

**Jeff Jacobson Additional Comments**  
**February 3, 2016**

Chair Mills, Vice Chair Brooks, and members of the Committee:

Having just reviewed the additional amendments submitted by Senator Tavares, I wish to respectfully comment on the new proposals she raises.

As I made clear in my previous submission, this constitutional amendment will not work if we set up rules that make it difficult or impossible to complete a legal map. Because Ohio's southwest and northeast corners are population heavy and you only can draw districts that go two of the four directions (you can't draw further east or north in north east Ohio, for example), it is easy to get landlocked by your rules with too few people on the inside of your firewall. That's already a big problem with a 50%+ ratio intactness rule, let alone the 30%+ that is now being proposed. **In fact, for two of the last three reapportionment maps, it was impossible to draw districts for northeast Ohio that were legal under the old population and intactness rules.** The new proposals will not work. Furthermore, as I state below, Issue 1 did not apply that rule to counties, but only to cities that are more than 50% of a district.

These intactness proposals also greatly favor urban Ohio at the expense of suburban and rural counties.

Getting rid of the word "contiguous" will make it harder to draw legal maps and more likely that the board will have to break one rule to follow another--an unacceptable result when breaking the rules will force you to redraw (and you will still have to break the rules).

The third proposal is one I could support: If a County is the size of a congressional district, it should be kept intact. That is in keeping with the new constitutional amendment. **However, the proposal by Rep. Clyde and Senator Tavares to require intactness for counties of less than one ratio (but greater than 50%, or 30%) was not part of Issue 1. Issue 1 said cities--not counties--of greater than 50% should be kept intact. We did not do counties because we did not want to set up the apportionment board for failure, as the old rules did.**

However, if the Committee wanted to follow Issue 1 and apply the 50% rule to cities, that would not unduly threaten the prospects for drawing a legal map. I would respectfully suggest that the Committee could use Sen. Tavares' proposal for whole ratio counties, and Rep. Clyde's 50% proposal but for cities, not counties.

Senator Tavares' fourth proposals requiring all counties to be kept whole is not workable at all. That's the same as taking her first proposal for 30% threshold for intactness down to 0%, saying all counties have to be intact. **If we were to adopt this amendment, you would need a miracle every ten years in the form of perfect population numbers to get out of northeast Ohio with all counties intact.**

Her fifth amendment, allowing for one split and only one, would not fix the problem. If you need to split a county, that creates two districts that each have a split. If Ohio has an even

number of congressional districts, that could in theory work. But often, especially in the corners of the state, you can only link certain counties to certain others. If the numbers on the forced linkage counties don't work, you might have to split a county on one end of the district, and another county on the other end, to get rid of excess population. There may be other reasons you have to split a county (i.e., preserving majority minority districts) and so would not be able to split another time (nor would the matching district be able to split a second time).

**But this pales in comparison to the problem created when you have an odd number of Congressional districts.** An odd number would mean that one district would have to have all counties perfectly intact. That might be difficult, even impossible to do. Or the district would be so long and snake-like that it would make drawing the rest of the state impossible. Imagine if an impenetrable line went through the middle of Ohio, and all districts had to be on one side or another and could not cross: You would have a lot more cul-de-sacs where there are limited ways to draw any district, let alone a legal district. This would take the northeast problem and apply it statewide.

Finally, it is not a good idea to set up rules that only can be followed if one has the most powerful supercomputer ever invented. With any of the rules we are looking at here, the board might well come to the conclusion after much trial and error that they have no choice but to violate one rule to follow the rest. However, someone with a more powerful supercomputer might be able to run 100,000 (100 million? more?) permutations until they find a find a map that follows every rule. Surely we don't want to make laws subject to whomever has the most money and the best computer, or to play "gotcha" with something no human being could have found on their own. But that's what would happen if we make the rules too complex and intertwined. **If we are not careful, and write rules that conflict or are unworkable, we invite the same outcome as some objected to under the old rules: The Supreme Court deciding to uphold maps that do not follow every detail of every rule.**

Mr. Chairman, again I reiterate that these complex rules on line drawing should be not be put up to a vote until we can carefully work through and negotiate and come up with acceptable rules. We went through that process before Issue 1 was proposed to the General Assembly, and we must do so here or we risk having our Congressional districting reform amendment become useless.

