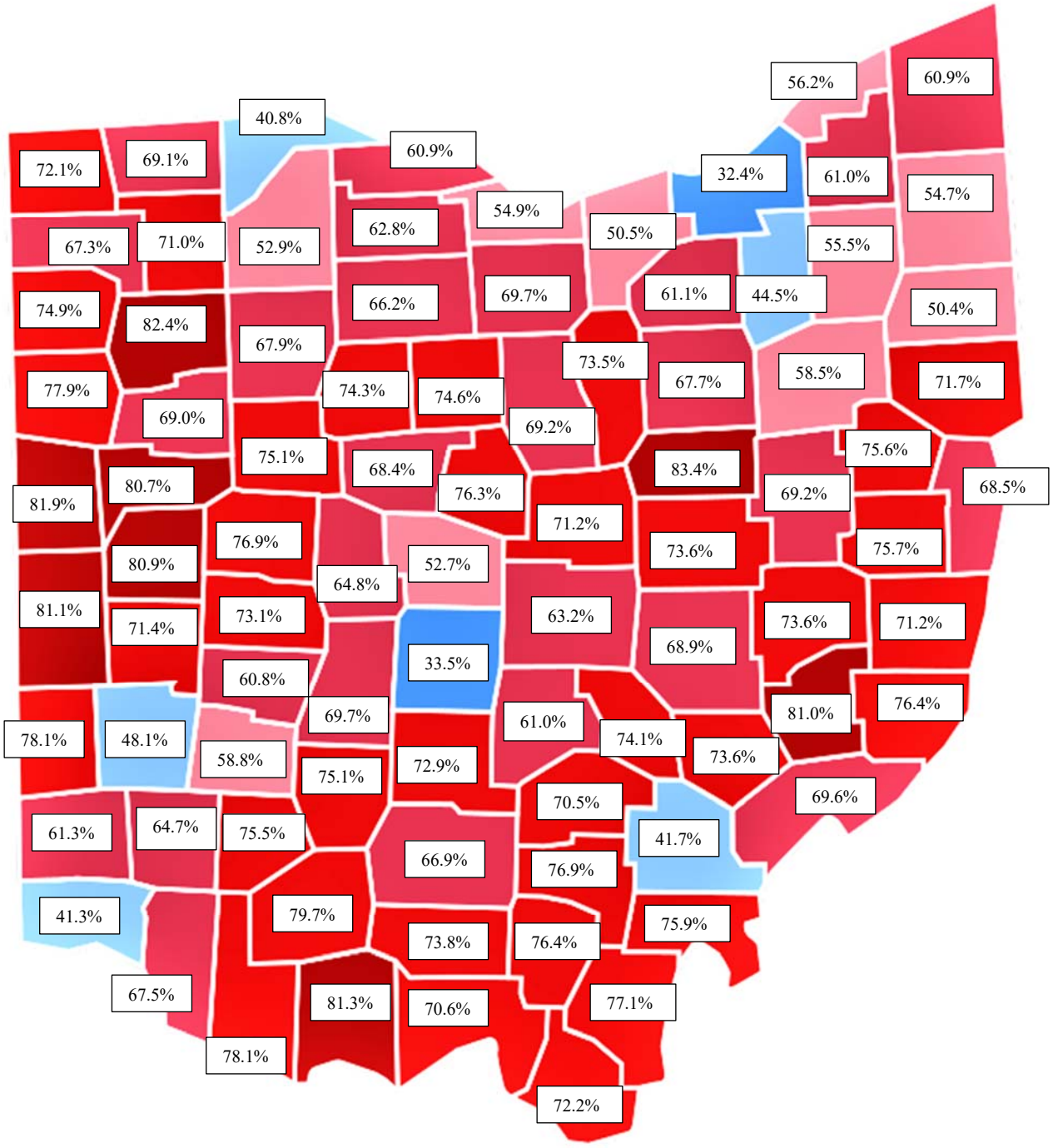
the commission to draw "a plan in which the statewide proportion of Republican-leaning districts to Democratic-leaning districts" complies with 54-46 percent ratio. ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, at ¶ 108. But in *LWV II* it modified that pronouncement, invalidating the first revised plan because it created too many competitive districts that only narrowly favored Democrats. ___ Ohio St.3d ___, 2022-Ohio-342, ___ N.E.3d ___, at ¶ 61 ("Bluntly, the commission's labeling of a district with a Democratic vote share between 50 and 51 percent * * * as 'Democratic-leaning' is absurd on its face").

{¶ 87} Of course, the Constitution does not preclude super-competitive districts—in fact, they are laudable in a democracy. *See Rucho v. Common Cause*___ U.S. ___, 139 S.Ct. 2484, 204 L.Ed.2d 931 (2019). Indeed, the more competitive a district, the more an election will be decided by voter preference and candidate quality rather than simple partisan voting patterns. The Ohio Constitution requires an assessment of "districts whose voters * * * favor each political party." Article XI, Section 6(B). Nonetheless, the commission did what the majority demanded. Its second revised plan reduced from 12 to five the number of seats favoring Democrats by less than 51 percent.

{¶ 88} But, alas, poor Charlie Brown has had the football yanked away again. Now, the majority says that even districts in which Democrats have a 2 percent advantage do not count as districts that " 'favor' [the Democratic] party." Majority opinion, ¶ 41. If the majority is going to create new requirements not found in the Constitution, it would certainly be nice if it would give the commission a little advance warning.

