IN THE
SUPREME COURT OF OHIO

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

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

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INTRODUCTION

Just three weeks ago, this Court held that it "lack[s] the constitutional authority to grant . . . relief" not expressly provided for in Article XI of Ohio's Constitution. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, (*LWV IV*), 166 Ohio St.3d 1460, 2022-Ohio-1235, 2022 WL 1113988, ¶ 64-66. Not expressly provided for in Article XI, for example, is authority for "this court to itself adopt a [redistricting] plan," or to review the constitutionality of a plan the Commission never approved. *Id.* at ¶ 65, 72. So the Court declined to do either.

Equally absent from Article XI is any authority permitting the Court to compel, under threat of contempt, Commission members to discharge their legislative function. Unsurprisingly then, the Court rejected requests by Petitioners here and in two other actions to hold the Commission in contempt, notwithstanding its finding that the third revised map was non-compliant. *Id.* at ¶ 32 n.6.[1]

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In complete disregard for this holding, Petitioners again move yet a second time for an order directing the Commission's members to show cause as to why they should not be held in contempt – this time, for alleged failure to comply with a May 6 deadline that, at the time they filed their April 25 motion, was twelve (12) days away, and *still* has not come to pass. They would also have the Court "direct the Commission to reengage independent map drawers" Drs. Johnson and McDonald, even though, in the same three-week-old decision, the Court clarified that its recommendation to hire independent map drafters was merely permissive, not mandatory. *Id.* at ¶ 4.

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[1] *See* 04/14/2022 *Case Announcements #4* 2022-Ohio-1244 (denying motions requesting orders to show cause in *League of Women Voters of Ohio v. Ohio Redistricting Comm*. (Supreme Court case No. 2021-1193); *Bennett v. Ohio Redistricting Comm*. (Supreme Court case No. 2021-1198) and *Ohio Organizing Collaborative v. Ohio Redistricting Comm*. (Supreme Court case No. 2021-1210)).

Petitioners offer no legal grounds for the Court to reconsider a decision it issued less than a month ago – much less ***one in which both the majority and the dissenting Justices agreed that the Court cannot order*** the relief sought here. Their Motion is devoid of merit and should be summarily denied.

LEGAL ANALYSIS

A. The Court Lacks Authority To Order Contempt – As It Told Petitioners Less Than A Month Ago.

1. Petitioners Have Already Lost This Battle. And For Good Reason.

After concluding that the Commission's third revised plan did not pass muster in its April 14, 2022 decision, this Court kept its order for relief decidedly limited: "We order that the commission be reconstituted and adopt a General Assembly-district plan that complies with the Ohio Constitution." *LWV IV*, 2022-Ohio-789 at ¶ 63. It acknowledged that Petitioners (both in this action and in two companion cases) "ask[ed] this court to do more than simply invalidate" the plan and direct the Commission to try again – even though an order to that effect is all that Article XI permits. *Id*. at ¶ 63; *see also* Ohio Const. Art. XI, Sec. 9(D). Such "additional or alternative relief" included the same remedy that Petitioners again demand here: "an order directing respondents to show cause why they should not be held in contempt." *Id.* at ¶ 63, 32 n.6.

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But the Court refused to "bend" the limitations of Article XI to Petitioners' whims. *Id.* at ¶ 65. No, the Court would not "itself adopt a [redistricting] plan—either the independent [unfinished] map drawers' plan," or one drafted by one litigant's preferred expert. *Id.* No, the Court would not "declare that the independent map drawers' plan is presumptively constitutional" when it had never been approved by the Commission. *Id.*

at ¶ 72. And no, the Court would not hold the Commission or its members in contempt. *See* n.1, *infra*.

Regarding the first two items, the Court explained that it "lack[ed] the constitutional authority to grant [either form] relief." *Id.* at ¶ 65, 72. The plain text of Article XI makes this clear. This Court has held Section 9 contemplates that a given plan may fall short of Article XI in a variety of ways, though the remedy for non-compliance is always the same: Order the Commission to adopt a new general assembly-district plan in accordance with Article XI. That's it.