A delay to the next meeting of your committee should be sufficient to work things out. I will pledge to participate wholeheartedly in such an effort.

Respectfully,

Jeff Jacobson

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**Testimony of  
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Submitted to the Ohio Constitutional Modernization Commission,  
Legislative Branch and Executive Branch Committee  
February 3, 2016**

The Brennan Center for Justice at New York University School of Law<sup>1</sup> appreciates the opportunity to submit these comments to the Legislative Branch and Executive Branch Committee regarding congressional redistricting reform in Ohio.

As the Committee considers whether to alter the congressional redistricting process in Ohio, the Brennan Center believes that the experiences of other states with redistricting reforms offer insights that could be useful to the Committee in deciding how to structure any additional reforms in Ohio.

Among the areas that merit consideration are:

- expanding the prohibition on partisan gerrymandering to congressional redistricting;
- adding more defined language to protect communities of interest;
- including everyday citizens on the commission;
- adding provisions to require that the commission's makeup reflect Ohio's diversity.

## **BACKGROUND**

Citizens increasingly feel that the political process is rigged. They are deeply cynical about our elected officials, especially those in Washington, D.C. While many factors have caused this unfortunate political atmosphere, partisan gerrymandering has almost certainly played a large role. Gov. John Kasich recently called partisan gerrymandering “the biggest problem we have” and Secretary of State Jon Husted has long been a proponent of reform.<sup>2</sup> Even President Obama called attention to this problem in his State of the Union Address when he said “we’ve got to end the practice of drawing our congressional districts so that politicians can pick their voters and not the other way around.”<sup>3</sup>

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<sup>1</sup> The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The opinions expressed in this letter are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law, if any.

<sup>2</sup> Lynn Hulsey, *Kasich Backs Redistricting Reform*, DAYTON DAILY NEWS, Jan. 3, 2016, <http://www.daytondailynews.com/news/news/local-govt-politics/kasich-backs-redistricting-reform/npwgg/>.

<sup>3</sup> Eliza Carney, *Can Obama Salvage His Democracy Agenda?*, THE AM. PROSPECT, Jan. 14, 2016, <http://prospect.org/article/can-obama-salvage-his-democracy-agenda>.

With the overwhelming approval of Issue 1 last November, Ohio's citizens gave resounding support for redistricting reform. The effort in Ohio presented a model and encouraged advocates and elected officials in other states, like Illinois, Indiana, and Michigan, to follow Ohio's lead as they begin to consider reforms in their states.<sup>4</sup>

## THINKING ABOUT CHANGES TO CONGRESSIONAL REDISTRICTING IN OHIO

### 1. Prohibiting Partisan Gerrymandering in Congressional Redistricting

With passage of Issue 1, Ohio joined states like Arizona, California, and Florida in expressly prohibiting drawing a redistricting plan "to favor or disfavor a political party."<sup>5</sup> Requirements like this have proven in other states to be powerful tools to make it possible to police the worse of partisan linedrawing abuses notwithstanding the absence, to date, of an enforceable federal anti-gerrymandering standard.<sup>6</sup>

While Ohio's restriction applies to political parties alone, other states have expanded the scope of their anti-gerrymandering language to also prohibit drawing districts to benefit individuals, including candidates and incumbents, in addition to political parties.<sup>7</sup> The Constitutional Modernization commission should consider whether similar language could provide further protections against partisan gerrymandering in Ohio.

Two other aspects of Issue 1 are noteworthy and may be worth extending to congressional redistricting in some form.