{¶ 89} The majority objects to the outsized number of Democratic-leaning competitive districts. But that is simply a function of political geography. Just look at a map of Ohio's Republican vote share by county in the last presidential election:[9]

9. This map was created using data from the Ohio Secretary of State's Office. *See* Ohio Secretary of State, 2020 Official Elections Results, available at https://www.ohiosos.gov/elections/election-results-and-data/2020/ (accessed Mar. 15, 2022) [https://perma.cc/5S4N-ZPMQ]. It was created using a template available at https://commons.wikimedia.org/wiki/File:Ohio_Presidential_Election_Results_2020.svg (accessed Mar. 15, 2022) [https://perma.cc/3XQ6-NEE7].



{¶ 90} Every expert who has opined on the matter in these cases agrees that because Democratic voters are concentrated in a few urban areas and Republican voters predominate in large rural swaths of the state, there are limited geographic areas in which Democratic-leaning districts can be created. *LWV I*, ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, at ¶ 128. A natural function of this political

reality is that the only way to meet the proportionality standard is to maximize the number of Democratic-leaning districts in urban areas. And maximizing the number of Democratic-leaning districts means that many of these districts will favor the Democratic Party by narrow margins. In contrast, in most of the rural, red areas of the state, it is impossible to draw districts that narrowly favor the Republican Party—there simply are not enough Democrats in those areas. *See LWV II*, ___ Ohio St.3d ___, 2022-Ohio-342, ___ N.E.3d ___, at ¶ 82-86 (Kennedy and DeWine, JJ., dissenting) (providing a more detailed discussion of Ohio's political geography).

{¶ 91} Indeed, at the time of the amendment's enactment the former chairman of the Ohio Democratic Party explained that

> computer modeling showed the process [under the amended version of Article XI] likely would not give Democrats a majority.
>
> "When you get modeling back that says you're confining yourselves to a permanent minority and Democrats will never get to 50, that gave many people pause," said state Democratic chairman David Pepper * * *. "We weren't looking for, and we didn't find, any models that showed we could guarantee ourselves a majority. Frankly, *that would be gerrymandering just like in the past* * * * the most important change is there would be *many more competitive races*."

(Emphasis added and second ellipsis in original.) *Vote yes on Issue 1*, Columbus Dispatch (Sept. 27, 2015) 5J.

{¶ 92} The majority, though, never acknowledges the undisputed evidence about the challenges inherent in creating sufficient Democratic-leaning districts to satisfy the proportionality requirement. Instead, it makes much of the fact that 19 Democratic-leaning districts are competitive and cites expert testimony stating that a 2 percent change in the voting preferences of Ohioans would cause Democrats to lose these districts. In doing so, the majority relies on predictions of future

performance instead of applying the plain language of Section 6(B), which requires the commission to consider "statewide state and federal partisan general election results during *the last ten years*." (Emphasis added.) Section 6(B) does not authorize the commission to base proportionality on any other metric, including predictions of future results.

{¶ 93} In demanding that the commission adopt a plan designed to guarantee Democratic wins, even in the face of changing voter preferences, the majority compels what the Constitution forbids: gerrymandering. This is the same majority that decried gerrymandering in *Adams v. DeWine* as "the antithetical perversion of representative democracy." ___ Ohio St.3d ___, 2022-Ohio-89, ___ N.E.3d ___, ¶ 2. Gerrymandering, it said, "is an abuse of power * * * that strategically exaggerates the power of voters who tend to support the favored party while diminishing the power of voters who tend to support the disfavored party." *Id.* Abandoning its pretense of upholding democratic principles, the majority makes clear today that notwithstanding the quality of candidates, the performance of incumbents, or the issues that matter to voters and drive turnout, winners and losers in statehouse elections must not be chosen on election night but instead must be preordained by the commission's plan.

3. Shifting the goalposts on alternative "more proportional" plans

{¶ 94} In concluding in *LWV I* that the enacted plan unduly favored the Republican Party, the majority pointed to a plan prepared by Dr. Rodden, one of petitioners' expert witnesses, as evidence that it was possible to draw a more proportional plan that complied with constitutional requirements. ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, at ¶ 126. The Rodden plan contained 57 Republican leaning House districts and 18 Republican leaning Senate districts. (It turned out that Dr. Rodden's plan did not comply with constitutional requirements—a fact petitioners were forced to admit in a filing to the court after *LWV I* was decided.) In *LWV II*, the majority pointed to a plan prepared by Democratic Party operative Chris Glassburn—apparently finalized only after the commission had adopted the first revised plan—as evidence that it was possible to draw a more proportional plan. ___Ohio St.3d ___, 2022-Ohio-342, ___ N.E.3d

___, at ¶ 46. The Glassburn plan contained 54 Republican House seats and 18 Republican Senate seats.

{¶ 95} On this go-round, though, the majority throws out its previous benchmarks. The second enacted plan contains more Democratic-leaning districts than the Rodden plan, which the majority held up as a model in *LWV I*, and it contains exactly the same number as the Glassburn plan. But now that those benchmarks counsel upholding the plan, they apparently no longer matter.

