

## 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
	:	Const., Art. XI
Ohio Redistricting Commission, et al.,	:	
	:	Apportionment Case
Respondents.	:	
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Bria Bennett, et al.,	:	
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Relators,	:	Case No. 2021-1198
	:	
v.	:	Original Action Pursuant to Ohio
	:	Const., Art. XI
Ohio Redistricting Commission, et al.,	:	
	:	Apportionment Case
Respondents.	:	
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Ohio Organizing Collaborative, et al.,	:	
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Relators,	:	Case No. 2021-1210
	:	
v.	:	Original Action Pursuant to Ohio
	:	Const., Art. XI
Ohio Redistricting Commission, et al.,	:	
	:	Apportionment Case
Respondents.	:	
	:	

**OHIO SECRETARY OF STATE FRANK LAROSE'S RESPONSE TO  
PETITIONERS' MOTIONS FOR AN ORDER DIRECTING RESPONDENTS  
TO SHOW CAUSE FOR WHY THEY SHOULD NOT BE HELD IN  
CONTEMPT OF THE COURT'S MARCH 16, 2022 ORDER**

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## I. INTRODUCTION

The Petitioners bring Motions for Contempt (“Motions”) on the theory that Republican members of the Redistricting Commission (“Commission”) collectively hijacked the process of passing the most recent redistricting plan (“Fourth Plan”) on March 28, 2022. The reality is that, as time was running out for the Commission to adopt a new Plan to comply with this Court’s order that a new Plan be adopted AND filed with the Secretary of State no later than March 28, Secretary of State Frank LaRose (“Secretary LaRose”) exercised the only available option to not miss that deadline. *See League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 2022-Ohio-789, 2022WL803033, ¶¶ 44-45. He voted for the only completed map before the Commission.

Significantly, Petitioners allege no contemptuous conduct committed by Secretary LaRose and he engaged in none. Petitioners’ allegations are principally directed at the alleged actions of Senate President Matt Huffman (“President Huffman”) and Speaker of the House Robert Cupp (“Speaker Cupp”). In fact, Petitioners only mention Secretary LaRose in passing, and they note that he was in the same boat as the other members of the Commission by virtue of not seeing the plan introduced by President Huffman prior to its presentation the night of Monday, March 28, 2022.

The purported alternative, the plan presented by “independent” mapmakers at 10:30 p.m. on March 28, was not complete (as acknowledged by Democrat Commission members), had not been thoroughly reviewed by members of the Commission, did not allow for amendments, and in the opinions of several of the Republican members of the Commission, suffered from numerous constitutional deficiencies. Unfortunately, the narrow timeframe for drafting an entirely new

redistricting Plan with entirely new mapmakers and with an entirely new process by the March 28 deadline set by this Court put Secretary LaRose and the Commission in a very difficult situation, and it proved impossible for the independent mapmakers to complete their work by the deadline.

Thus, at present, Secretary LaRose is unwarrantedly being brought before this Court for doing nothing more than casting a vote for the Fourth Plan in accordance with his duty as a Commission member, given the options he had as the deadline approached. Rather than being contemptuous, Secretary LaRose exercised his best judgment *to comply with this Court's orders* that a new Plan be adopted by the Commission *and* filed with his office, all before 11:59 p.m. on March 28, and then filed with this Court before 9:00 a.m. on March 29, 2022. Nothing Secretary LaRose did is contemptuous. Therefore, the Motions as they pertain to Secretary LaRose should be denied.

## II. BACKGROUND

On March 16, 2022, this Court entered an Order invalidating the second revised plan (“Third Plan”) in its entirety and ordered the Commission to draft and adopt a new General Assembly District Plan that conformed with the Ohio Constitution including Article XI, Sections 6(A) and 6(B). *Ohio Redistricting Comm’n*, 2022-Ohio-789, 2022WL803033, ¶ 44. The Order suggested that the Commission should retain an independent mapmaker that answered to all Commission members. The Court provided the Commission just 12 days to identify allegedly “independent” mapmaker(s), conduct the necessary vetting on them, and contract with them, allow them reasonable time to travel to Ohio, properly equip them for the task with computers and software, work with Statehouse staff to provide a room and with the Ohio channel to have it all televised, and *then* prepare a completely new districting Plan and required it to be adopted by the Commission *and* filed with the Secretary of State no later than Monday, March 28. The Court’s

Order made it explicitly clear that no stipulations for extensions of time were to be filed, and the Clerk should reject any such stipulation filed by the Commission. *Id.* at ¶¶ 30, 45, 47.

