

**IN THE  
SUPREME COURT OF OHIO**

League Of Women Voters Of Ohio, *et al.*, :  
Relators, : Case No. 2021-1193  
v. : Original Action Pursuant to  
Ohio Redistricting Commission, *et al.*, : Ohio Const., Art. XI  
Respondents. : [Apportionment Case Pursuant  
to S. Ct. Prac. R. 1403]

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Bria Bennett, *et al.*, :  
Relators, : Case No. 2021-1198  
v. : Original Action Pursuant to  
Ohio Redistricting Commission, *et al.*, : Ohio Const., Art. XI  
Respondents. : [Apportionment Case Pursuant  
to S. Ct. Prac. R. 1403]

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The Ohio Organizing Collaborative, *et al.*, :  
Relators, : Case No. 2021-1210  
v. : Original Action Pursuant to  
Ohio Redistricting Commission, *et al.*, : Ohio Const., Art. XI  
Respondents. : [Apportionment Case Pursuant  
to S. Ct. Prac. R. 1403]

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**COMBINED RESPONSE OF RESPONDENT GOVERNOR MIKE DEWINE TO (A)  
PETITIONERS' SECOND MOTION FOR AN ORDER DIRECTING RESPONDENTS  
TO SHOW CAUSE FOR WHY THEY SHOULD NOT BE HELD IN CONTEMPT OF  
THE COURT'S APRIL 14, 2022 ORDER; (B) PETITIONERS' MOTION FOR AN  
ORDER DIRECTING RESPONDENTS TO SHOW CAUSE, MOTION TO SCHEDULE  
CONTEMPT HEARING, AND MOTION FOR ATTORNEYS' FEES; AND (C) MOTION  
OF PETITIONERS THE OHIO ORGANIZING COLLABORATIVE, ET AL. FOR AN  
ORDER DIRECTING RESPONDENTS TO SHOW CAUSE WHY THEY SHOULD NOT  
BE HELD IN CONTEMPT**

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Ohio Redistricting Commission, <i>et al.</i> ,	:	[Apportionment Case Pursuant to S. Ct. Prac. R. 1403]
Respondents.	:	

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
LAW AND ANALYSIS .....	4
A.    The Petitioners’ Failure Of Proof. The Governor’s Actions Are Consistent With The Determinations Made By Ohio’s Chief Election Officer And The Findings In The Federal Action .....	4
1.    The Ohio Secretary Of State Has Determined That “Map 3 Is The Only Viable Option To Effectively Administer A Primary Election on August 2, 2022.” .....	4
a.    The Secretary’s Status As Ohio’s Chief Election Officer.....	4
b.    Secretary LaRose Has Said August 2, 2022 Is the Last Date Available To Conduct A Primary Election – And The Only Map That Permits An August 2 Primary Is Map 3 .....	5
c.    The Governor Relied On Ohio’s Chief Elections Officer In Voting For The Only Map That Permitted An August 2 Primary .....	7
d.    All Challenges To the Secretary’s Determinations Are Untimely Per This Court’s Scheduling Order .....	7
2.    The Federal Court Has Determined That Map 3 Is The Only Viable Option To Effectively Administer A Primary Election on August 2, 2022—The Intervening Petitioners Agreed As Well .....	8
3.    The Federal Court Also Considered, Adjudicated, And Rejected Petitioners’ Litany Of Other Arguments.....	9
B.    Petitioners’ Failure On The Law.....	16
1.    The Commission’s Actions Are Protected By Legislative Immunity, Among Other Doctrines .....	16

	<u>Page</u>
2. Petitioners Have No Legal Or Factual Response To Ohio’s Legislative Immunity Doctrine .....	18
3. Petitioners Have No Legal Or Factual Response To The Authorities Holding That The Separation of Powers Prohibits The Issuance Of Contempt And The Ohio Constitution Otherwise Forbids The Other Various Demands.....	22
4. Petitioners Simply Misconstrue The Defense Of Impossibility Of Performance .....	26
C. Alternatively, Damages or Monetary Sanctions May Not Be Imposed.....	27
CONCLUSION .....	28

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bogan v. Scott-Harris</i> , 523 U.S. 44, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) .....	17, 25
<i>Brnovich v. Democratic Nat'l Comm.</i> , ___ U.S. ___, 141 S. Ct. 2321, 210 L.Ed.2d 753 (2021).....	18
<i>City of Toledo v. State</i> , 154 Ohio St. 3d 41, 2018-Ohio-2358, 10 N.E.3d 1257 .....	21, 24, 26
<i>Gonidakis v. LaRose</i> , 2022 WL 1175617 (S.D. Ohio Apr. 20, 2022).....	<i>passim</i>
<i>Habeeb v. Ohio House of Representatives</i> , 2008-Ohio-2651 .....	27
<i>Hicksville v. Blakeslee</i> , 103 Ohio St. 508, 134 N.E. 445 (1921) .....	17, 18, 20, 21
<i>Horry Tel. Coop., Inc. v. Georgetown</i> , 408 S.C. 348, 759 S.E.2d 132 (2014) .....	24
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978).....	20
<i>Kent v. Mahaffy</i> , 2 Ohio St. 498 (1853) .....	22
<i>Kniskern v. Amstutz</i> , 144 Ohio App. 3d 495, 760 N.E.2d 876 (8th Dist. 2001) .....	17, 18
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV I)</i> , ___ Ohio St.3d ___, 2022-Ohio-65, 2022 WL 110261 .....	2, 19
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV II)</i> , ___ Ohio St.3d ___, 2022-Ohio-342, 2022 WL 354619 .....	2, 15, 19
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV III)</i> , ___ Ohio St.3d ___, 2022-Ohio-789, 2022 WL 803033 .....	2, 15, 19
<i>League of Women Voters of Ohio v. Ohio Redistricting Comm'n, (LWV IV)</i> , ___ Ohio St.3d ___, 2022-Ohio-1235, 2022 WL 1113988 .....	<i>passim</i>
<i>Merrill v. Milligan</i> , 142 S. Ct. 879 (2022) .....	10, 11
<i>New Orleans Water Works Co. v. City of New Orleans</i> , 164 U.S. 471, 17 S.Ct. 161, 41 L.Ed. 518 (1896).....	23, 24, 25
<i>ProgressOhio.org v. Kasich</i> , 129 Ohio St. 3d 449, 2011-Ohio-4101, 953 N.E.2d 329 .....	22

