

## 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 COMBINED  
RESPONSE TO PETITIONERS’ MOTION FOR AN ORDER DIRECTING  
RESPONDENTS TO SHOW CAUSE, MOTION TO SCHEDULE CONTEMPT  
HEARING, AND MOTION FOR ATTORNEYS’ FEES; 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; AND 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**

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## I. INTRODUCTION

Petitioners attempt to fault the Commission's majority for resubmitting the General Assembly district plan adopted by the Commission on February 24, 2022 on May 5, 2022 ("Map 3"), to use solely for 2022 legislative elections, and not for the four or ten-year periods set forth in Article XI, Section 8 of the Constitution. The Commission's purpose for doing so is to comply with the directives of two courts exercising jurisdiction over the same subject.

The Commission resubmitted Map 3 consistent with the Federal Court's pronouncements in *Gonidakis, et al. v. LaRose*, Case No. 2:22-CV-773 (S.D. Ohio) ("Gonidakis Case"). In that case, the Federal Court held that Map 3 will be used for the 2022 election cycle only if, by May 28, 2022: (a) the Commission, this Court, and the General Assembly have not worked together to adopt a new map and have this Court approve it, and (b) the General Assembly does not pass emergency legislation to modify elections administration deadlines that will already have passed. Also, this Court continues to exercise jurisdiction over redistricting plans for use beyond the 2022 election cycle. The temporal limitation on the use of Map 3 is an acknowledgement that another submission of redistricting maps will ultimately be made to this Court. However, as established herein and by Secretary LaRose's prior filings and representations in this case and the Gonidakis Case, in the interim, Map 3 is the only viable option to proceed with an August 2 primary election and not disrupt the November 8, 2022 general election.

Secretary LaRose is both a member of the Commission and the Secretary of State. As the Secretary of State, he is Ohio's chief elections officer (R.C. 3501.04) and has the legal duty to hold and successfully administer a primary election for partisan General Assembly candidates. Given that Ohioans have already missed the opportunity to vote for party House and Senate candidates at the recent primary election on May 3, 2022, Secretary LaRose cannot be in contempt of this

Court when he is acting in accordance with his solemn duty to ensure orderly and trustworthy elections and to protect the voting rights of Ohioans.

## II. BACKGROUND

### A. INCORPORATION OF SECRETARY LAROSE'S PRIOR FILINGS

The issues related to Petitioners' most recent Motions have been extensively briefed in the above-captioned cases. Accordingly, as a preliminary matter, Secretary LaRose incorporates herein by reference, as if fully rewritten, all of his prior filings and arguments in these cases.

### B. THE CURRENT SITUATION

On April 14, 2022, this Court invalidated the "Fourth Plan" (*i.e.*, the plan that was passed by the Commission on March 28, 2022) and, in doing so, stated without further support that "the so-called April 20 'deadline' for implementing a General Assembly-district plan appears to be an artificial deadline" since other states have primary elections later than August 2. *LWV IV*, Slip Opinion No. 2022-Ohio-1235, ¶ 68.<sup>1</sup> This Court ordered the Commission to "be reconstituted, to convene, and to draft and adopt an entirely new General Assembly-district plan that meets the requirements of the Ohio Constitution, including Article XI, Sections 6(A) and 6(B)..." It further ordered the Commission to file that entirely new district plan "with the secretary of state by 9:00 a.m. on May 6, 2022, and to file it with this court by noon on the same date." *Id.* at ¶¶ 78-79.

On May 4, 2022,<sup>2</sup> the Commission convened and Secretary LaRose described the impossibility of implementing any new General Assembly plan past April 20, particularly in the

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<sup>1</sup> By contrast, the briefing in the Gonidakis Case and the facts adduced by the Federal Court panel during the March 30, 2022 hearing in that case included many Ohio-specific elections administration deadlines and challenges for the administration of any "new" map other than Map 3. *See Gonidakis, et al. v. LaRose*, Slip Op. at pp. 41-43, 45-48.