- If the plan includes violations Sections 2, 3, 4, 5, or 7 "*the available remedies shall be*" for the Court to "*order the commission to adopt a new general assembly district plan in accordance with this article*"[2];

- In the case of a non-compliant plan approved under Section 8(C), "*the available remedies shall be*" for the Court to "*order the commission to adopt a new general assembly district plan in accordance with this article*";[3]

- In the case of a plan violates Section 6, the Court has held that the available remedy shall be to "*order the commission to be reconstituted*" to "*adopt a General Assembly-district plan in conformity with the Ohio Constitution*," as it has now done four times over. [4]

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As even Petitioners concede, this Court "***can exercise only such powers as the constitution itself confers***," and may "***derive no power elsewhere***." *Kent v. Mahaffy*, 2 Ohio St. 498, 498–99 (1853) (emphasis added). Article XI confers no

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[2] In the case of "isolated" violations of these provisions, the Court may "order the commission to amend the plan to correct the violation[s]." Ohio Const. Art. XI, Section 9(D)(3)(a).

[3] *See* Ohio Const. Art. XI, Section 9(D)(3) (emphasis added).

[4] *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV I)*, __ Ohio St.3d __, 2022-Ohio-65, 2022 WL 110261, ¶ 91-101, 138 (emphasis added); *see also League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV II)*, —— Ohio St.3d ——, 2022-Ohio-342, 2022 WL 354619, ¶ 67-68 and *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV III)*, —— Ohio St.3d ——, 2022-Ohio-789, 2022 WL 803033, ¶ 44; *LWV IV*, 2022-Ohio-789 at ¶ 63.

contempt powers. Nor is there any textual basis for Petitioners' request that the Court "***direct the Commission to reengage independent map drawers . . . to complete***" the unfinished and unapproved maps the Court refused to adopt in its April 14 decision. [Mtn. at 1 (emphasis added).] To the contrary, the Court took pains to clarify its earlier recommendations on this point in *LWV II* and *LWV III*, 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). Petitioners, insisting upon the same relief nonetheless, either overlooked this portion of the Court's decision, or ignored it.

Ohio's voters vested the Commission with exclusive authority for map drafting, and in every instance, the Court is bound to return that responsibility to the Commission's discretion. *See Voinovich v. Ferguson*, 63 Ohio St. 3d 198, 204 (1992) (Holmes, J., concurring) ("The very fact that the governor, auditor and secretary of state are consociated as a board to apportion the state for members of the general assembly, shows of itself, that . . . in applying the rules prescribed, a discretion would have to be exercised, and these officers were selected to exercise it." (Cleaned up)). Reapportionment is a legislative task. *LWV I*, 2022-Ohio-65 at ¶ 76. And because legislative tasks require a lawmaking body to exercise "judgment, wisdom, and discretion of a high order," "the [legislative] trust thus imposed cannot be shifted to other shoulders; neither can the judgment and discretion of any other body be substituted for that of the Legislature itself." *State ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cty*., 120 Ohio St. 464, 478 (1929), *aff'd sub nom. State of Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cty*., 281 U.S. 74 (1930). "The separation-

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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.'" *City of Toledo v. State*, 154 Ohio St. 3d 41, 2018-Ohio-2358, 10 N.E.3d 1257, ¶ 27. Under Article XI, those duties include the drafting of general assembly redistricting plans.

The Dissent noted that this same reasoning justified the Majority's decision to reject Petitioners' contempt demands:

> [***T*his court does not have the power to hold the commission or its members in contempt**. . . . Article XI gives the responsibility for drafting and adopting a General Assembly-district plan to the Ohio Redistricting Commission, an independent constitutional body, so its members are not subject to personal liability or personal incarceration as punishment for contempt for actions taken while engaged in the legislative process of redistricting[.]
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> [*LWV IV*, 2022-Ohio-1235 at ¶ 94-96 (Kennedy, J., dissenting) (emphasis added).]