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Shillitani v. United States</i> , 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) .....	4
<i>Spallone v. United States</i> , 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) .....	17, 23
<i>State ex rel. Cincinnati Enquirer v. Hunter</i> , 138 Ohio St.3d 51, 2013-Ohio-5614, 3 N.E.3d 179 .....	20
<i>State ex rel. Gallagher v. Campbell</i> , 48 Ohio St. 435 (1891) .....	19
<i>State ex rel. Grendell v. Davidson</i> , 86 Ohio St. 3d 629, 716 N.E.2d 704 (1999) .....	19
<i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward</i> , 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999) .....	21
<i>Tenney v. Brandhove</i> , 341 U.S. 367, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951) .....	17
<i>Topletz v. Skinner</i> , 7 F.4th 284 (5th Cir. 2021) .....	3
<i>United States v. Rylander</i> , 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) .....	4
<b><u>Other Citations</u></b>	<b><u>Page(s)</u></b>
Ohio Constitution Article XI, Section 1(A) .....	12, 22
Ohio Constitution Article XI, Section 1(A)(3) .....	10
Ohio Constitution Article XI, Section 1(B)(1) .....	26
Ohio Constitution Article XI, Section 9(D) .....	12, 22, 25, 26
Ohio Constitution Article XI, Section 9(D)(1) & (2) .....	25
Ohio Constitution Article XVI, Section 1 .....	11
Ohio Revised Code § 2743.02 .....	27
Ohio Revised Code § 3501.04 .....	4
Ohio Revised Code § 3513.263 .....	11
Black's Law Dictionary (5 Ed.1979) .....	27

## INTRODUCTION

While Petitioners' most recently-filed reiterations of their demands for contempt, sanctions, and other extraordinary relief are perhaps more frenzied than their prior submissions, they suffer from the same constitutional infirmities. The memoranda are long on rhetoric and short on legal support. They advance arguments already soundly (and repeatedly) rebuffed by the authorities cited in Respondents' prior submissions, as well as **this Court's own rulings**. In the case of the Governor alone, he has submitted no less than five memoranda extensively detailing the fatal constitutional and other barriers to their demands (collectively, "Governor's Briefs").<sup>1</sup> Granted, two of the five were filed within the last seven days given the uptick in Petitioners' endless serial filings. But, in other instances, the **Petitioners have been placed on notice for literally months of the grounds and authorities compelling rejection of their demands.**

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<sup>1</sup> Response of Respondent Governor Mike DeWine to Court's Show Cause Order, filed on **February 23**, 2022, in Case Nos. 2021-1193; 2021-1198; and 2021-1210; Response of Respondent Governor Mike DeWine to Petitioners' Objection to the Ohio Redistricting Commission's February 24, 2022 Revised Plan, filed on **March 3**, 2022, in Case Nos. 2021-1193; 2021-1198; and 2021-1210; Combined Response of Respondent Governor Mike DeWine to (A) Petitioners' Renewed Motion for an Order Directing Respondents to Show Cause and Motion to Schedule Contempt Hearing; and (B) Petitioners' Objections to General Assembly District Plan Adopted on March 28, 2022, filed on **April 4**, 2022 in Case Nos. 2021-1193; 2021-1198; and 2021-1210; and Response of Respondent Governor Mike DeWine to Petitioners' Motion for an Order Directing Respondents to Show Cause for Why They Should Not Be Held In Contempt of the Court's April 14, 2022 Order, filed on **May 5**, 2022 in Case No. 2021-1193; Combined Response of Respondent Governor Mike DeWine to (A) Petitioners' Objection to the Ohio Redistricting Commission's May 6, 2022 Resubmission of the Invalidated February 24, 2022 Plan (B) Petitioners' Objections to the Already-Invalidated February 24, 2022 Plan, Re-Adopted on May 5, 2022, and Request for Immediate Relief; and (C) Petitioners the Ohio Organizing Collaborative, et al. Joinder in Objections to the Already-Invalidated February 24, 2022 Plan, Re-Adopted on May 5, 2022 Filed by Petitioners Bria Bennett, et al. in Case No. 2021-1198, filed on **May 9**, 2022 in Case Nos. 2021-1193; 2021-1198; and 2021-1210.

Counting this memorandum, the Governor has submitted three memoranda within the last seven days. In one submission, he was provided not even a full business day to respond; in another, the Court's order afforded him less than three calendar days to respond; and as to one other motion, he was afforded a twenty-four hour response time. The latter is in reference to the League of Women Voters "motion" filed on May 11, which is an out-of-rule reply brief since it is candidly responding to arguments presented by the Governor on May 5 in response to the League of Women Voters' April 25 Motion. This flaunts the Court's scheduling order forbidding the filing of replies, as do the contempt motions which follow in sequence following the filing of objection responses, thus serving as de facto replies.

Several legal propositions, fatal to Petitioners' arguments, are outlined in the Governor's Briefs. They include:

1. The Redistricting Commission is a legislative body.
2. Article XI permits the Court to review and, if found unconstitutional, invalidate a legislative plan. The Court's sole remedy, however, is to order the Commission to adopt a new general assembly district plan in accordance with Article XI.
3. The Court can make only "should" recommendations about how the Commission should accomplish adopting a new general assembly district plan, not "shall" orders.
4. The Court may not order, in any circumstance, 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. No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.
5. "[A]uthority for setting the date for a primary election belongs to the General Assembly, not to the Ohio Supreme Court." *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV IV)*, \_\_ Ohio St.3d \_\_, 2022-Ohio-1235 at ¶ 69 (citing R.C. 3501.40 and 3501.01(E)(1)).<sup>2</sup>
6. The separation-of-powers doctrine precludes the judiciary from asserting control over the performance of duties that are legislative in character; compelling the commission to enact or adopt a map; or holding the Commission in contempt.
7. Impossibility of performance excuses any personal liability.
8. Ohio's legislative immunity doctrine shields the Commission, and its members, from liability.

Even a modest review reveals Petitioners' memoranda offer no substantive support for their positions, just rhetoric and inapposite citations. One would assume

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<sup>2</sup> See generally, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV I)*, \_\_ Ohio St.3d \_\_, 2022-Ohio-65, 2022 WL 110261; *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV II)*, \_\_ Ohio St.3d \_\_, 2022-Ohio-342, 2022 WL 354619; *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV III)*, \_\_ Ohio St.3d \_\_, 2022-Ohio-789, 2022 WL 803033; *League of Women Voters of Ohio v. Ohio Redistricting Comm'n, (LWV IV)*, \_\_ Ohio St.3d \_\_, 2022-Ohio-1235, 2022 WL 1113988.

that, armed with time and apparently endless resources, the Petitioners, collectively, could identify a single case where a court has used contempt to compel a legislative body to vote in a particular fashion where the legislators were entitled to exercise discretion or deliberate. They do not. Not a single one. **Petitioners' demand remains that the Court should ignore the Ohio Constitution, the fundamental concept of separation-of-powers, and Ohio's statutes to fashion whatever relief necessary to achieve Petitioners' self-serving objectives.** It is that basic; and it is fundamentally wrong.