<sup>2</sup> Between April 14 and May 4, several issues factored into the Commission's ability to meet, including the May 3 primary election that Secretary LaRose administered, multiple Commission members having contested primary races, and a Commission member contracting COVID.

absence of emergency legislative changes to the statutory elections calendar. (May 4 Tr. p 10 at 0:33:53). He described a number of issues that both his staff and boards of elections encountered in administering the May 3 primary election on an expedited timeline: rushed quality control efforts and testing (resulting in some election day failures); inability to report congressional results on a statewide basis; problems with ballot printing and re-printing, delayed election night reporting; and staff and volunteer burnout due to long days. (May 4 Tr. pp 10–11 at 33:53). Secretary LaRose also informed the Commission, consistent with his previous statements, that even with August 2, 2022 as the latest date on which a primary election could be held in Ohio, his office needed the final state legislative district lines 104 days prior to August 2 (*i.e.*, April 20) in order to administer the election. *Id.*

Secretary LaRose explained that under Ohio law, primary elections are conducted on a 90-day timeline, and the county boards of elections need two weeks prior to the start of the 90-day timeline to program the district lines into their computer systems. *Id.* Secretary LaRose gave examples of election-related deadlines if the General Assembly primary election is held on August 2 (as the *Gonidakis* panel has indicated it will be), for instance: May 16 to certify the validity and sufficiency of candidate petitions; May 20 for filing of protests to candidate petitions; May 24 for certification of official form of the ballot and for boards of elections to certify the names of the candidates; May 27 for write-in candidates; numerous others deadlines in June; and the first military and overseas civilian ballots being mailed out in accordance with state and federal law on June 17. *Id.*; *see also* May 4 Tr. p 16 at 0:59:06.

Secretary LaRose noted that even if the Commission passed a new map that same day, it would likely be challenged and, given the likely three-week period of time for the parties to argue over the challenge and this Court to rule, then it would be just a week and a half before federally

required military and overseas civilian ballots would need to be mailed to voters. (May 4 Tr. p 10 at 0:33:53). That would be past a number of statutory and practical deadlines, and Secretary LaRose did not see any way the Commission could pass a new map at that point and not compromise the integrity of the election. *Id*; see also Exhibit C to Respondents McColley's and LaRe's Response to Petitioners' Objections filed on May 9, 2022 (Ohio Association of Election Officials, "Election Officials Press for August 2 Primary," April 18, 2022).

The Commission members then discussed timing issues and potentially utilizing the Third Plan and Map 3, and Representative Russo and Senator Sykes contended the Commission had time to move forward with a new map. (May 4 Tr. p 12 at 43:16, p 13 at 43:58). Secretary LaRose explained how the Third Plan/Map 3 is already programmed into the computer systems at nearly all of the county boards of elections. (May 4 Tr. p 13 at 46:02). Representative Russo and Secretary LaRose discussed her concern that it appeared the Commission had no choice in what it could do pursuant to Secretary LaRose's explanations. In response, Secretary LaRose indicated his job as Secretary of State is to carry out the law as it is written and the deadlines he discussed were triggered earlier in the process. (May 4 Tr. pp 16-17 at 1:00:58, p 17 at 1:02:37). Senator McColley, the Senate Majority Whip, stated that he did not believe there were enough votes in the Senate to pass emergency legislation needed to adjust some elections deadlines. (May 4 Tr. pp 17-18 at 1:04:27). Senator McColley also noted that Drs. Johnson's and McDonald's unfinished maps had 16 constitutional violations that he could see. *Id*.

On May 5, 2022, the Commission voted 4-3 to resubmit the Third Plan/Map 3 as a stop-gap for the 2022 election only. The Commission also included Secretary LaRose's statement regarding logistical realities of administering a 2022 primary election for state legislative districts. See Secretary LaRose's Statement to the Ohio Redistricting Commission attached as Exhibit 1. In



his statement, Secretary LaRose explains why August 2 is the only date by which Ohio can hold a primary election and, at this point, the Third Plan/Map 3 is the only viable option to effectively administer a primary election on August 2, 2022. The statement provides, in part:

The Ohio General Assembly has the sole authority in the Ohio Revised Code (3501.40) to set the time, place, and manner of a public election conducted in the State of Ohio. The only other government entity that can supersede that authority is a federal court of law.

A three-judge panel assigned to consider the Ohio General Assembly redistricting case *Gonidakis, et al. v. LaRose*, Case No. 2:22-CV-773 (S.D. Ohio), has ordered that if the State does not adopt a lawful district plan and set a primary election date before May 28, "... we will order the primary be moved to August 2 and Map 3 be used for only the 2022 election cycle. After that, Ohio will have to pass a new map that complies with federal and state law."