As the Petitioners correctly allude, the Commission worked quickly to adhere to the Court's March 28 deadline. The Commission reconvened three days after the Court's Order, on March 19, and began the discussion of hiring two independent mapmakers.<sup>1</sup> Two days later, on March 21, the Commission came to an agreement on retaining Dr. Douglas Johnson and Dr. Michael McDonald ("Mapmakers").<sup>2</sup> Despite the Commission members' swift bipartisan actions to allow the Mapmakers to begin their work, the Mapmakers were not able to begin drawing until Wednesday, March 23, leaving them just five days to complete their task.<sup>3</sup>

Through the coming days, the Mapmakers were hard at work in their attempt to complete what seemed to be an insurmountable task given the timeline and that neither of them was from Ohio, knew of Ohio's political geography, or were familiar with the numerous technical line drawing requirements in Sections 2, 3, 4, 5, and 7 of Article XI. On the day of the deadline, March 28, at approximately 9:00 p.m., the Mapmaker Dr. Johnson reported that he completed the House map but that changes would still need to be made to the northwest area of the map.<sup>4</sup> Dr. Johnson reported that they had not yet produced a Senate map and that it could take 45 minutes to produce

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<sup>1</sup> Tr. of Ohio Redistricting Commission (Mar. 19, 2022), available at <https://redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-19-2022-236/transcript-1361.pdf> (accessed April 3, 2022).

<sup>2</sup> Tr. of Ohio Redistricting Commission (Mar. 21, 2022), available at <https://redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-21st-257/transcript-1381.pdf> (accessed April 3, 2022).

<sup>3</sup> Tr. of Ohio Redistricting Commission (Mar. 23, 2022), available at <https://redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-23-2022-276/transcript-1421.pdf> (accessed April 3, 2022).

<sup>4</sup> Tr. 4 of Ohio Redistricting Commission (March 28, 2022), at p. 2, available at <https://redistricting.ohio.gov/meetings> (accessed April 3, 2022).

one if things fell into place.<sup>5</sup> President Huffman questioned Dr. Johnson about constitutional issues with the House map; for example, pertaining to districts in relation to northeastern cities and population requirements.<sup>6</sup> When asked if he had caught the error, Dr. Johnson responded that he could run reports to find those errors but that takes time, and so they tried to rush production of the maps and then run the appropriate reports.<sup>7</sup> Dr. Johnson was also asked if members of the Commission could propose amendments to the maps, and he indicated that only revisions that fit with the overall scheme could be proposed.<sup>8</sup> Dr. Johnson referenced fundamental concerns Speaker Cupp had raised about the maps and that there was no time to address them prior to the deadline.<sup>9</sup>

That evening, President Huffman went on to introduce a different map, *i.e.*, the Fourth Plan.<sup>10</sup> According to Speaker Cupp, the Fourth Plan was prepared that afternoon and the Plan displayed an improvement in the symmetry issues in both the House and Senate plans that this Court found problematic in the Third Plan (*i.e.*, the Plan adopted by the Commission on February 24, 2022) and moved it closer to comporting with the Court's Order.<sup>11</sup> House Minority Leader Allison Russo ("Leader Russo") questioned each member of the Commission as to whether they had seen the Fourth Plan prior to its introduction.<sup>12</sup> Secretary LaRose, along with Governor Mike DeWine ("Governor DeWine"), Leader Russo, Senator Vernon Sykes ("Senator Sykes"), and

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at p. 3.

<sup>9</sup> *Id.* at pp. 2-3.

<sup>10</sup> *Id.* at p. 3.

<sup>11</sup> *Id.* at p. 4.

<sup>12</sup> *Id.* at pp. 10-11.