Compounding the impropriety of their legal demands, Petitioners offer a factual narrative they know is wrong. Petitioners the League of Women Voters, the Philip Randolph Institute of Ohio, all of the individual Bria Bennett petitioners (save for Carrie Kubicki), and the Ohio Organizing Collaborative (OCC), are intervenors in *Gonidakis, et al. v. LaRose*, Case No. 2:22-CV-773 (S.D. Ohio) ("Federal Action"). Before this Court, Petitioners now advance bad faith arguments on which **they litigated** and **they lost** in the Federal Action, as outlined below.

For the reasons explained below, as well as those set forth in the Governor's Briefs, Petitioners' motions should be denied, and the Court should put an end to these serial motions by barring Petitioners from filing any more of them moving forward. Threatening or holding a party in contempt where it is established that either no contempt power exists, the alleged contemnor is shielded by a privilege, or the alleged contemnor lacks the ability to comply with the court's order **amounts to a violation of Commissioners' rights under the Due Process Clause of the Fourteenth Amendment.** See, e.g., *Topletz v. Skinner*, 7 F.4th 284, 295–96 (5th Cir. 2021) (when



the contemnor 'has no ... opportunity to purge himself of contempt,' confinement of a civil contemnor violates due process") (quoting *Shillitani v. United States*, 384 U.S. 364, 371, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966)). See also *United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) ("Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.").

### **LAW AND ANALYSIS**

#### **A. The Petitioners' Failure Of Proof. The Governor's Actions Are Consistent With The Determinations Made By Ohio's Chief Election Officer And The Findings In The Federal Action.**

Legally, no basis exists for Petitioners' demands, as made clear by this Court's prior decisions and the Governor's Briefs. But even if we turn to the facts, the record is clear that the Governor acted consistent with the information provided by the Ohio Secretary of State and the findings made by the court in the Federal Action.

#### **1. The Ohio Secretary Of State Has Determined That "Map 3 Is The Only Viable Option To Effectively Administer A Primary Election on August 2, 2022."**

##### **a. The Secretary's Status As Ohio's Chief Election Officer.**

"The secretary of state is the chief election officer of the state, with such powers and duties relating to the registration of voters and the conduct of elections as are prescribed in Title XXXV of the Revised Code." R.C. 3501.04. He "oversees the elections process and appoints the members of boards of elections in each of Ohio's 88 counties," in addition to "supervis[ing] the administration of election laws" statewide.<sup>3</sup>

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<sup>3</sup> See Ohio Secretary of State, "Duties & Responsibilities," <https://www.ohiosecretaryofstate.gov/secretary-office/duties-responsibilities/> (last accessed 5/11/22).

**b. Secretary LaRose Has Said August 2, 2022 Is the Last Date Available To Conduct A Primary Election – And The Only Map That Permits An August 2 Primary Is Map 3.**

“Overseeing an election requires much more than simply counting the ballots cast on election day.” *Gonidakis v. LaRose*, 2022 WL 1175617, at \*4 (S.D. Ohio Apr. 20, 2022). A multitude of statutory and constitutional deadlines must be complied with in order to administer the forthcoming November 8, 2022 state and federal election, including a primary that must include General Assembly candidates. Secretary LaRose has explained that Ohio conducts its “elections . . . over at least a 90-day period.” [LaRose 5/5/22 Statement.<sup>4</sup>] During that time, the state must:

- Conduct “almost a month of early voting before both the primary and general election,” *Gonidakis*, 2022 WL 1175617, at \*4;
- Ensure that overseas service members *receive* their ballots at least 45 days before the election, 52 U.S.C. § 20302(a)(8);
- Receive write-in candidates’ declarations of intent for partisan offices no later than 72 days before the primary election, R.C. 3513.041;
- Determine the validity or invalidity of the declaration of candidacy and petition, R.C. 3513.05.
- Certify candidates no later than 78 days before the primary election, R.C. 3513.05;
- Hold protests against certified candidates no later than 74 days before the primary election, R.C. 3513.05, and against write-in candidates no later than 67 days before the primary election, R.C. 3513.041, and
- Certify to boards of elections the form of official ballots no later than 70 days before the primary election, R.C. 3513.05, after which boards in the most populous county in a multi-county district must then certify candidate names to the other county boards of elections in the district no later than 70 days before primary election. R.C. 3513.05.

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<sup>4</sup> See Ohio Redistricting Commission, Statement to the Commission of Secretary LaRose, May 5, 2022, <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-5-2022-316/statement-to-commission-by-secretary-larose-2022-5-05.pdf> (emphasis added) (“LaRose Statement”).

[LaRose Statement.]

None of this begins to take into account administrative burdens that, as Secretary LaRose reported to the Commission at its May 4, 2022 meeting, are necessary to avoid forcing already “burn[t]out” local elections officials “to do 100 days['] worth of work in 45 days,” as they had to in order to pull off the May 3 primary – which did not even include state-legislative candidates. [Bennett, 11, 16.<sup>5</sup>] Such administrative tasks include not only the “at least two-week[] [period necessary] to reprogram voter registration and tabulation systems to accommodate a new map,” [LaRose Statement], but also time for “logic and accuracy” testing of the ballots, which can occur only after Secretary LaRose certifies the form of the ballots. [*Id.* at 16.]

In order to accommodate all necessary deadlines and administrative contingencies, Secretary LaRose and “and **the bipartisan Ohio Association of Elections Officials** have repeatedly stated that because August 2, 2022 is already reserved for ‘special elections’ in Ohio law, it is the only date on which a statewide primary election can be conducted in advance of the scheduled General Election.” [LaRose Statement (emphasis added.)] Any alternative date would require the General Assembly, which has sole authority for setting primary dates, to enact emergency legislation. “That means bipartisan votes. That means supermajority votes to pass that emergency legislation.” [Bennett at 12.] Yet, as Secretary LaRose noted, “[t]he Speaker of the Ohio House and the President of the Ohio Senate have indicated publicly that they lack the required two-thirds vote in both chambers to enact emergency

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<sup>5</sup> [See Transcripts of the Commission’s Meetings of 5/4/22 and 5/5/22, as submitted by the Bennett Petitioners.]

legislation for this purpose”—a point Commission members confirmed at the May 4 meeting. [LaRose Statement.<sup>6</sup>]