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Legislative immunity is, as Justice Kennedy notes, another facet of the separation-of-powers doctrine that requires the Court to reject Petitioners' Motion. "Absolute legislative immunity ***attaches to all actions taken 'in the sphere of legitimate legislative activity***,'" including the Commission members' decisions as to when, where, and how to convene for the purpose of drafting another plan consistent with the Court's April 14 order. *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) (emphasis added).[5]

[5] *See e.g.*, *Manogg v. Stickle*, 5th Dist. Licking County No. 99CA82, 2000 WL 1495, at *1-2 (Dec. 29, 1999) (affirming summary judgment in favor of defendants on the trial court's holding that the "conduct of a meeting" by defendant county trustees was subject to immunity); *Muslim Cmty. Ass'n of Ann Arbor & Vicinity v. Pittsfield Charter Twp*., 947 F. Supp. 2d 752, 760 (E.D. Mich. 2013) (decision not to schedule a hearing to address zoning application was subject to legislative immunity); *see also Guindon v. Twp. of Dundee, Mich*., 488 F. App'x 27, 34 (6th Cir. 2012) ("The decision not to place Guindon on the agenda was a legislative act.").

2. Insofar As The Court Entertains Petitioners' Request For Reconsideration, Legislative Immunity Precludes A Contempt Order Against The Commission's Members – Regardless Of Petitioners' Conclusory "Bad Faith" Allegations.

Implicitly conceding to Justice Kennedy's observation that legislative immunity forecloses their request, Petitioners argue that under *Hicksville v. Blakeslee*, 103 Ohio St. 508, 517 (1921), immunity is unavailable here because it "does not protect actions undertaken willfully and in bad faith." [Mtn. at 6.] Not so. In fact, *Hicksville* held the exact opposite.

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 it 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).[6]

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More to the point, the Court has held that the Commission's members are "presumed to have properly carried out their duties" in the drafting process. *LWV I*, 2022-Ohio-65 at ¶ 79-80. To hold them in contempt for what Petitioners perceive to be their "bad faith" motives would necessarily undermine that presumption, along with the

[6] Petitioners' reliance on the two-sentence order in, *Forsythe v. Winans*, 44 Ohio St. 277, 277 (1886), which did not consider the legislative immunity defense, is also of no help to them. That case involved the question of contempt to enforce an order of injunctive relief. Here, by contrast, the Court has no constitutional authority under Article XI to order injunctive relief *in the first instance*.

traditional deference due to lawmakers in this setting. *State ex rel. Gallagher v. Campbell*, 48 Ohio St. 435, 436–37, 442 (1891); *Perry v. Perez*, 565 U.S. 388, 393, 132 S.Ct. 934, 181 L.Ed.2d 900 (2012).

"In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed." *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). "Courts are not the place for such controversies." *Id.* Ohio's courts, in fact, have traditionally refused to inquire into legislative motives, for "[i]t is not within the judicial province to nullify a statute or ordinance merely because of the alleged impropriety or mistaken beliefs underlying the legislators' reasons for enacting it." *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 502 (1941).

Legislative immunity is not "conditioned upon favorable review of the legislation in courts" because such a standard would render the protection "nearly meaningless" and "increas[e] politiciz[ation]" between the General Assembly and the judiciary. *Kniskern v. Amstutz*, 144 Ohio App. 3d 495, 497, 760 N.E.2d 876 (8th Dist. 2001). Political polarization would increase still further, if, instead of evaluating the final product of the legislative process, such as a Commission-approved revised plan, the Court opted to interrogate the Commission members' personal motives in the course of drafting. Which is yet another reason "the judicial function does not begin until after the legislative process is completed." *Toledo*, 2018-Ohio-2358 at ¶ 27.

"The privilege would be of little value if* [Commission members] *could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based

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***upon a jury's speculation as to motives*.”** *Tenney*, U.S. at 377 (emphasis added); *see also Kniskern*, 144 Ohio App. 3d at 496 (endorsing this language). “The claim of an unworthy purpose” on the part of the legislator – or in this case, the Commission member – “does not destroy the privilege,” and would not be grounds for finding of contempt even if the Court had authority to issue one. *Tenney*, U.S. at 377.