Auditor Keith Faber (“Auditor Faber”), all stated they had not seen the Fourth Plan prior to its introduction.<sup>13</sup>

Secretary LaRose pointed out that it appeared the Mapmakers would not have a completed map by the midnight deadline.<sup>14</sup> Senator Sykes moved to have the Commission’s attorney prepare an emergency motion for an extension of 12 hours so that the Commission could continue to work on the Mapmakers’ maps.<sup>15</sup> Speaker Cupp reminded Senator Sykes that this Court’s orders specifically prohibited filings for extensions of time.<sup>16</sup> Leader Russo also moved to have the Commission’s attorney file for an extension of 12 hours.<sup>17</sup>

Speaker Cupp subsequently moved to have the Fourth Plan adopted, which was approved by a 4-3 vote.<sup>18</sup> Senator Sykes moved for the Mapmakers’ plan (“Mapmakers’ Plan) as it existed at 10:30 p.m. to be adopted instead and to allow for additional work to be conducted to update the map over the course of four weeks.<sup>19</sup> Secretary LaRose asked Senator Sykes, if such a motion were to pass, when would the Commission know the maps were final so that he could begin directing the Boards of Elections to start reprogramming their computer systems.<sup>20</sup> Senator Sykes did not answer Secretary LaRose’s question and, instead, simply responded that they are final right now.<sup>21</sup> Secretary LaRose again pressed Senator Sykes to provide an answer as Senator Sykes had just

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at p. 11.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at pp.13-14.

<sup>19</sup> Tr. 5 of Ohio Redistricting Commission (March 28, 2022), at p. 1, available at <https://redistricting.ohio.gov/meetings> (accessed April 3, 2022).

<sup>20</sup> *Id.* at p. 2.

<sup>21</sup> *Id.*

stated that additional changes could be made.<sup>22</sup> Senator Sykes did not provide a clear answer and claimed only additional changes would be made if necessary.<sup>23</sup>

Senator Sykes then attempted to introduce the Mapmakers 'Plan and claimed that it met the proportionality requirement.<sup>24</sup> When questioned further by President Huffman as to what exactly the Commission would be doing for the next four weeks, Senator Sykes responded that they would make any necessary adjustments to the maps.<sup>25</sup> Leader Russo stated that the Commission could provide some of the files to Secretary LaRose's office and make additional tweaks over the coming days.<sup>26</sup>

Members of the Commission went on to point out numerous constitutional deficiencies with the MapMakers' Plan. Speaker Cupp noted there were egregious compactness issues with respect to several districts in both the House and Senate map.<sup>27</sup> Governor DeWine agreed, noting that while the Mapmakers 'Plan did hit proportionality, it suffered from many constitutional deficiencies including less compact districts, fewer communities of interest being kept together, more split cities and fewer competitive districts.<sup>28</sup> Auditor Faber commented that amendments he proposed to the Mapmakers 'map had not yet been addressed and the maps essentially split every large city.<sup>29</sup> Senator Sykes's motion to adopt the Mapmakers 'Plan failed by a 2-5 vote.<sup>30</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at p.3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at p. 4.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at p. 5.

<sup>30</sup> *Id.* at p. 7.

The next day, on March 29, 2022, before this Court has even had a chance to consider the constitutionality of the Fourth Plan, Petitioners filed their Motions—ostensibly making Secretary LaRose subject to their Motions without identifying any contemptuous conduct by him.

### **III. LAW & ARGUMENT**

#### **A. There Are No Grounds To Hold Secretary LaRose in Contempt.**

There are at least three reasons why an order of contempt against Secretary LaRose is unwarranted. First, contempt is not an appropriate remedy where Secretary LaRose complied with this Court's Order. Second, the separation of powers doctrine prohibits finding Secretary LaRose in contempt for performing a legislative function. Third, the impossibility defense applies to the issues in question, making a finding of contempt against Secretary LaRose inappropriate.

##### **i. Contempt Is Not An Appropriate Remedy Where Secretary LaRose Complied With This Court's Order.**

Contempt of court has been variously defined as “disobedience of an order of a court” and “conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.” *Denovchek v. Bd. of Trumbull Cty. Commrs.*, 36 Ohio St.3d 14, 15, 520 N.E.2d 1362 (1988). The Secretary's actions on the Commission during the period between this Court's invalidation of the Third Plan on March 16, 2022, and the Court's deadline of March 28, and his votes on March 28 do not fit that description.