**c. The Governor Relied On Ohio’s Chief Elections Officer In Voting For The Only Map That Permitted An August 2 Primary.**

Considering his expertise, and having personally “sat down with Secretary LaRose” for “quite some time” to go “over the problems that he had articulated,” Governor DeWine, while acknowledging the “legal obligation . . . to try to hit th[e] marks” the Court has set, decided to vote in favor of Map 3, as a matter of practicality. [Bennett 14, 23.] Referring to the unsuccessful efforts of the independent map drawers, Governor DeWine noted that while the Commission “accept[ed] whatever the court tells us,” “it became abundantly clear you can’t hit all those marks” – at least not consistent with the obligation to “avoid partisan favoritism.” [*Id.* at 14.] “I have said this consistently at every stage of this, we have an obligation to try to come up with a map,” he noted. But in the end, with a “fuller understanding of what [Secretary LaRose] said,” it was “clear to [Governor DeWine] that it is impossible to proceed with an August 2nd primary with any map other than map three.” [*Id.* at 24.] Accordingly, he along with a majority of Commission members, voted in favor of resubmitting the Map 3.

**d. All Challenges To the Secretary’s Determinations Are Untimely Per This Court’s Scheduling Order.**

Some Petitioners attempt to collaterally attack the Secretary’s determination. However, **their efforts are belated and out-of-rule.** Under this Court’s order, Petitioners were obligated to offer any argument (and evidence in support thereof) in

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<sup>6</sup> [See Bennett 17 (Sen. McColley: “But based upon previous conversations that we’ve had in our own caucus and conversations I’ve had with other members of our caucus, I don’t think there would be votes for an emergency at this time in this process.”)]

opposition to Map 3 in their objections, and the Court's orders make clear they are not entitled to file any replies. Just as the Court has expected Respondents to comply with the expedited scheduling orders, Petitioners cannot remedy the fatal evidentiary deficiencies in their Objections, or circumvent this Court's scheduling order, by advancing factual arguments that belong, if anywhere, in their Objections.

**2. The Federal Court Has Determined That Map 3 Is The Only Viable Option To Effectively Administer A Primary Election on August 2, 2022—The Intervening Petitioners Agreed As Well.**

Governor DeWine also had the benefit of *Gonidakis* Court's April 20 Decision. That decision first made clear that August 2 is the deadline for completing a primary. "Based on the uncontroverted evidence that we heard across multiple hearings, we make the following findings of fact: **Under current state law, April 20 is the last day that Ohio can implement a map other than Map 3 to ensure a primary does take place on August 2.**" *Gonidakis*, 2022 WL 1175617, at \*9 (emphasis added). The "uncontroverted evidence" referenced in the Federal Action **included the intervening Petitioners' concessions:**

- ". . . April 20. That is when every party to this litigation agrees a map would have to be in place for the state to conduct a primary that both complies with state election law and allows for an orderly general election in November." *Id.* at \*1.
- ". . . all parties agree that April 20 is the drop-dead date to choose a new map that be implement in time for a primary and general election." *Id.* at \*2.
- "As all parties agree, Ohio's last date for implementing a new map under law is April 20." *Id.* at \*13.
- "As a result, all the parties agree that April 20 is the drop-dead date to implement a new map under current law." *Id.* at \*24.

Then, based upon the evidentiary record, the federal court held “Map 3 is the most equitable option available” given numerous considerations, including that “further delay would override far more state law.” *Id.* at \*24. The court then offers an extensive analysis of the appropriateness of Map 3 over all others, but that analysis need not be repeated here. It suffices to state that Governor DeWine had the benefit of this extensive analysis as part of his deliberation—just as this Court does now when it is, once again, being asked to consider the actions of the Commission.

**3. The Federal Court Also Considered, Adjudicated, And Rejected Petitioners’ Litany Of Other Arguments.**

The court in the Federal Action – in which Petitioners voluntarily and almost universally chose to intervene – also considered and rejected many of the factual arguments they raise here.

Consistent with their unwillingness to take no for an answer, however, Petitioners seek to re-litigate them again, without addressing (much less rebutting) the federal court’s findings. We begin with the OCC Petitioner’s untimely challenge to Secretary LaRose’s “assert[ions] during the May 4 and 5 hearings that he could not implement anything other than the February 24 plan in time for an August 2 primary date for the 2022 election.” [OOC Mtn. at 13.] The OOC Petitioners conveniently ignore, as noted above, that “all parties” to the federal litigation, themselves included, “agree[d] that April 20 is the drop-dead date to choose a new map that can be implemented in time for a primary and general election,” including for an August 2 primary date. *Gonidakis, 2022 WL 1175617*, at \*2. As the court put it:

**Working backwards from August 2 means that Ohio must thus have a new map by April 20 under current law. All the parties agree on this.** So we call this date the ‘drop dead’ date. If the State does not have a

map ready to go by that date, then even the August 2 primary date would be unfeasible—an intolerable situation from all parties' perspectives.

[*Gonidakis*, 2022 WL 1175617, at \*4 (emphasis added).]

And the only map that had been implemented as of April 20 was, indeed, Map 3. “Map 3 [therefore] provides Ohio with the most time to comply with all federal law while minimizing disruptions and costs in administering the required primary election,” which is precisely why the federal court chose it as a stop-gap. *Gonidakis*, 2022 WL 1175617 at \*27.

Next, defying all common sense, Petitioners argue that “Secretary LaRose’s assertions about what *he* and the *boards of election* can or cannot do are not relevant to the *Commission’s* duties.” [OOC Mtn. at 13; Bennett Mtn. at 19-20.] Yet as Secretary LaRose remarked at the May 4 meeting, he does not abandon his role as the state’s chief elections officer upon stepping into his role as a Commission member. To the contrary, he is a Commission member **only by virtue of holding that position**, as voters mandated that the State’s chief elections officer should be a Commission member, see Ohio Const. Art. XI Sec. 1(A)(3), a nuance Secretary LaRose recognized. “It would be It would be irresponsible for me, as Ohio's chief elections officer,” he noted, “to even consider a new map unless the legislative leaders . . . could assure me that they can get that they could get that supermajority vote to pass a piece of legislation to allow us to adjust those timelines.” [Bennett 12.]