In short, the legislative privilege precludes the abusive ligation tactics waged by Petitioners.

B. Petitioners Should Lose This Battle Again.

Beyond *Hicksville*, Petitioners cite a number of cases in support of their already-rejected request. While some are inapposite, and others irrelevant, none justify their request for this Court to reconsider a decision it issued less than a month ago.

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1. The Commission Is Not A Private Corporation.

First, in support of their argument that the Court may “hold individual Commission members in contempt” for the actions of the Commission as a whole, Petitioners cite case law concerning whether corporate officers may be held in contempt for the acts of the corporations they control. *See Wilson v. United States*, 221 U.S. 361, 381-82, 31 S.Ct. 538, 55 L.Ed. 771 (1911); *S. E. C. v. Barraco*, 438 F.2d 97 (10th Cir. 1971); *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 955, 958 (9th Cir. 2014).

Suffice it to say the Commission is a constitutionally-defined legislative body comprised, as decreed by Ohio voters, of disparate stakeholders. Nothing in the constitution grants any individual commission member power over the Commission, which can adopt new voting districts only by majority vote. Ohio Const. Art. XI, Sec.

1(B)(1). Corporate officers and board members do not pass laws, and they cannot invoke the legislative immunity that protects the Commission's members here. Similarly absent in a corporate context are the separation-of-powers considerations that weigh heavily in the case law rejecting Petitioner's position. [*See* Gov. DeWine's Combined Resp. to Pets' Renewed Motion for Show-Cause Order and Objections to 3/28/22 plan, at 19-22, 28-29 (discussing Commission members' duty to honor their oaths of office and separation of powers.)] Facile comparisons that ignore these obvious, legally-determinative distinctions do not warrant the Court's attention.

2. Mandamus Cases, Which By Definition Involve Orders To Compel *Non-Discretionary* Acts, Are Irrelevant.

Second, in support of their claim that "courts [can] hold officials acting in a legislative capacity in contempt when they are in defiance of a court order," Petitioners rely on a trio of cases arising under this Court's original jurisdiction in relating to writs of mandamus or prohibition in Article IV Section 2(B)(1).[7]

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[7] In *State ex rel. Turner v. Vill. of Bremen*, 118 Ohio St. 639, 163 N.E. 302 (1928), the defendant village council members had failed to comply with a previous mandamus order requiring them to appropriate funds to pay judgments against the village – meaning, in other words, that there had already been an order confirming that the duty to appropriate funds was not a discretionary one. *State ex rel. Edwards v. Murray*, 48 Ohio St. 2d 303, 304, 358 N.E.2d 577 (1976), and *State ex rel. Bd. of Cty. Comm'rs of Cuyahoga Co. v. Juv. Div. of Ct. of Common Pleas of Cuyahoga Cty*., 54 Ohio St. 2d 113, 374 N.E.2d 1369 (1978), likewise both involved the obligation of local governments to fund their local court systems. *Edwards*, 48 Ohio St. 2d at 304–05 ("it is the duty of county commissioners to appropriate funds necessary to facilitate the administration of justice"); *see also* 54 Ohio St. 2d at 113-114. Thus, Petitioners' reference to the courts' inherent authority to enforce its "basic functions" ***relates not to the court's ability to enforce is previous orders, but fund its daily functions and existence.*** *See State ex rel. Slaby v. Summit Cty. Council*, 7 Ohio App. 3d 199, 204, 454 N.E.2d 1379 (9th Dist. 1983) ("In a line of cases, the Supreme Court of Ohio has developed a connection between the inherent authority of courts and the courts' ability to secure sufficient operating funds."). Even in this context, moreover, separation-of-powers concerns prevent the judiciary from overstepping its bounds. *See In re Furnishings & Equip. for Judge, Courtroom & Pers. for Courtroom Two*, 66 Ohio St. 2d 427, 430, 423 N.E.2d 86 (1981) ("because an equal branch of the government may not impinge on the authority and rights of the other branches, a court cannot exercise its inherent power to order a board of county commissioners to act unless the court's order is reasonable and necessary for the proper and efficient operation of the court"). Because the obligation to fund courts *is not* a discretionary one per *Turner*, these cases are irrelevant.