{¶ 96} Notably absent from the majority opinion is any reference to a map that is more proportional than the second enacted plan. And for good reason. One does not exist. It is telling in this regard that the plan that petitioners would have this court order the commission to adopt actually creates *fewer* districts that favor the Democratic Party than the second revised plan.

4. Shifting the goalposts on statistical measures

{¶ 97} A revealing feature of these three cases is the shifting use of statistical measures by petitioners' experts and the majority. Instead of applying a consistent set of measures to fairly assess each of the three plans, the petitioners and the majority have simply cherry-picked statistics to support their favored outcomes.

{¶ 98} For example, in *LWV I*, the majority relied heavily on Dr. Kosuke Imai's 5,000 simulated plans to show that the commission could have drawn a more proportional plan and that it could have done so without disfavoring Democrats. ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, at ¶ 112. In *LWV II*, the majority relied on Dr. Imai's 5,000 simulated plans to contend, incorrectly, that the first revised plan was an outlier. ___ Ohio St.3d ___, 2022-Ohio-342, ___ N.E.3d ___, at ¶ 43. In fact, the first revised plan was more proportional than most of Dr. Imai's 5,000 plans: "the average of the 5,000 plans he generated contained 79 total Republican-leaning districts (60 percent) and 53 total Democratic-leaning districts (40 percent)." *Id.* at ¶ 110 (Kennedy and DeWine, JJ., dissenting).

{¶ 99} So what does Dr. Imai have to say about the second revised plan? Crickets. Petitioners this time have offered no analysis from Dr. Imai. Sometimes what is not said tells more than what is.

{¶ 100} Dr. Imai had also opined that the first revised plan was an outlier when analyzed under four political-science measures of partisan bias—efficiency gap, mean-median gap, partisan symmetry, and declination. Other than partisan symmetry, there is no evidence presented regarding the three other metrics. For example, Dr. Christopher Warshaw's affidavits in support of the first and second sets of objections analyzed the efficiency gap, mean-median gap, and declination of the various plans, but he did not address those metrics at all in his affidavit supporting the third set of objections. It does not require a tremendous leap of logic to infer why this type of evidence is missing today.

{¶ 101} Petitioners point to the plan's partisan asymmetry, contending that some, if not all, of the competitive districts that lean Democratic based on prior election results should be counted as Republican districts. Respondents, on the other hand, point to Dr. Michael Barber's explanation that the commission's second revised plan creates an efficiency gap—the number of "wasted" votes above 50 percent plus 1 that a party receives—that favors Democrats in both chambers of the General Assembly. But nary is there a mention of any of this in the majority opinion. Once again, the majority selectively incorporates only the evidence that can support its chosen outcome.

{¶ 102} Further, in *LWV II*, the majority indicated that the Democratic-leaning districts were too competitive because "a 1 percent swell in Republican vote share would sweep [those] 12 additional districts into the Republican column." ___ Ohio St.3d ___, 2022-Ohio-342, ___ N.E.3d ___, at ¶ 40. That no longer applies under the second revised plan, so the majority now asserts that a *5 percent* swing of votes in favor of the Republican Party would result in 23 more Republican seats while an inverse swing would net the Democrats at most two seats. *See* majority opinion at ¶ 33. The majority is simply rewriting the rules as it goes along to create the appearance that its holding stands on law and principle rather than the need to reach a chosen outcome.

C. The majority's curious treatment of double bunking

{¶ 103} There is another aspect of the majority opinion that bears mention. The majority criticizes Senate President Huffman for expressing concern that the

Sykes-Russo plan placed a large number of incumbent Republicans in the same districts as other Republicans but did not do the same for Democratic members.

{¶ 104} The majority is correct that Article XI does not explicitly prohibit double-bunking incumbents in the same district. Yet, contrary to the majority's assumption, courts have recognized that maintaining incumbents in their home districts is a legitimate goal in adopting a district plan. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983); *Harper v. Hall*, 2022-NCSC-17, ¶ 170. The practice of protecting incumbents is "neutral" and "time-honored." *See Vieth v. Jubelirer*, 541 U.S. 267, 300, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (lead opinion of Scalia, J.); *see also Rucho*, ___ U.S. at ___, 139 S.Ct. at 2500, 204 L.Ed.2d 931 (protecting incumbents is a "traditional" districting criteria). Incumbency considerations do not evince an intent to favor or disfavor a political party, particularly here because the commission avoided double-bunking incumbents of both parties.

II. The second revised plan is constitutional

{¶ 105} The majority's conclusion that the second revised plan violates sections 6(A) and 6(B) rests on two faulty premises: (1) that only a plan that is collectively drafted by all seven members of the commission is valid; and (2) that competitive districts with a margin of less than 2 percent should not be counted in Article 6(B)'s proportionality analysis. Both are refuted by the text of the Constitution.

A. The plan complies with Article XI, Section 6(A)

{¶ 106} The majority concludes that because all seven commissioners did not jointly draft the second revised plan, there is a violation of Section 6(A)'s requirement that the commission attempt to draw a plan that is not drawn primarily to favor a political party. But the Constitution specifically authorizes a simple majority of the commission to enact a plan. Sections 8(A) and (C). The second revised plan was enacted by the commission in accordance with all commission rules and all constitutional requirements. Just because the majority does not like the process created by Article XI does not mean that the second revised plan unduly favors the Republican Party.