Beyond that, the federal court detailed the various administrative challenges that must be accounted for in a typical election, proving that such practicalities do matter. “[R]unning elections state-wide is extraordinarily complicated and difficult.” *Gonidakis*, 2022 WL 1175617, at \*19 (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022))

(Kavanaugh, J., concurring)). As evidence before the federal court confirmed, they “require[] enormous advance preparations by state and local officials and pose significant logistical challenges.” *Id.* at \*21 (citation omitted). Late-stage judicial interventions can “sow ‘chaos for candidates, campaign organizations, independent groups, political parties, and voters.” *Id.* at \*21 (quoting *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring)).<sup>7</sup>

These realities also expose Petitioners’ argument that “Secretary LaRose and the boards of election *can* implement a plan within 68 days of adoption by the Commission,” as willfully ignorant, if not outright misleading. Again, the federal court heard “undisputed testimony that Ohio law requires 90 days for pre-election steps (candidate filings, residency requirements, overseas ballot distribution, early voting, and the like) plus another two weeks for county boards to reprogram the system with a new map. That is the minimum amount of time the State needs, under current federal and state regulations, between adopting a new map and holding a primary election.” *Gonidakis*, 2022 WL 1175617, at \*1. The court even pointed out a number of Ohio requirements that must be completed at least 90 days before a primary. See Ohio Const. Art. XVI, Sec. 1 (requiring that constitutional amendments be submitted 90 days before the election to be placed on the ballot for a referendum); R.C. 3513.263 (setting deadlines of 90 days before election for nominating petitions and 74 days for protests).

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<sup>7</sup> Justice Kavanaugh’s concurrence in *Merrill* in fact identifies just the problems that still plague Ohio here: “The State says that those individuals and entities now do not know who will be running against whom in the primaries next month. Filing deadlines need to be met, but candidates cannot be sure what district they need to file for. Indeed, at this point, some potential candidates do not even know which district they live in. Nor do incumbents know if they now might be running against other incumbents in the upcoming primaries.” *Id.* at 880.



“The Ohio Elections Calendar weaves together countless intricate and interdependent dates and procedures.” *Gonidakis*, 2022 WL 1175617, at \*19. “Judges simply cannot know all the consequences when we start tugging on those strings,” which is precisely why courts, and the Commission’s members, are entitled to rely on Secretary LaRose’s expertise. *Id.*

When it came to choosing which plan the court should use as a fall back in the Federal Action, Petitioners urged it to adopt maps largely identical to those they now insist the Commission should have approved here: “maps drafted by [the] two ‘independent’ mapmakers hired by the Commission,” or one “offered by Bennett’s expert witness, Professor Rodden,” the problems with which were immediately apparent to the federal court. *Gonidakis*, 2022 WL 1175617, at \*9.

Most obvious was the issue this court cited in rejecting Petitioners’ requests for it to adopt their own apportionment map, or preemptively declare the independent map drafters’ plans “presumptively constitutional”<sup>8</sup> in its April 14 decision: “The Rodden and independent mapmakers’ maps haven’t been approved by the Commission, as the Ohio Constitution requires.” *Gonidakis*, 2022 WL 1175617, at \*24 (citing Ohio Const. Art. XI, Sec. 1(A) (mandating that Commission approve maps) & 9(D) (barring courts from doing so)). And these were not the only problems. “Neither was passed by the Commission through the Ohio Constitution’s redistricting process, nor subjected to the critique of other mapmakers or experts.” *Gonidakis*, 2022 WL 1175617, at \*27. In the case of the independent maps, further, there were unconstitutional defects identified for the Commission’s refusal to adopt them without time for any amendments:

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<sup>8</sup> *LWV IV*, 2022-Ohio-1235 at ¶ 63-66, 72.

- First, the independent mapmakers’ plan risked emphasizing partisan symmetry at the expense of the districts’ compactness.
- Second, the proposed plan risked improperly splitting municipalities and counties in violation of the Ohio Constitution.
- Third, the proposed plan did not consider where incumbents lived, and thus might have created districts where multiple incumbents would find themselves in a showdown.
- And lastly, these concerns collectively presented a daunting task for the independent mapmakers to solve before the deadline imposed on the Commission by the Ohio Supreme Court.

[*Gonidakis*, 2022 WL 1175617, at \*28 (citations omitted).]

Equally relevant here, it is not apparent that any of these defects were corrected in the “Corrected Independent Mapdrawers’ Plan” Minority Leader Russo presented to the Commission **at 3:00 p.m. on May 5**. “As we all know,” Auditor Faber remarked, “a number of us had amendments to be offered that . . . were not able to be considered in the time frame that the independent . . . map drawers had.” [Bennett 23.] Ultimately, “we couldn’t even offer amendments to that map or talk about suggestions as to where they are,” and so “whether this map meets all the provisions of two, three, four or five and seven,” Auditor Faber “ha[d] no idea.” [*Id.*] Nor did he have an opportunity “to review it in detail.” [*Id.*]

Worse yet, in the case of the Rodden-drafted plan, the federal court suggested the Bennett Petitioners improperly withheld the map for the sake of securing through the federal court what it knew it could not through the Commission:

**As for Rodden's own map, it was never even seen by the Commission. Bennett never says why the Commission didn't see or couldn't have seen this map. Nor does Bennett explain why one party should be able to advance its preferred map through federal litigation only, rather than through the constitutionally prescribed state-redistricting process.** Were we to accept Bennett's invitation, the

sandbagging incentives would be obvious: Each side would have reason to keep a map in its pocket, out of view of the constitutionally empowered actors, to present, as yet untainted, to a federal court.

[*Gonidakis*, 2022 WL 1175617, at \*28 (italic in original, other emphasis added (record citations omitted)).]

To the extent the “Corrected Independent Mapdrawers’ Plan” is the one that the Bennett Petitioners claim the Commission “had access to for weeks before May 5,” they twist the truth – that map was, in fact “never seen by the Commission,” never voted on by it, and instead withheld until at least April 8 for the sake of Petitioners’ ability to game the system and “advance its preferred map through federal litigation only.”

Moreover, having “access” to a plan filed ***not with*** the Commission, but with a federal court, nor put to vote before it by any Commission member, is not the same as having the opportunity (or even ***notice*** of the opportunity or necessity) to critically review it before casting a vote on it. See e.g., *LWV II*, 2022-Ohio-789 at ¶ 29 (“Similarly, not until 12:30 p.m. on February 24—the day the commission voted on and passed the second revised plan—were the minority-party commission members given a copy of the proposed plan for review. . . . Until the final version was posted, House Minority Leader Russo did not know whether the plan to be voted on was the same one that she and Senator Sykes had been given earlier that afternoon.”). Bennett Petitioners admit they submitted the “Corrected Independent Mapdrawers’ Plan” via the Commission’s online submissions system for the first time on May 4. [Mtn. at 13.] They further admit that Minority Leader Russo “sent a letter” to other Commission members regarding the map, introduced and moved for its adoption, all for the first time on May 5. [*Id.* at 14-15.] And, as this Court has found, having only a few hours’ opportunity to consider a plan to be voted on the same day it was introduced – especially a plan the

Bennett Petitioners admit they could have been placed formally before the Commission “weeks” earlier – is utterly insufficient. *LWV III*, 2022-Ohio-789 at ¶ 29; see also *LWV II*, 2022-Ohio-342 (striking down apportionment plans where Commission members were “in the dark” and about which they had “little clue,” as it was “introduced and later adopted on the same day”).