While none of these cases addressed legislative immunity issues, there is a more basic distinction: Mandamus cases, wherein the relator has established "a clear legal right to the requested relief, a clear legal duty on the part of the [government body] . . . to provide it," *State ex rel. Waters v. Spaeth*, 131 Ohio St. 3d 55, 56, 2012-Ohio-69, 960 N.E.2d 452 ¶ 6, have no application here, as redistricting is a purely legislative, discretionary duty. ***"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) (emphasis added); *accord*: *State ex rel. Pressley v. Indus. Comm'n*, 11 Ohio St. 2d 141, 158, 228 N.E.2d 631 (1967) ("mandamus will not lie to control the discretion of a public official or commission").

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As this Court held more than 100 years ago, "***mandamus will not lie***" as against a legislative commission tasked with apportioning voting districts under Ohio's Constitution, because the task is one which "***necessarily call[s] for the exercise of judgment and discretion on the part of the***" apportioning body. *Gallagher*, 48 Ohio St. at 436–37 (emphasis added). "[I]n applying the rules prescribed, a discretion would have to be exercised," and Ohio voters have "selected [the Commission's members] to exercise it." *Voinovich*, 63 Ohio St. 3d at 204 (Holmes, J., concurring). The task "thus imposed cannot be shifted to other shoulders." *Bryant*, 120 Ohio St. at 478.

Indeed, in a provision tailored to preempt Petitioners' unceasing gamesmanship, voters have explicitly said it cannot: "[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 OCC petitioners' plea to "vindicate the federal Constitution" by adopting a redistricting plan of its own. *LWV IV*, 2022-Ohio-1235 at ¶ 66. Nevertheless, Petitioners (*again*) demand that the Court sidestep this limitation by achieving indirectly – through orders of contempt and directives to re-engage map drafters who have drafted incomplete plans "***that ha[ve] not been approved by***" the Commission – what it cannot do directly. *See New Orleans Water Works Co. v. City of New Orleans*, 164 U.S. 471, 481, 17 S.Ct. 161, 41 L.Ed. 518 (1896) (rejecting request for a bill enjoining legislative functions, as a court "ought not to attempt to do indirectly what it could not do directly").

The Court must resist Petitioners' invitation to "derive power elsewhere" and interpret its way into greater authority than Ohio's voters have seen fit to give it in Article XI. *Kent*, 2 Ohio St. at 498–99; *see also ProgressOhio.org v. Kasich*, 129 Ohio St. 3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 5 ("Neither legislation nor rule of court can expand [this Court's] jurisdiction.").

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3. Petitioners Would Have The Court Ignore Not Only Its April 14 Decision, But Also Its Holding In *Toledo*.

Third, Petitioners' request for a judicial fiat voiding Article XI's limitations upends not only the will of Ohio's voters, but also the careful separation-of-powers balance embedded in Ohio's Constitution[8] as articulated in *City of Toledo v. State*, 2018-Ohio-

[8] *See City of Zanesville v. Zanesville Tel. & Tel. Co*., 63 Ohio St. 442, 451, 59 N.E. 109 (1900), on reh'g, 64 Ohio St. 67 (1901) ("The distribution of the powers of government-legislative, executive, and judicial-among three co-ordinate branches, separate and independent of each other, is a fundamental feature of our system," and "any encroachment by one upon the other is a step in the direction of arbitrary power").

2358. *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.

Petitioners contend the case is "inapt" here, however, because *Toledo* involved an injunction "prohibit the General Assembly from enacting a law," and "there is no attempt to block the Commission from drawing a map" in this instance. [Mtn. at 8, n.7.] Yet *Toledo* does not turn on whether the contempt order at issue would enforce an injunction that prohibits certain legislative activity, as opposed to one that affirmatively requires the legislature to act. As *Toledo* explained:

> 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."
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> [*Id.* at ¶ 27 (citations omitted, emphasis added).]