{¶ 107} Furthermore, it is manifest that the commission drafted the plan to comply with the neutral map-drawing requirements of Sections 2, 3, 4, 5, and 7 as well as its directory duty to achieve partisan proportionality. The evidence simply does not establish that the commission attempted to draw the second revised plan with the primary purpose to favor or disfavor a political party.

{¶ 108} The majority contends that the commission acted primarily to favor Republicans and to disfavor Democrats by drawing a number of "competitive" Democratic-leaning districts without also drawing a proportionate number of "competitive" Republican-leaning districts. But the evidence does not support the majority's implicit assumption that it was possible to comply with the objective map-drawing requirements of Sections 2, 3, 4, 5, and 7 and this court's judge-made rule that the plan must provide proportional representation while also ensuring that all Democratic-leaning districts are essentially safe enough to result in a proportional number of Democratic victories over the life of the plan. No map presented to the commission or to this court has achieved that. And the fact that the commission failed to do the impossible does not prove that it drew the second revised plan primarily to favor or disfavor a political party.

{¶ 109} In fact, it is petitioners who seek a partisan plan. They ask for *less proportionality* and fewer Democratic-leaning districts in order to receive safer, more solidly Democrat districts. They therefore recognize that proportionality and safe Democratic districts are incompatible with Ohio's political geography. But nowhere does Article XI ensure safe seats. With the second revised plan, the commission has gone from Republicans being favored to win 85 House and Senate seats to the Democrats' 47, *see LWV I*, ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, at ¶ 24, to what is currently a perfectly proportional division of districts in a 72-60 split. How is an attempt to create 13 more districts that favor the Democratic Party primarily an attempt to disfavor the Democratic Party?

B. The plan complies with Article XI, Section 6(B)

{¶ 110} Article XI, Section 6(B) directs the commission to draw the plan so that "[t]he statewide proportion of districts whose voters * * * favor each political party * * * correspond[s] closely to the statewide preferences of the voters of

Ohio." The second revised plan contains 54 percent of districts whose voters favor the Republican Party and 46 percent of districts whose voters favor the Democrat Party. Thus, it corresponds exactly to the statewide preferences of the voters of Ohio.

{¶ 111} Nowhere does Article XI guarantee symmetry such that both political parties have the same number of "safe" seats and the same number of "competitive" seats. Instead, Article XI, Section 6(B) directs the commission to attempt to draw a map that includes districts that "favor" a party in close correspondence to the preferences of Ohio voters. This is exactly what the commission did here.

{¶ 112} Once the majority's faulty premises are stripped away, there is no basis on which to sustain petitioners' objections. We would overrule the objections and sustain the constitutionality of the second revised plan.

III. It did not have to be this way

{¶ 113} Fair to say, the majority's decision creates chaos. With the primary election set to occur in less than two months, voters, candidates, and election officials remain in the dark about Ohio's legislative-district lines. The majority attempts to shift the blame for that to the commission, but had the majority simply followed the text of the Constitution and respected the limits to this court's power, none of this would be happening. To explain why, we need to take a step away from the process that has been followed by the majority and outline the process that is actually laid out in the Constitution.

A. Background: Article XI

{¶ 114} Article XI of the Ohio Constitution controls who draws a General Assembly–district plan, establishes subjective and objective map-drawing requirements, prescribes the length of time a district plan may last, and authorizes but limits judicial review. For a more detailed analysis of these provisions, *see LWV I*, ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, at ¶ 193-200 (Kennedy, J., dissenting).

{¶ 115} The subjective map-drawing requirements include the standards that the members of the commission keep in mind when drawing a plan. The