First, Issue 1 includes not just a ban on partisan gerrymandering but a number of objective rules governing how redistricting is to be done. These detailed rules include things like preventing political subdivisions from being divided between multiple districts and could help increase the redistricting commission's accountability. The experience in other jurisdictions is that objective redistricting criteria are often more effective in preventing gerrymandering abuses than intent-based criteria. It is typically easier, for example, to police based on results than the redistricting process. The rules included in Ohio's new constitutional language provide a clear set of guidelines that may help courts review future redistricting lawsuits or even prevent litigation altogether and similar rules for congressional redistricting could be beneficial.

Second, Issue 1 implemented another mechanism that attempts to ensure partisan fairness. The new constitutional language states that the redistricting commission must attempt to draw districts such that "the statewide proportion of districts whose voters, based on statewide state and federal partisan general

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<sup>4</sup> Editorial Board, *Ohio Wants a Fair Map. Sound familiar, Illinois?*, CHI. TRIB., Oct. 29, 2015, <http://www.chicagotribune.com/news/opinion/editorials/ct-ohio-remap-illinois-edit-1030-20151029-story.html>, Mary Kuhlman, *Redistricting Reform: Will Indiana Try Ohio's Approach?*, PUB. NEWS SERV., Nov. 16, 2015, <http://www.publicnewsservice.org/2015-11-16/campaign-finance-reform-money-in-politics/redistricting-reform-will-indiana-try-ohios-approach/a48986-1>, Caitlin Reedy, *League of Women Voters Hosts Forum on Redistricting Process*, THE MICH. DAILY, Nov. 5, 2015, <https://www.michigandaily.com/section/news/league-women-voters-hosts-forum-redistricting>.

<sup>5</sup> OHIO CONST. art. XI, § 6(A), ARIZ. CONST. art. IV, pt. II, § 1, CAL. CONST. art. XXI, § 2(e), FLA. CONST. art. III, §§ 20(a), 21(a).

<sup>6</sup> *See, e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363 (Fla. 2015) (striking down Florida's congressional map on the basis of unconstitutional partisan influence), *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597 (Fla. 2012) (striking down Florida's state senate map on the basis of unconstitutional partisan influence).

<sup>7</sup> *See, e.g.*, CAL. CONST. art. XXI, § 2(e), FLA. CONST. art. III, §§ 20(a), 21(a).

election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio.”<sup>8</sup> Serious consideration should be given to extending these rules to congressional redistricting.

## 2. Protecting Communities of Interest

Issue 1 does not include language to protect minority groups and communities of interest from being split among multiple districts. Many reforms in recent years have included such language and the Constitutional Modernization Commission should consider whether it would be worthwhile to include similar language in Ohio. Some examples of language protecting communities of interest are set forth below.

CAL. CONST. art. XXI, § 2(d)(4):

The geographic integrity of any city, county, city and county, local neighborhood, or local community of interest shall be respected in a manner that minimizes their division to the extent possible without violating the requirements of any of the preceding subdivisions. A community of interest is a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the election process. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

ARIZ. CONST. art. IV, pt. 2, § 1(14)(D):

District boundaries shall respect communities of interest to the extent practicable.

AUSTIN, TEX., CODE OF ORDINANCES, art. II, § 3(E)(4):

The geographic integrity of any local neighborhood or local community of interest shall be respected in a manner that minimizes their division to the extent possible without violating the requirements of any of the preceding subsections. A community of interest is a contiguous population that shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

## 3. Including Everyday Citizens on the Commission

Issue 1 does not prohibit elected officials from serving on the Ohio redistricting commission. Although the four appointed members of the commission could include non-politicians, they equally could be

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<sup>8</sup> OHIO CONST. art. XI, § 6(B).

lawmakers or others closely connected with the political process, such as staffers, lobbyists, or political operatives.