Commission member Auditor Faber expressed these very concerns in explaining his “trouble [in] adopting this map that I learned about today for the first time at 3:00 or thereabouts.” [Bennett 23.] In addition to “not [having] had a chance to review it in detail,” Faber cited another fatal defect with the purportedly “Corrected” plans: “I think it’s **inappropriate for us to be voting on that map as completed by one of the petitioners and their lawyers.**” [*Id.* (emphasis added.)] “I’ve had things that I liked [that] Mr. Rodden had done and thought might be a workable spot in the past. However, this map and these changes, I don’t believe, represent that. I don’t believe they’re fair.” [*Id.*] This Court has, furthermore, suggested that such last-minute, one-sided “modifi[cations]” is evidence that a map is non-compliant with Article XI. The following is the criticism offered by this Court when Republicans were alleged to have engaged in similar conduct:

The evidence suggests that Springhetti, a staff member for the Republican legislative caucus, modified the second revised plan in one afternoon to produce the third revised plan. Neither Senator Sykes, House Minority Leader Russo, nor their staff had an opportunity to provide input concerning the creation of the third revised plan or a meaningful opportunity to review the proposal or provide amendments to it once it was presented to the commission.

[*LWV IV*, 2022-Ohio-1235 at ¶ 40.]

What's more, the federal court's findings expose Petitioners' duplicity in suggesting that "[u]nrebutted evidence submitted in the federal three-judge court on April 8, 2022 and filed with this Court shows that only minor technical corrections to the independent map drawers' plan were necessary" to bring it in "full compliance with Article XI." [Mtn. at 11.] To be clear, neither the commission, nor any adjudicative body has ever made a finding that the "Corrected Independent Mapdrawers' Plan" was in "full compliance with Article XI." Rather, as noted, the federal court's only "unrebutted" finding was just the opposite – that it couldn't be adopted **because it did not comply with Ohio's Constitution**. *Gonidakis*, 2022 WL 1175617, at \*24, \*28.

In summary, Petitioners cannot credibly be heard to advance a multi-tiered sanction motions based upon a factual predicate that is not only untimely, but was previously rejected. Ironically, the foregoing illustrates that Petitioners have engaged in the very conduct that this Court has relied upon to support a finding of an unconstitutional partisan intent. Petitioners' narrative, therefore, runs counter to the maxim "he who seeks equity must do equity." Petitioners' hands are hardly clean and they cannot proceed before this Court seeking extraordinary relief.

**B. Petitioners' Failure On The Law.**

**1. The Commission's Actions Are Protected By Legislative Immunity, Among Other Doctrines.**

The Governors Briefs, incorporated herein, detail the controlling law. However, we believe it is helpful to briefly restate the legislative immunity doctrine, which is a universal bar to Petitioners' demands. Its application and import is straightforward. The Commission is an independent legislative body that acts through deliberation and majority vote. "That legislative officers are not liable personally for their legislative acts

is **so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be found where the doctrine has been questioned and judicially declared.**” *Kniskern v. Amstutz*, 144 Ohio App. 3d 495, 496-97, 760 N.E.2d 876 (8th Dist. 2001) (quoting *Hicksville v. Blakeslee*, 103 Ohio St. 508, 517–518, 134 N.E. 445 (1921) (italic emphasis in original; bold emphasis added)). The Commission’s “exercise of legislative discretion should not be inhibited by judicial interference or **distorted by the fear of personal liability.**” *Bogan v. Scott-Harris*, 523 U.S. 44, 52, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) (emphasis added); see also *Spallone v. United States*, 493 U.S. 265, 279, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) (“any restriction on a legislator’s freedom undermines the ‘public good’ by interfering with the rights of the people to representation in the democratic process”).

Immunity, it must be remembered, is not for the benefit of the immune, but for their constituents. “Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.” *Kniskern v. Amstutz*, 144 Ohio App. 3d 495, 496 (2001) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951)). Without freedom to make the choices they deem best, Commission members are hamstrung by the will of aggressive litigants staking out positions for the benefit of their own personal and political interests.

The present case should be no exception. “Ohio courts have . . . long recognized that when a legislator votes on a proposed bill or ordinance, he is performing a quintessentially legislative function and thus enjoys absolute immunity arising out of the casting of that vote.” *Id.* at 496. Were it otherwise, a legislator could

be hauled into court for his decision in favor of a statute later found to be unconstitutional – “yet no one would claim that a legislator would be liable either in his official or in his individual capacity for the exercise of his judgment and discretion in voting for such void statute.” *Hicksville*, 103 Ohio St. at 518–19.

A Commission member’s choice of voting districts is no different. “Under our form of government, legislators have a duty to exercise their judgment” in all tasks. *Brnovich v. Democratic Nat’l Comm.*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 2321, 2350, 210 L.Ed.2d 753 (2021). “It is insulting to suggest” – as Petitioners do – “that they are mere dupes or tools” toeing the party line. *Id.* Nor could such an assumption serve as grounds for holding any Commission member in contempt. If, after all, “**legislative immunity were . . . conditioned upon favorable review of legislation in the courts, the doctrine would be rendered nearly meaningless and both the legislature and the judiciary would become increasingly politicized.**” *Kniskern*, 144 Ohio App. 3d at 497 (emphasis added.).

With the benefit of this introduction, we turn to Petitioners’ failed attempts to refute the dispositive case authority on this and other legal points.

## **2. Petitioners Have No Legal Or Factual Response To Ohio’s Legislative Immunity Doctrine.**

Having already had deployed, without success, whatever authority they could muster against legislative immunity several times over, Petitioners’ new offerings on this issue are acutely meritless. That starts with the OOC Petitioners’ argument (which the Bennett Petitioners seemingly echo) that “this Court should not equate the Commission with a legislative body.” [Mtn. at 15.] Setting aside the wealth of federal Supreme Court precedent stating the opposite, see *Gonidakis*, 2022 WL 1175617, at \*26 (collecting

cases) this suggestion, even if reviewed under only Ohio law, is wrong. Only months ago, this Court reiterated that “apportionment is a legislative task and that an adopted apportionment plan—like enacted legislation—is presumptively constitutional.” *LWV I*, 2022-Ohio-65 at ¶ 76. The Court has applied this presumption, which itself is grounded in decades-old precedent, see *State ex rel. Gallagher v. Campbell*, 48 Ohio St. 435, 436-37 (1891) (rejecting mandamus action to compel actions of apportionment board because redistricting “necessarily call[s] for the exercise of judgment and discretion on the part of” its members), four times in the course of this very litigation. *LWV I*, 2022-Ohio-65 at ¶ 76-80; *LWV II*, 2022-Ohio-342 at ¶ 29; *LWV III*, 2022-Ohio-789 at ¶ 23; *LWV IV*, 2022-Ohio-1235 at ¶ 36. Petitioners offer no explanation for offering an argument contradicted by this Court’s precedent.