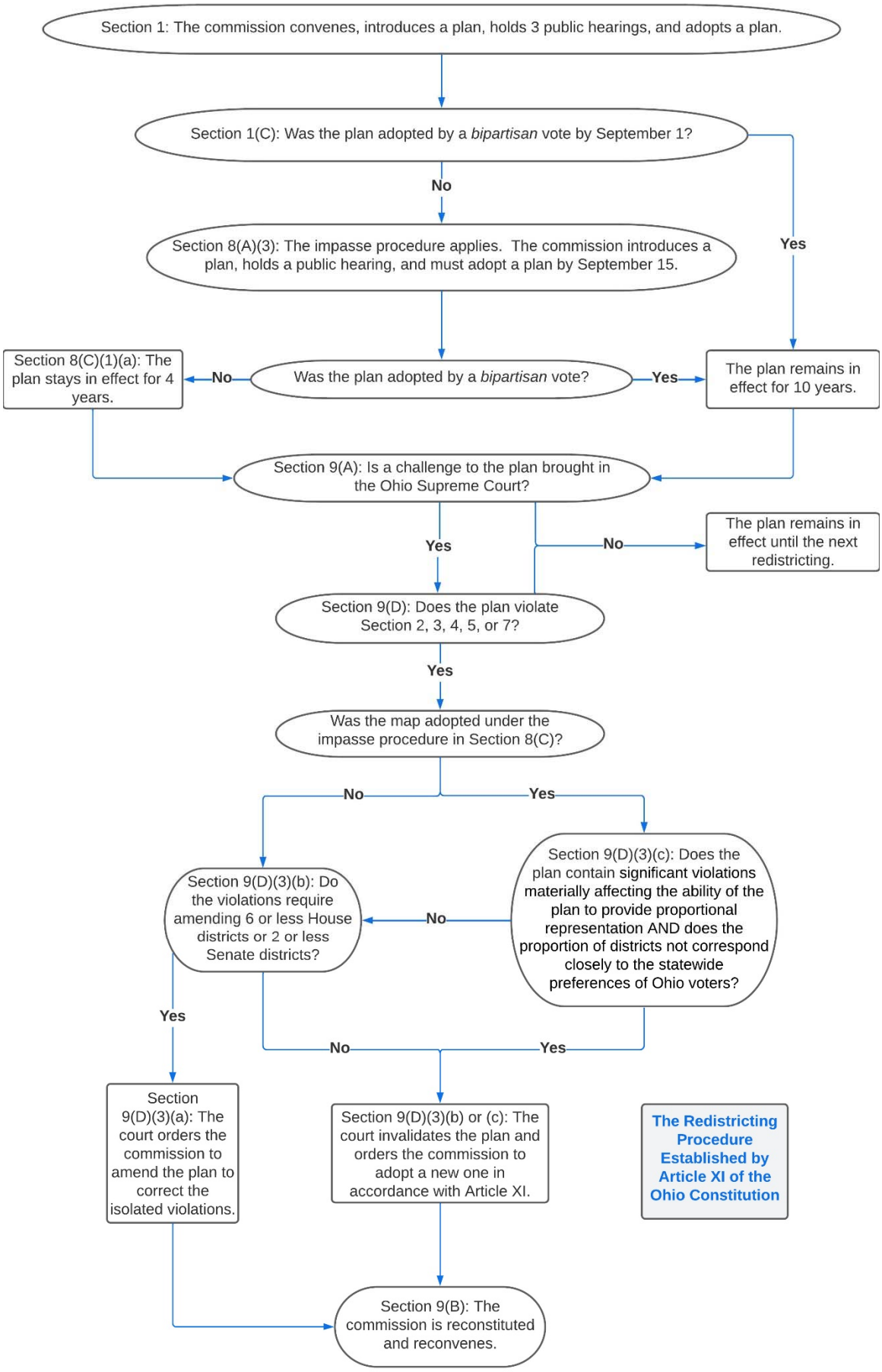
requirements of Section 6 relating to an attempt to create proportional districts and districts that do not primarily favor a political party are examples of these subjective requirements. On the other hand, compliance with the objective map-drawing requirements presents essentially a factual question for this court—it can be determined on the face of the plan.

{¶ 116} Section 1 establishes the redistricting commission and provides the procedures it must follow. Sections 2, 3, 4, 5, and 7 are the objective map-drawing requirements, which the commission *shall* apply. Section 2 establishes the number of legislators per district. Section 3 sets forth the population and line-drawing rules for all districts and the composition and numbering of House districts, and Section 4 prescribes the composition and numbering of Senate districts. Section 5 regulates district boundaries for senators who have unexpired terms, and Section 7 establishes the governmental-unit boundaries to be used.

{¶ 117} When a plan is adopted by a bipartisan vote including at least two members from each of the two largest political parties, the plan lasts for ten years, unless it is invalidated by this court or a federal court. Article XI, Sections 1(B)(3), 3(A), and 8(B). When commissioners fail to adopt a plan by a bipartisan vote, Section 8 provides an impasse procedure under which the commission may adopt a plan by a simple majority vote that lasts only four years.

{¶ 118} When a plan is challenged in this court, our authority to review the plan is limited. Section 9(D)(3) requires a predicate violation of the objective map-drawing requirements of Section 2, 3, 4, 5, or 7 before this court may invalidate a plan. The determination whether a plan is invalid or may be amended by the commission depends on whether the violation or violations of Section 2, 3, 4, 5, or 7 are isolated, Section 9(D)(3)(a), or more widespread, Section 9(D)(3)(b), or significant and material, Section 9(D)(3)(c).

{¶ 119} Theis entire General Assembly–redistricting process is displayed in the following flowchart:


Section 1: The commission convenes, introduces a plan, holds 3 public hearings, and adopts a plan.
Section 1(C): Was the plan adopted by a *bipartisan* vote by September 1?
No
Yes
Section 8(A)(3): The impasse procedure applies. The commission introduces a plan, holds a public hearing, and must adopt a plan by September 15.
Was the plan adopted by a *bipartisan* vote?
No
Yes
Section 8(C)(1)(a): The plan stays in effect for 4 years.
The plan remains in effect for 10 years.
Section 9(A): Is a challenge to the plan brought in the Ohio Supreme Court?
Yes
No
The plan remains in effect until the next redistricting.
Section 9(D): Does the plan violate Section 2, 3, 4, 5, or 7?
Yes
Was the map adopted under the impasse procedure in Section 8(C)?
No
Yes
Section 9(D)(3)(b): Do the violations require amending 6 or less House districts or 2 or less Senate districts?
No
Section 9(D)(3)(c): Does the plan contain significant violations materially affecting the ability of the plan to provide proportional representation AND does the proportion of districts not correspond closely to the statewide preferences of Ohio voters?
Yes
No
Yes
Section 9(D)(3)(a): The court orders the commission to amend the plan to correct the isolated violations.
Section 9(D)(3)(b) or (c): The court invalidates the plan and orders the commission to adopt a new one in accordance with Article XI.
The Redistricting Procedure Established by Article XI of the Ohio Constitution
Section 9(B): The commission is reconstituted and reconvenes.

