

Professor Daniel P. Tokaji
Testimony to Ohio Apportionment Board
August 26, 2011

Thank you for the opportunity to testify before you today. By way of introduction, I am a Professor of Law at The Ohio State University's Moritz College of Law and a Senior Fellow at the nonpartisan *Election Law @ Moritz* project, a group of scholars that provides information, analysis, and commentary on election law. I am also a co-author of the casebook *Election Law: Cases and Materials*, the co-editor of *Election Law Journal*, the only peer-reviewed journal in the field.

The focus of my academic research and writing is election law, here in Ohio and throughout the country. Among the topics addressed in my scholarship are redistricting and the Voting Rights Act of 1965. In the past, I have served as counsel for plaintiffs in voting rights cases challenging various election laws and practices, and I currently serve as an advisor to the Ohio Campaign for Responsible Redistricting. This testimony is offered solely on my own behalf, not on behalf of any individuals or entities with which I am associated.

I know that I do not need to remind this board of the gravity of the task before you. How our state legislative districts are drawn will affect every single Ohioan the decade to come. That is because redistricting has a major impact not only on who gets elected to office, but also on the decisions that are made once in office. From taxes and public safety to education and jobs, redistricting affects every aspect of our lives. It will have a major impact on how well or poorly our government serves Ohio citizens in the next decade.

I appreciate this board providing the opportunity for public testimony. Its hearings are an important first step toward a fair redistricting process. They are, however, only a first step.

I have one big point to make in my testimony today: It is essential to have a fair, open, and transparent process for drawing district lines. That process should include ample opportunity for interested members of the public to review possible and proposed plans and to provide constructive, critical feedback well before any plan is adopted. I am very concerned that the timetable set forth in this board's rules, which appears to allow only one week between the presentation of plans and their adoption, will not provide an adequate process.

Before getting too deeply into process, let me say a few words about substance. The Ohio Constitution lays out a number of criteria for redistricting, including adherence to existing county and municipal boundaries. I am sure this board is very familiar with these requirements. Compliance with federal law is also required. That includes the Voting Rights Act of 1965 – most notably Section 2, which prohibits practices that result in the abridgement of the right to vote on account of race. A plan that fails to satisfy this federal law would be subject to legal challenge. So too, a plan that violates the one person, one vote rule or that gerrymanders voters based upon their race or party would be subject to legal challenge under the Equal Protection Clause. In two decisions last decade, *Vieth v. Jubelirer* and *LULAC v. Perry*, the Supreme Court kept the door open for partisan gerrymandering claims, though it not clearly defined the applicable legal standard.

It is appropriate to discuss these and other substantive criteria for redistricting. But without any potential or proposed plan before us, those debates will necessarily have an abstract and academic

cast to them.

What is most important to recognize at this stage is the necessity of a fair, transparent, and open process that affords the public ample opportunity to review and comment on potential plans before they are enacted. Based on my research and review of the vast literature in this area, I believe that this is what separates a good districting process from a bad one.

Let me explain clearly what I mean: What can and should be avoided is a process that shuts some people's voices out of the conversation entirely. What can and should be avoided is a process in which redistricting maps are drawn or agreed to behind closed doors, in the proverbial smoke-filled room. What can and should be avoided is a process in which a plan is proposed and quickly rammed through, with little or no meaningful opportunity for public comment.

Notwithstanding the requirements of state and federal law, the drawing of district lines has not been a model of fairness in the past, in Ohio as in other states. Fortunately, we have a chance to change things. Secretary of State Husted deserves credit for creating a website through which citizens can draw their own maps. We also have before us maps that were drawn by citizens as part of an open competition sponsored by the Ohio Campaign for Accountable Redistricting. In every respect – adherence to county and municipal boundaries, compactness, competitiveness, and fairness to both major parties – the two top-scoring plans are better than the ones that were drawn a decade ago.

This shows that it is possible to draw fair redistricting plans that conform to the requirements of state law. It also reveals the false dichotomy of anyone who might assert that this board must choose between conformity to state law on the one hand, and fair and competitive districts on the other. The reality is that we can and should have both. Of course, this board is not required to adopt these citizen-drawn plans. But these plans shift the burden to this board, to come up with something that is at least as good, not only in terms of conformity to the basic requirements of state law but also in terms of fairness to all of Ohio's citizens. Thanks to better technology, we now have the ability to hold this board accountable, in a way that was not possible even in the last redistricting cycle.

This board need not repeat the mistakes of the past. It would do a great deal to restore public faith in our democracy, if you were to follow a fair, open and transparent process. That would include inviting and then reviewing proposed plans from interested members of the public. It would also include giving members of the public an adequate opportunity to review and comment on all plans that this body is considering. Finally, it would include drawing a map that is fair to everyone – not just to incumbents or the party in power, but to the People of Ohio.

Not everyone will be happy with the plan you ultimately adopt. But everyone should have the opportunity to be heard. Everyone should have ample time to review proposed plan before it becomes law. And everyone should have the chance to provide testimony on plans this body is considering. Whatever you do, I respectfully ask, please don't deny Ohio citizens that opportunity.