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Redistricting (again) is a legislative duty. *Gallagher*, 48 Ohio St. at 436–37; *see also LWV I*, 2022-Ohio-65 at ¶ 76. And the Court can no more require the Commission to convene at a specific time and place, or engage particular map drafters, than it "can compel the [the Commission] to enact, amend or repeal" a specific districting plan. *Toledo*, 2018-Ohio-2358 at ¶ 27. Separation-of-powers concerns forbid it.

4. Petitioners' Unhappiness With This Court's Decisions Do Not Justify Entry Of A Contempt Order That Violates Governor DeWine's Fundamental Due Process Rights.

Fourth and finally, Petitioners contend that the Governor's impossibility of performance defense – based on the fact that he cannot dictate the other Commission

members' voting or drafting decisions[9] – "has no force whatsoever in connection with a decision not to convene a meeting of the Commission." [Mtn. at 9.] They are wrong.

To reiterate: the Court cannot use the contempt power to "assert[] control over" the performance of "purely legislative" duties. *Toledo*, 2018-Ohio-2358 at ¶ 27-29. Nor can it probe "the motives, whether expressed or unexpressed, which may have induced the exercise of this power." *Bigelow*, 138 Ohio St. at 502. "[M]andamus will not lie" against Commission members for "the exercise of [their] judgment and discretion" in map drafting, *Gallagher*, 48 Ohio St. at 436–37, and orders for contempt calculated to control their decisions in the apportionment process should not either. *Toledo*, 2018-Ohio-2358 at ¶ 27.

Holding Commission members in contempt because they did not proceed with a meeting at the time and place requested by the Commission's minority members is no different than holding a General Assembly member in contempt for voting to enact an invalid law. Just as "no one would claim that a legislator would be liable either in his official or in his individual capacity for . . . voting for" an unconstitutional statute, *Hicksville*, 103 Ohio St. at 519, no reasonable litigant would claim, in light of the foregoing authority, that this Court can hold the Governor in contempt for his decisions

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[9] Petitioners do not dispute that Governor DeWine has no legal authority to control the Commission or its members. A contemnor must, as a matter of due process, retain the "opportunity to purge himself of contempt" by complying with the court's order. *Shillitani v. United States*, 384 U.S. 364, 371 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); *State ex rel. Johnson v. Cty. Ct. of Perry Cty*., 25 Ohio St. 3d 53, 55, 495 N.E.2d 16 (1986) ("The contemnor is said to carry the keys of his prison in his own pocket . . . since he will be freed if he agrees to do as ordered."). "And when that rationale does not exist because the contemnor 'has no ... opportunity to purge himself of contempt,' confinement of a civil contemnor violates due process." *Topletz v. Skinner*, 7 F.4th 284, 295–96 (5th Cir. 2021). Thus, multiple courts have held that use of the contempt power to compel an official to exceed his legal authority is impermissible. *See New York State Ass'n for Retarded Child., Inc. v. Carey*, 631 F.2d 162, 166 (2d Cir. 1980) ("the court cannot compel the Governor to act unlawfully" to expend funds where "New York law forbids [him] from expending funds for that purpose"); *Newman v. Graddick*, 740 F.2d 1513, 1528–29 (11th Cir. 1984) (the Attorney General's actions "could not be the basis for a contempt holding" where "he does not have the ability to bring the Alabama prison system into compliance with previous orders of the district court").

regarding Commission meetings, or that he, and other Commission members, can be compelled to rehire specifically-named map drafters to complete a revised General Assembly-district plan.

The voters have entrusted the Commission's members – not the Court, or the Petitioners – with the duty to draft general assembly-district plans. Regardless of Petitioners' willingness to file serial Motions in an attempt to impose their demands, the Commission's "exercise of legislative discretion should not be inhibited by judicial interference," "distorted by the fear of personal liability," *Bogan*, 523 U.S. at 52, or constrained by "the hazard of a judgment against them based upon [Petitioners'] speculation as to [their] motives." *Tenney*, U.S. at 377.

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CONCLUSION

Petitioners' Motion must be denied.

Respectfully submitted,

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