B. The majority mischaracterizes Article XI

{¶ 120} The second revised plan was adopted along party lines. Such a plan takes effect upon its filing with the secretary of state. Article XI, Section 8(C)(1)(a). Section 9(A) vests this court with "exclusive, original jurisdiction in all cases arising under this [Article XI]," but that grant of power is limited.

{¶ 121} Although Section 9(A) is a general statement that this court is the proper forum to hear a challenge to a General Assembly–district plan, Section 9(D) is a more specific provision that sets out the limits of our review. Section 9(D)(1) prohibits this court from ordering "the implementation or enforcement of any general assembly district plan that has not been approved by the commission in the manner prescribed by [Article XI]." Section 9(D)(2) forbids this court from "order[ing] the commission to adopt a particular general assembly district plan or to draw a particular district." And Section 9(D)(3) provides that certain remedies are available if a plan is both *adopted by the commission* and "does not comply with the requirements of [Article XI,] Section 2, 3, 4, 5, or 7." (Emphasis added.)

{¶ 122} For "isolated violations of those requirements," Section 9(D)(3)(a) requires this court to order the commission to amend the plan to remedy the violations. When the violations require the commission to amend at least six House districts or at least two Senate districts, Section 9(D)(3)(b) directs this court to wholly invalidate the plan. Finally, Section 9(D)(3)(c) permits this court to invalidate a plan adopted under Section 8(C) if the plan significantly violates Section 2, 3, 4, 5, or 7 in a manner that materially affects the ability of the plan to provide proportional representation and the statewide proportion of districts does not correspond closely to the statewide preferences of Ohio voters.

{¶ 123} Therefore, this court's power to invalidate a plan, in whole or in part, expressly depends on the existence of a predicate violation of Section 2, 3, 4, 5, or 7. The majority, however, has never held that any of the plans adopted by the commission in these cases violated those provisions. *See generally LWV II*, ___ Ohio St.3d ___, 2022-Ohio-342, ___ N.E.3d ___; *LWV I*, ___ Ohio St.3d ___, 2022-Ohio-65, ___N.E.3d ___.

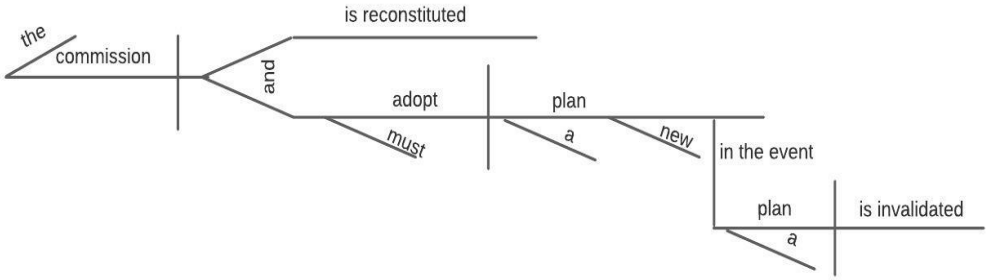
{¶ 124} Tellingly, the majority makes no attempt to ground its exercise of judicial review in any provision of the Constitution. Although the majority previously asserted that Article XI, Section 9(B) grants the court the power to invalidate a plan based on a stand-alone violation of Section 6 or *for any reason*, *see LWV I* at ¶ 98, it makes no mention of Section 9(B) today. But if that means the majority has had the epiphany that Section 9(B) does not provide the far-ranging authority it previously claimed, it does not say so.

{¶ 125} In any event, because Section 9(B) does not address the authority of this court to do anything, it cannot be a source of judicial power. Section 9(B) states:

> In the event that any section of this constitution relating to redistricting, any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid by an unappealed final order of a court of competent jurisdiction then, notwithstanding any other provisions of this constitution, the commission shall be reconstituted as provided in Section 1 of this article, convene, and ascertain and determine a general assembly district plan 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 time for redistricting under this article in conformity with such provisions of this constitution as are then valid.

{¶ 126} Reduced to its essentials, Section 9(B) says: "In the event that * * * any general assembly district plan * * * is determined to be invalid by * * * a court of competent jurisdiction[,] then * * * the commission shall be reconstituted * * * and determine a general assembly district plan * * * to be used until the next time for redistricting." Or put more simply, the commission shall be reconstituted and must adopt a new plan if its old plan is invalidated by a court.

{¶ 127} Elementary rules of grammar demonstrate that the commission, not this court, is the subject of Section 9(B). A simple sentence diagram shows this:



{¶ 128} Because *the commission* is the subject of Section 9(B), that provision grants the commission the enumerated power to be reconstituted should a plan be invalidated. Section 9(B) does not provide this court with any enumerated power at all, because this court is not a subject of the provision.

{¶ 129} If the opening clause of Section 9(B) is not an enumerated power giving this court authority to act, then what does the opening clause do? As is common with legal instruments, the opening clause serves as a condition precedent as to when the commission is reconstituted. In the law, a condition precedent is something that must occur before something else can happen. *Black's Law Dictionary* 366-367 (11th Ed.2019) (defining "condition precedent" as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises"). The phrase "in the event that" is a "linguistic convention[]" used "to create conditions precedent." *Israel v. Chabra*, 537 F.3d 86, 93 (2d Cir.2008); *see also United States v. Gen. Dynamics Corp.*, 481 U.S. 239, 244, 107 S.Ct. 1732, 95 L.Ed.2d 226 (1987), fn. 5.