First and foremost, the Commission complied with the Court's Order in its March 16 opinion. The Commission adopted a new district Plan no later than March 28, filed it with the Secretary of State no later than March 28, and filed it with the Court by 9:00 a.m. on Tuesday, March 29, 2022. The last time the issue of contempt was before this Court in this litigation was when the Court *sua sponte* ordered the Respondents to show cause why they should not be held in

contempt for NOT adopting a new Plan by the Court's deadline of February 17, 2022. *See League of Women Voters of Ohio v. Ohio Redistricting Comm.*, Slip Opinion No. 2022-Ohio-65, ¶ 61; *see also* Entry filed on February 18, 2022. With that in mind, for his part, Secretary LaRose was not going to miss this Court's deadline to adopt a new Plan by March 28. The new Fourth Plan adopted by the Commission on March 28 is obviously not the Petitioners' preferred plan, and it may not be the Court majority's preferred plan. But it is a new Plan, which is what this Court ordered the Commission to adopt by March 28, and Art. XI, § 9(D)(2) of the Ohio Constitution does not allow this Court to order the Commission to adopt a particular plan.

In addition, the Commission passing a redistricting Plan does not impede or obstruct this Court in the performance of its functions. In fact, that is the action the Commission was ordered to take. The Constitution provides that the power to redistrict the General Assembly lies with the Commission, and the Commission adopted the Fourth Plan in accordance with its role and authority. Ohio Const. Art. XI, § 1(A). This Court will review the Fourth Plan for constitutional compliance and that function is not impeded. Moreover, specific to Secretary LaRose, he has not engaged in any contemptuous conduct; certainly, Petitioners' have not identified any. Thus, a finding of contempt against Secretary LaRose is not appropriate, and Petitioners' Motions as they pertain to him should be denied.

**ii. The Separation of Powers Doctrine Prohibits Finding Secretary LaRose In Contempt For Performing A Legislative Function.**

Petitioners fail to allege contemptuous conduct by Secretary LaRose. Thus, the only issue before this Court with respect to Secretary LaRose is whether it can hold him in contempt for engaging in a legislative function, *i.e.*, voting as a member of the Commission for the Fourth Plan. The separation of powers doctrine makes it abundantly clear that the answer to that question is no.

As this Court has stated, Ohio's Constitution establishes the Commission as a separate branch of government with its tasks of districting and apportionment being primarily legislative tasks. *Adams v. DeWine*, — Ohio St.3d —, 2022-Ohio-89, — N.E.3d —, ¶ 26. In *City of Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶¶ 26-28, this Court made it clear that the separation of powers doctrine prohibits the judicial branch from exercising its contempt power to compel a co-equal branch of government in exercising legislative functions.

This Court stated the following:

...[S]eparation-of-powers principles prevent the judiciary from enjoining the legislative branch of government from enacting laws.

In framing the Ohio Constitution, the people of this state conferred on the General Assembly the legislative power. This lawmaking prerogative cannot be delegated to or encroached upon by the other branches of government. ...

The separation-of-powers doctrine therefore 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.” A court can no more prohibit the General Assembly from enacting a law than it can compel the legislature to enact, amend, or repeal a statute— “the judicial function does not begin until after the legislative process is completed.”

Accordingly, we agree with the prevailing rule that under a tripartite form of government, “a court cannot enjoin the legislature from passing a law. ‘This is true whether such action by the legislature is in disregard of its clearly imposed constitutional duty or is the enactment of an unconstitutional law.’”

*Id.* (emphasis added).

In this matter, Secretary LaRose's only pertinent conduct is that he engaged in a legislative function by voting as a member of the Commission for the Fourth Plan. Consequently, the separation of powers doctrine prohibits a finding of contempt. Further, the Fourth Plan is entitled to a presumption of constitutionality and, even if the Fourth Plan is subsequently adjudicated to be

unconstitutional, which is not conceded and has not yet been determined, there is still no basis for finding Secretary LaRose in contempt simply for voting in favor of it. *See City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 466, ¶ 40 (questioning the wisdom of the legislature's public-policy decisions does not fall within the scope of the court's review to interpret statutory provisions and determine whether they are in accord with the federal and state Constitutions).

In fact, if this Court follows the Petitioners' arguments, this Court would essentially grant itself the power to order members of the Commission to vote in the manner it deems fit, without regard for the conscience or judgment of the members. Not only would such a result run afoul of the Ohio Constitution, it would effectively render the Commission, a constitutionally created body with the same status as this Court, a nullity. It would also create dangerous precedent by allowing Ohio courts to intercede in legislative matters and potentially hold officials in contempt for casting votes with which opponents disagree. Such an outcome is untenable and impermissible under the law. Accordingly, the Motions as they pertain to Secretary LaRose should be denied.