Other states, by contrast, have found it beneficial to prohibit elected officials from serving on the commission and to have their redistricting commissions include ordinary citizens. Some examples of language requiring that everyday citizens be included are copied below:

Cal. Code § 8252(a)(2):

The State Auditor shall remove from the applicant pool individuals with conflicts of interest including:

(A) Within the 10 years immediately preceding the date of application, neither the applicant, nor a member of his or her immediate family, may have done any of the following:

- (i) Been appointed to, elected to, or have been a candidate for federal or state office.
- (ii) Served as an officer, employee, or paid consultant of a political party or of the campaign committee of a candidate for elective federal or state office.
- (iii) Served as an elected or appointed member of a political party central committee.
- (iv) Been a registered federal, state, or local lobbyist.
- (v) Served as paid congressional, legislative, or State Board of Equalization staff.
- (vi) Contributed two thousand dollars (\$2,000) or more to any congressional, state, or local candidate for elective public office in any year, which shall be adjusted every 10 years by the cumulative change in the California Consumer Price Index, or its successor.

(B) Staff and consultants to, persons under a contract with, and any person with an immediate family relationship with the Governor, a Member of the Legislature, a Member of Congress, or a member of the State Board of Equalization, are not eligible to serve as commission members. As used in this subdivision, a member of a person's "immediate family" is one with whom the person has a bona fide relationship established through blood or legal relation, including parents, children, siblings, and in-laws.

ARIZ. CONST. art. IV, pt. 2, § 1(3):

By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and

impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

AUSTIN, TEX., CODE OF ORDINANCES, art. II, § 3(D)(4):

Each commission member shall apply this article in a manner that is impartial and that reinforces public confidence in the integrity of the redistricting process, A commission member shall be ineligible, for a period of 10 (ten) years beginning from the date of appointment, to hold elective public office for the City of Austin. A member of the commission shall be ineligible, for a period of three (3) years beginning from the date of appointment, to hold appointive public office for the City of Austin, to serve as paid staff for or as a paid consultant to the City of Austin, the city council of the City of Austin or any member of the city council of the City of Austin, or to receive a non-competitively bid contract with the City of Austin. This three (3) year ban on having a paid consultancy or entering noncompetitively bid contracts applies to the member individually and all entities for which the member is a controlling person.

Members of the Ohio Constitutional Modernization Commission have themselves acknowledged the value of having non-elected officials on the commission. At the January 14, 2016 meeting, Gov. Taft commented, and Rep. Curtin agreed, that members of Congress ought to be banned from sitting on the redistricting commission.<sup>9</sup> Sen. Tavares went further, proposing that such a ban should also extend to current members of the General Assembly.<sup>10</sup>

#### 4. Adding Provisions to Require that the Commission's Makeup Reflect Ohio's Diversity

Even after the passage of Issue 1, there is no requirement in the Ohio Constitution that the redistricting commission will reflect either the demographic or political diversity of the state.

By contrast, the provisions of the California Constitution specifically require that 4 of 10 members of that state's independent redistricting commission be independents and, likewise, requires efforts be made to ensure that there is geographic and ethnic diversity on the commission.<sup>11</sup>

Given the demographic complexity of Ohio, the Commission should consider whether similar provisions would be beneficial for the Ohio Commission. Such a provision could be particularly important given that three of seven positions on the redistricting commission are filled by statewide elected officials, who it is entirely conceivable could hail from a single part of the state, be of a single ethnicity or otherwise not be broadly reflective of the state's populace.

A commission that accurately reflects the demographic makeup of the entire state—including factors such as geography, race, and ethnicity—would improve the redistricting process. A diverse redistricting

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<sup>9</sup> OHIO CONST. MODERNIZATION COMM'N, JAN. 14 MEETING PACKET PART I 6 (2016).

<sup>10</sup> *Id.*

<sup>11</sup> Cal. Code § 8252(f)-(g).

commission is important because individuals from a particular community are presumably the most familiar with and knowledgeable about their community's needs. A commissioner from the Akron area, for example, could draw from her understanding of local demographic and geographic nuances to create districts that are more representative of Akron communities. Likewise, a commissioner from Cincinnati could potentially create better and more representative districts in southwest Ohio than a commissioner from Youngstown. For this reason, it is important that as many geographic regions, as well racial and ethnic groups, as possible be represented on the commission.