{¶ 130} Again, Section 9(B) states, "In the event that any section of this constitution relating to redistricting, any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid by an unappealed final order of a court of competent jurisdiction then, notwithstanding any other provisions of this constitution, the commission shall be reconstituted * * *." Therefore, the power enumerated is for the commission to reconstitute, but

only if a court of competent jurisdiction has first invalidated any section of Article XI or any district plan or any district.

{¶ 131} Because Section 9(B) does not speak to what this court may or may not do, it does not grant this court any power to declare a district plan invalid based on a stand-alone violation of Section 6. Rather,

> the negative implication of Article XI, Section 9 is obvious. Section 9(D) is a provision that limits the authority of this court in reviewing a General Assembly–district plan. It prohibits this court from ordering the commission to adopt a specific plan and from drawing the districts ourselves. And that same provision provides that this court may invalidate a General Assembly–district plan in whole or in part only if we first find a violation of Article XI, Section 2, 3, 4, 5, or 7.

LWV I, ___ Ohio St.3d ___, 2022-Ohio-65, ___N.E.3d ___, at ¶ 227 (Kennedy, J., dissenting).

{¶ 132} Indeed, "[i]f violations of Section 6 were intended to be actionable, one would naturally expect Section 9(D) to say so. But that language is conspicuously absent." *Id.* at ¶ 217 (Kennedy, J., dissenting). The exclusion of Section 6 from the remedies expressly provided by Section 9(D)(3) demonstrates that any remedy for such violations is not judicially enforceable—the inclusion of Sections 2, 3, 4, 5, and 7 within the provision shows that Section 6 was intentionally excluded from it. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). For this reason, "the standards established by Article XI, Section 6 are directory and therefore not judicially enforceable." *LWV I* at ¶ 245 (Kennedy, J., dissenting).

{¶ 133} But this raises the question why. Why would Section 9(D) enumerate the power of judicial review for violations of Section 2, 3, 4, 5, or 7 but not for Section 1 or 6? The answer to this question is obvious. The Ohio Constitution limits this court's review of a district plan to alleged violations of the

objective map-drawing requirements. Because the subjective standards turn on the perception of each member of this court, few principles can be identified to guide and confine the court's review of them. Compliance with the standards set forth in Section 6 is solely a matter of degree: Has a sufficient attempt been made? Does the proportionality of representation correspond *closely enough* to voter preferences? Is a district compact enough? Such questions require this court to determine what the commission was thinking when it was adopting a plan. But how can a court know this? Is the court supposed to examine evidence as to the collective thinking of the whole commission, a majority of the members of the commission, or each member of the commission? Indeed, one need look no further than the concurring opinion's endorsement of Section 6 as a standardless opportunity for judicial "discretion in analyzing a district plan," concurring opinion, ¶ 58, to understand the dangers the amendment's architects sought to avoid in making only violations of the objective requirements reviewable. Removing subjectivity from the equation and relying on purely objective measures affords the voters of Ohio the promise of Article XI: an end to gerrymandering.

{¶ 134} In contrast to the wholly subjective standards of Section 6—which prohibit the plan from having a primary purpose of partisan favoritism and requires compact districts and close correspondence with the preferences of Ohio voters—the judicially enforceable requirements of Sections 2, 3, 4, 5, and 7 are objective in nature. Violations of Sections 2, 3, 4, 5, and 7 are readily observable—with the right software, anyone can see those violations. The population requirements either are met or they are not. The same is true regarding the order in which the districts are drawn and the number of divisions of governmental units. Compliance with these objective map-drawing requirements can be proved by evidence and decided by a court.

{¶ 135} So, with precision, the amendments to Article XI denied this court the power to invalidate a plan based solely on the court's subjective view of a violation of Section 1 or 6. As Justice Felix Frankfurter once observed, "when the Constitution * * * gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation. Precisely because 'it is a

constitution we are expounding,'; we ought not to take liberties with it." *Natl. Mut. Ins. Co. of Dist. of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582, 646-647, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949) (Frankfurter, J., dissenting), quoting *McCulloch v. Maryland*, 17 U.S. 316, 407, 4 L.Ed. 579 (1819).

{¶ 136} The careful calculus embodied within Article XI imposes mandatory requirements on the commission in Sections 2, 3, 4, 5, and 7 that justify this court's invalidating a plan if the objective measures are not met. It also directs the commission in Sections 1 and 6 to follow certain procedures and standards in adopting a plan while also appealing to each commissioner's oath to uphold the Ohio Constitution, to discourage partisan favoritism and encourage proportional representation in the plan. But Article XI's plain terms do not make these directory requirements, which involve considerations best left to the political branches of our government, enforceable by this court, a forum in which politics may not intrude. Article XI does this by expressly enumerating this court's power to invalidate a plan only when Section 2, 3, 4, 5, or 7 has been violated; by failing to enumerate such a power for this court to enforce compliance with Section 1 or 6, the architects of Article XI necessarily imposed a limit beyond which this court may not cross. The majority today, as in its previous decisions in these cases, has utterly failed to justify its exercise of power expressly withheld.