**iii. The Impossibility Defense To Contempt Applies To This Matter Making A Finding Of Contempt Against Secretary LaRose Inappropriate.**

To be clear once again, Secretary LaRose and the Commission complied with this Court's Order, and Secretary LaRose did not engage in any contemptuous conduct. However, should the Court elect to prematurely adjudicate the constitutionality of the Fourth Plan pursuant to Petitioners' Motions, it must also consider that impossibility of performance is a valid defense to a contempt charge. *Gauthier v. Gauthier*, 12th Dist. Warren No. CA2011-05-048, 2012-Ohio-3046, 2012WL2524374, ¶ 33; *In re Purolo*, 73 Ohio App.3d 306, 313, 596 N.E.2d 1140, 1145 (3rd Dist.1991) (explaining that a person can establish the impossibility defense by setting forth

facts demonstrating it was not within his power to obey the court's order); *State ex rel. DeWine v. Washington C.H.*, 12 Dist. Fayette No. 2013-12-030, 2014-Ohio-3557, ¶¶ 29-38 (finding the city's impossibility defense barred a contempt charge, where a completion date provided under a consent decree for the city to make the necessary improvements in its sewer system was impossible to complete).

This Court ordered the Commission to pass an entirely new redistricting map by March 28, 2022. *See Ohio Redistricting Comm'n*, 2022-Ohio-789, 2022WL803033, ¶¶ 44-47. The 12-day turnaround time really became a five-day period to produce a new map because the process for identifying and approving Mapmakers, entering into contracts with them, establishing guidelines for the process, and getting the Mapmakers to Ohio resulted in the Mapmakers commencing their work on March 23, 2022. With the deadline looming on the evening of March 28—just five days later—the Mapmakers' endeavor proved to be an impossible task. Petitioners somehow contend the Mapmakers' Plan was complete the night of the 28<sup>th</sup> but that is simply inaccurate. Senator Sykes's and Leader Russo's requests for an extension of time from this Court belie that position, as does their suggestion to allow four more weeks for additional work on those maps.<sup>31</sup>

Secretary LaRose, at the deadline imposed by this Court, simply voted for the Fourth Plan, which was the only completed plan that could be filed in time to comply with this Court's Order. If the Court finds fault with the process by which the Commission ultimately adopted the Fourth Plan, it cannot decouple the challenges faced by the Commission from the terms of its Order.

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<sup>31</sup> Tr. 4 of Ohio Redistricting Commission (March 28, 2022), at p. 11, available at <https://redistricting.ohio.gov/meetings> (accessed April 3, 2022); Tr. 5, of Ohio Redistricting Commission (March 28, 2022), at p. 1, available at <https://redistricting.ohio.gov/meetings> (accessed April 3, 2022).

Secretary LaRose endeavored to comply with this Court's Order and, at the end of March 28, he took the action that was the best available option in his judgment. That is not the sort of behavior that should be punished by contempt.

Furthermore, assuming *arguendo* the Mapmakers' Plan was complete during the March 28 meeting of the Commission (which Secretary LaRose disputes), members of the Commission had valid concerns that it plainly did not comport with the Constitution.<sup>32</sup> Therefore, as a constitutionally-required member of the Commission who is vested by that same Constitution with the discretion to vote for (or against) any proposed district plan as his conscience dictates, Secretary LaRose could not comply with this Court's orders by voting for the MapMakers' Plan. Finally, it is worth noting that, even if Secretary LaRose wanted to, he cannot enact a constitutionally compliant redistricting map on his own. The Constitution provides that power to the Commission, and the Commission cannot act except by a simple majority of its members. Ohio Const. Art. XI, §§ 1(A) and 1(B)(1). Accordingly, even if this Court finds that Secretary LaRose's vote for the Fourth Plan was violative of its Order, the impossibility defense protects Secretary LaRose from a finding of contempt.

#### **IV. CONCLUSION**

In accordance with the foregoing, Secretary LaRose should not be the subject of Petitioners' Motions and should not be found in contempt. Petitioners' Motions as they pertain to Secretary LaRose should be denied.

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<sup>32</sup> Tr. 5 of Ohio Redistricting Commission (March 28, 2022), at pp. 4-7, available at <https://redistricting.ohio.gov/meetings> (accessed April 3, 2022).



Respectfully submitted,

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