The Bennett and League of Women Voters Petitioners also cite to mandamus cases to argue that legislative immunity – a point **none of these cases discuss** – should not apply. Governor DeWine has already explained in his May 5, 2022 response to the League of Women Voters’ Petitioners April 25 show-cause motion why mandamus cases – particularly those arising in the unique setting of the mandatory obligation to fund local courts – have no application here. Redistricting is a purely legislative, discretionary duty, *LWV I*, 2022-Ohio-65 at ¶ 76, and “[a] writ of mandamus will not issue to a legislative body or its officers to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control.” *State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 633, 716 N.E.2d 704 (1999).



OOC Petitioners curiously cite *Hutto v. Finney*, 437 U.S. 678 (1978), in support of their quest to rebut legislative immunity. Why is unclear. That case involved a claim against state prison officials for attorneys' fees under the federal Civil Rights Attorney's Fees Awards Act, which the Court held had the effect of waiving the State's right to assert sovereign immunity as a defense to an attorney fee award. *Id.* at 691. No one argues that any such waiver of common-law **legislative immunity** has occurred here. Similarly misplaced is their reference to *State ex rel. Cincinnati Enquirer v. Hunter*, 138 Ohio St.3d 51, 2013-Ohio-5614, 3 N.E.3d 179, wherein "this Court upheld a finding of contempt against a Magistrate Judge who violated a valid writ of prohibition." [Mtn. at 16.] Over and above the fact that writ of mandamus and prohibition cases are distinguishable for the reasons already given, magistrates are judges, not legislators. Thus they have no right to **legislative** immunity and are not engaging in discretionary legislative tasks.

Equally erroneous is the Bennett Petitioners' attempt to challenge *Hicksville's* "universal[] accept[ance]" of legislative immunity, which attaches to the Commission members' actions here. 103 Ohio St. at 517. Specifically, Petitioners claim that *Hicksville* is distinguishable because the Court there was considering "a village council's enactment of [unconstitutional legislation] in the first instance," and that it conditioned immunity on whether a legislator was acting in "good faith." [Mtn. at 34.] Neither is correct. It was in *Hicksville* the Court observed "**[t]hat legislative officers are not liable personally for their legislative acts is so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be found where the doctrine has been questioned and judicially declared.**" *Id.* at 517

(emphasis added). The Court then made clear that this legislative immunity is broadly applied. It first noted that the doctrine afforded protection for municipal legislators. *Id.* at 518-19. Next, in direct contradiction to Petitioners' claims, this Court specifically **rejected** the argument that village council members could be held personally liable for "voting for [a] resolution that they knew . . . was illegal, and therefore evinced [that they acted in] bad faith." *Id.* at 519 (emphasis added). The point of *Hicksville*, in other words, is that knowingly enacting unconstitutional legislation **is not grounds for revocation of immunity.**

Plus, even if *Hicksville* can be read as applying only to a knowing enactment of unconstitutional legislation "in the first instance," this Court's subsequent case law makes plain that such immunity extends even where lawmakers *repeatedly* enact such unconstitutional legislation. See e.g., *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 467, 715 N.E.2d 1062 (1999) (striking down "legislation previously declared violative of the Constitution" that the General Assembly had nonetheless reenacted, but not imposing personal liability upon any General Assembly member). As this Court held in *City of Toledo v. State*, 154 Ohio St. 3d 41, 2018-Ohio-2358, 10 N.E.3d 1257, the Court cannot use the contempt power to "assert[] control over" the performance of "purely legislative" duties, even if those duties include knowingly enacting an unconstitutional law – **and even if enactment of legislation that has the effect of violating a court order.** See 154 Ohio St. 3d 41, 2018-Ohio-2358, 10 N.E.3d 1257, ¶ 1, 27-29 (trial court cannot enjoin the General Assembly from enjoining enforcement of statutes reducing funding to "cities that were not acting in

compliance with [General Assembly] statutes that had previously been declared unconstitutional”).

**3. Petitioners Have No Legal Or Factual Response To The Authorities Holding That The Separation of Powers Prohibits The Issuance Of Contempt And The Ohio Constitution Otherwise Forbids The Other Various Demands.**

To reiterate: this Court “can exercise only such powers as the constitution itself confers, or authorizes the legislature to grant.” *Kent v. Mahaffy*, 2 Ohio St. 498, 498–99 (1853). It “can derive no power elsewhere.” *Id.* “[N]either statute nor rule of court can expand [its] jurisdiction” beyond the constitutional grant in Article XI. *ProgressOhio.org v. Kasich*, 129 Ohio St. 3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 4. And Article XI confers no contempt powers.

Petitioners are on notice of the Court’s commitment to this principle. It has refused to “declare . . . presumptively constitutional” plans not approved by the Commission; to “itself adopt a [redistricting] plan”; or to hold in contempt Commission members without authority to do so under Article XI, merely for making the legislative judgments that Ohio’s voters have entrusted to them. *LWV IV*, 2022-Ohio-789 at ¶ 72, 65, 32 n.6.

Between them, Petitioners have now had six (6) chances to prove through their briefs that this Court has the authority to hold Commission members in contempt merely for exercising their independent discretion in drafting apportionment maps – a task Ohio’s Constitution dedicates to their exclusive authority. See Ohio Const. Art. XI, Sec. 1(A) & Sec. 9(D). Not once have any pointed to a single case wherein any court, much less an Ohio court, has held a legislator in contempt for casting a vote on a matter within the scope of her constitutionally-defined discretion. Not in the redistricting

setting. Not in any setting. So glaring an omission speaks volumes as to the unprecedented nature of the relief Petitioners have insisted upon through countless briefs, built on a smattering of at-best tangentially relevant and intentionally-skewed cases, none of which have resulted in the orders they demand here.