C. The unfulfilled promise of Article XI

{¶ 137} Rather than follow the process established by the Ohio Constitution (as depicted in the simple flowchart above), the majority creates a new remedy to invalidate a plan for failing to comply with Article XI, Section 6 or *for any other reason*. Unmoored from the plain language of the Ohio Constitution or any basic notions of judicial restraint, the majority has injected needless uncertainty and confusion into the 2022 election cycle. By distorting and misrepresenting the plain language of Article XI, Section 9(B), the majority has empowered itself to use a judicially unenforceable provision to strike down any district plan that the commission adopts. The result of this standardless judging is the application of ad hoc rules to usurp the authority of an independent constitutional body, with the

ultimate goal of forcing the commission to eventually adopt the plan that the majority has in mind.

{¶ 138} It did not have to be this way. The official ballot language for Issue 1, the 2015 proposed constitutional amendment to Article XI, reflected that the threat of a four-year plan was meant to foster bipartisanship; the ballot language stated that Article XI would "prevent deadlock by limiting the length of time any plan adopted without bipartisan support is effective." Ballot Board: 2015, Ballot Issues for the 2015 November Election, Issue 1, Ballot Language, available at https://www.ohiosos.gov/legislation-and-ballot-issues/ballot-board/ballot-board-2015/ (accessed Jan. 10, 2022) [https://perma.cc/ZP9U-VN86]. "The apparent hope was that the uncertainties and electoral vagaries that come with a four-year plan would motivate political actors to reach a consensus." *LWV I*, ___ Ohio St.3d ___, 2022-Ohio-65, ___ N.E.3d ___, at ¶ 235 (Kennedy, J., dissenting).

{¶ 139} The people were led to believe that Issue 1 would create a bipartisan process that would yield more competitive elections within more compact House and Senate districts, that the process would be public, and that any deadlock over a district plan would be prevented by limiting the life of a plan adopted along party lines to four years.

{¶ 140} Contemporary media accounts heralded the four-year-plan impasse procedure as a key element of the proposed amendment, in that the consequence of the failure to attain bipartisan agreement on a ten-year plan would be a partisan plan limited to four years.

> Issue 1's key reform is that for an 'apportionment' (legislative map) to apply, as now, for 10 years, at least two minority party Redistricting commissioners would have to support it. Otherwise, the map would only apply for four years.
>
> No coincidence, Ohio elects governors, auditors and secretaries of state every four years. So: A Redistricting Commission majority that refused to bargain with a Redistricting Commission minority to approve a 10-year map might find itself the

> commission's new minority in four years—when new General Assembly districts would have to be drawn. That is, Issue 1 would tie carrots to sticks to encourage bipartisan district-drawing.

Suddes, *State Issue 1 an opportunity for Democrats*, Dayton Daily News (July 19, 2015). Senate President Huffman, a state representative at the time, said: " 'This system basically says we are going to have a system that you now have an incentive to take in account what the minority party wants. * * * If there's a chance your district may change four years from now, that is bad. There's value in a 10-year map as proposed to a four-year map. * * * All the people sitting at the table now have an incentive to compromise.' " Sowinski, *Huffman gives sales pitch for redistricting in Ohio*, Lima News (Aug. 29, 2015).

{¶ 141} The voters understood that the proposed amendment included a process geared toward bipartisan agreement and that it contained an alternative with a real political cost—a plan passed on a partisan basis would last only four years and be subject to revision by a reconstituted redistricting commission with new members, possibly of a different political party. The hedge against partisanship, then, was the limitation of a partisan plan to four years. But because of the majority's activist decision to substitute itself for the commission in Article XI's redistricting process, one has to ask: Will the people ever realize the promise of what they adopted?

{¶ 142} What was not contemplated when Article XI was adopted was that this court would ignore the plain text of the Constitution and seize control of the map-drawing process. Yet that is what the majority has done, tearing down the goalposts it erected in *LWV I* and *LWV II*.

{¶ 143} The majority hoists the blame for the looming constitutional crisis on the commission, but that is simply a diversion. The blame falls solely with the four justices in the majority today. The majority has thrust the court into this political process and wreaked havoc. It has usurped the sovereignty the people exercised in adopting Article XI and has seized the commission's powers as its own.

IV. Conclusion

{¶ 144} The majority's decree today is an exercise of raw political power. Nothing less. Nothing more.

{¶ 145} The Constitution limits this court's authority to order the commission to adopt a new plan, but the majority ignores this limitation. The majority invalidates a plan that complies with all constitutional requirements. And now that the commission has met the extraconstitutional guidelines announced by the majority in this court's previous decisions, the majority finds those efforts insufficient. The goalposts that the majority erected in *League I*, and moved in *League II*, have now been torn down entirely.

{¶ 146} The majority demands a new plan but provides precious little guidance on how that is to be achieved. An imminent election is thrown into disarray and Ohio nears a constitutional crisis, but the majority offers the commission only standardless judging and a vague admonition to try again.

{¶ 147} In so doing, the majority proves prescient Thomas Jefferson's fear that the Constitution would be "a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please." 12 *The Works of Thomas Jefferson* 137 (P. Ford Ed.1905). We disagree that fundamental law is so malleable.

{¶ 148} Because the majority does not exercise authority granted to it by the Ohio Constitution but instead nakedly wields the judicial power, we dissent.

FISCHER, J., concurs in paragraphs 138-142 of the foregoing opinion.