In this regard, the Supreme Court's observation in *Spallone* was no exaggeration: There is "no parallel for a court to say to an elected official, 'You are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote.'" *Spallone*, 493 U.S. at 266. Holding elected officials in contempt for the manner in which they vote is simply "extraordinary." *Id.*; see also *id.* at 280 (referring to the "the 'extraordinary' nature of the imposition of sanctions against the individual [city] councilmembers").

The most any Petitioner can say about the legal grounds for such an order is the OOC Petitioners' observation that the "Court [in *Spallone*] did not foreclose the possibility that a federal court could use its inherent powers to hold individual city council members in contempt if coercing the city to comply with its orders failed" - an observation made only after the begrudging concession that the Supreme Court, in fact, "reverse[] the district court's imposition of sanctions on individual council members" in that case. [Mtn. at 17.] But relief the Supreme Court *did not foreclose* in one case carries hardly the same force as would an order granting such relief by any court, in any case, at any time, ever. On the latter point, Petitioners cite nothing.

Moreover, in the only case close to the facts at hand, the Supreme Court held that imposition of such judicial control over a legislative body in fact is improper. In *New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 17 S.Ct. 161, 41 L.Ed.

518 (1896), the Court rejected the notion that a court should order injunctive relief dictating the future conduct of a lawmaking body in that case, the defendant city: “[T]he courts **will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption.** The passage of ordinances by such bodies are legislative acts, which a court of equity will not enjoin.” *Id.* at 481 (emphasis added).

As is evident, *New Orleans Water Works* also speaks to separation-of-powers concerns, including those identified by this Court in *Toledo*. Relying on *New Orleans Water Works*, among other supportive cases, *Toledo* holds that the Court cannot use the contempt power to “assert[] control over” the performance of “purely legislative” duties, even if those duties include knowingly enacting an unconstitutional law. 2018-Ohio-2358 at ¶ 27-29 (citing *New Orleans Water Works Co. v. New Orleans*, 164 U.S. 471, 481, 17 S.Ct. 161, 41 L.Ed. 518 (1896) (“a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character”) and *Horry Tel. Coop., Inc. v. Georgetown*, 408 S.C. 348, 353, 759 S.E.2d 132 (2014), fn. 5 (explaining that the separation-of-powers doctrine would be violated if a court compelled a legislative body to enact a law)). “The separation-of-powers doctrine . . . precludes the judiciary from asserting control over ‘the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control,’ including, for instance, ‘compel[ing] the legislature to enact, amend, or repeal a statute.” *Toledo*, 2018-Ohio-2358 at ¶ 27-29.

Compelling the Commission to adopt a specific plan, as Petitioners insist it must here, should be no different. This conclusion is driven not only by the separation-of-powers considerations embodied in Ohio's Constitution, but also those made explicit in Article XI's plain text. Voters have made plain in Section 9(D) that the legislative duties of mapdrafting must never be shifted from the Commission to the Court: "[n]o court shall order, **in any circumstance**, the implementation or enforcement of any general assembly district plan **that has not been approved by** the Commission, nor "order the commission to adopt a particular" plan or draw a particular district. Ohio Const. Art. XI Sec. 9(D)(1) & (2) (emphasis added). This is precisely why the Court rejected the OOC petitioners' plea to "vindicate the federal Constitution" by adopting a redistricting plan of its own. *LWV IV*, 2022-Ohio-1235 at ¶ 66. Nor can the Court deploy the contempt power to achieve indirectly what the Constitution says it cannot do directly. See *New Orleans Water Works*, 164 U.S. at 481 (rejecting request for a bill enjoining legislative functions, as a court "ought not to attempt to do indirectly what it could not do directly").

Discretionary powers reserved to the Commission, furthermore, go well beyond the mere voting for or against a particular map. See *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) ("Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'"). Decisions as to when, where, and how to convene for the purpose of drafting general assembly-district plans in compliance with this Court's order are well within the purview of that discretion. Were it otherwise, this Court would not have needed to clarify its earlier recommendations regarding the hiring of independent mapdrawers, explaining that "our

language in League III suggesting that the commission ‘should’ retain an independent map drawer” meant only “‘**should**’ and not ‘**shall**[.]’” *LWV IV*, 2022-Ohio-789 at ¶ 4 (emphasis added).

And if the Court cannot hold Commission members in contempt, require them to adopt a new map in a particular manner (and it cannot) it has no authority to micromanage the mapdrafting process as Petitioners demand it should do here. To the extent any Petitioner is still claiming that this Court has the power to adopt a plan of its own, Article XI says it cannot. Ohio Const. Art. XI 9(D). And this Court has said it cannot. No meritorious basis exists in law or fact to continue to a claim for this relief.

**4. Petitioners Simply Misconstrue The Defense Of Impossibility Of Performance.**

Unable to rebut the Governor’s impossibility defense on the merits, Petitioners opt instead to misconstrue it, focusing on the time available to draft an apportionment map, rather than the **legal authority** necessary to **issue**, and to **comply with** a hypothetical contempt order. On the issuing side, this Court has held that it cannot use the contempt power to “assert[] control over” the performance of “purely legislative” duties. *Toledo*, 2018-Ohio-2358 at ¶ 27-29. On the compliance side, Governor Dewine would have no opportunity to purge the contempt, for the Commission can adopt new voting districts only by majority vote, Ohio Const. Art. XI, Sec. 1(B)(1), and he, like the Court, has no legal authority to compel its members to vote in one manner or the other.

No amount of inapposite case law from the corporate law setting changes that reality. For this additional reason, Petitioners’ motions must be denied.

**C. Alternatively, Damages or Monetary Sanctions May Not Be Imposed.**

Finally, the Governor's Briefs did not previously address the subject of Petitioners' demands for payment of attorneys' fees by, or the imposition of fines or other monetary relief upon, the Governor and other members of the Commission. In the hope that the following will also assist in bringing closure to Petitioners' serial filings, we note that Petitioners' submissions overlook a key point. Public officers enjoy statutory immunity under R.C. 9.86: "[N]o officer . . . shall be liable in any civil action that arise under the laws of this state for damage or injury caused in the performance of his duties, unless the officer's . . . actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner." The "bad faith" exception provides Petitioners no hope. It is limited to where there is "a design to mislead or deceive another, \* \* \* not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *Habeeb v. Ohio House of Representatives*, 2008-Ohio-2651 ¶12 (quoting Black's Law Dictionary (5 Ed.1979)). No such evidence exists. Of course, the Court of Claims has exclusive jurisdiction to determine, initially, whether the officer or employee is entitled to personally immunity under R.C. 9.86. See R.C. 2743.02.



**CONCLUSION**

For these reasons, as well as those set forth in the Governor's Briefs, Petitioners' motions should be denied.

Respectfully submitted,

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