As of this date, the Ohio General Assembly has not set a primary election date for [the offices of State Representative, State Senator, and political party State Central Committee member]. Any action doing so would require an emergency clause to make the election date and its associated deadlines effective immediately. The 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 legislation for this purpose; therefore, the only remaining option to conduct a primary election to which Ohio voters are entitled is the prescribed action by the federal district court.

[The Secretary of State's] office 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 (November 8, 2022)....

*Id.*

It is also important to note that Petitioners in this case are also parties to the *Gonidakis* Case, and all parties—including Petitioners—agreed before the Federal Court panel that April 20 was the deadline for any new redistricting maps to be adopted that could be used in time for a legislative primary election on August 2, 2022. Consistent with the foregoing, in the *Gonidakis* Case, Elections Director Amanda Grandjean, testifying on behalf of Secretary LaRose, informed

the Federal Court and parties that Ohio's 88 county boards of elections would need at least two weeks to program any *new* map (*i.e.*, a map other than Map 3, which is already programmed) into their systems and then the usual 90-day primary election period to administer all of Ohio's statutory deadlines for an August 2 primary election. That timeline set April 20 as the deadline for adopting a new map. The testimony provided that August 2 is the only date on which a primary election can be held without disrupting the administration of the November 8 general election (*i.e.*, April 20 to May 3 = 2 weeks, and then May 4 to August 2 = 90-day statutory timeline for election administration). Significant here, the Federal Court indicated in its opinion:

The Ohio Supreme Court's most recent deadline for the Commission to craft a fifth map (which would be subject to a fifth round of litigation) falls after the so-called 'drop dead' date of 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....

All parties agree that the primary should be moved to August 2. But they disagree about the appropriate map....

As all parties agree, Ohio's last date for implementing a new map under current law is April 20. And that date has come.

*Gonidakis, et al. v. LaRose*, No. 2:22-cv-00773, 2022 U.S. Dist. LEXIS 72172, pp. 2, 17, 24 (S.D. Ohio April 20, 2022).

Petitioners cannot ignore realities and the established deadlines (that Secretary LaRose does not have the authority to change) that they acknowledged in the *Gonidakis* Case and take contrary positions calling for contempt in this action. As the Federal Court recognized, even if Map 3 is used for this coming August 2 primary election, the Commission will still have to pass a new General Assembly district map that complies with federal and state law going forward. Accordingly, Map 3 is a temporary solution to allow Secretary LaRose to uphold his duty to ensure orderly and trustworthy elections and protect the voting rights of Ohioans.

### III. LAW & ARGUMENT

#### A. THERE ARE NO GROUNDS TO HOLD SECRETARY LAROSE IN CONTEMPT

Petitioners' Motions should be denied and there is no basis to find Secretary LaRose in contempt based upon the reasons set forth below and in Secretary LaRose's prior filings.

**i. The law and Separation of Powers Doctrine prohibits this Court from controlling the manner in which the Commission adopts a General Assembly district plan and prohibits a finding of contempt against Secretary LaRose.**

Petitioners' demands for relief in their latest Motions essentially ask this Court to commandeer the General Assembly plan-drawing process. Specifically, the OOC Petitioners ask this Court to fine Secretary LaRose and the majority members of the Commission \$10,000 per day until a constitutional plan is enacted, require them to report to this Court on a weekly basis, and order a plan to be used in 2022 elections unless the Commission enacts a new plan that passes this Court's constitutional muster by May 19, 2022. *See* Motion of Petitioners The Ohio Organizing Collaborative, et al. filed on May 10, 2022 ("OOC Motion"), pp. 18-19. The League Petitioners strive for a similar result and ask this Court to order the Commission to enact a plan by May 16, 2022. *See* Petitioners' Second Motion filed on May 10, 2022, p. 32.

The Separation of Powers Doctrine prohibits such a result and courts from forcing a decision or a super-veto over the actions of a co-equal branch. "The principle of separation of powers is embedded in the constitutional framework of our state government. The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of the government. *State v. Warner*, 55 Ohio St.3d 31, 43-44, 564 N.E.2d 18, 31 (1990); *State v. Harmon*, 31 Ohio St. 250, 258 (1877). It is inherent in our theory of government "that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved. \* \* \*"

*S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159, 28 OBR 250, 252, 503 N.E.2d 136, 138 (1986), quoting *Fairview v. Giffee*, 73 Ohio St. 183, 187, 76 N.E. 865, 866 (1905).

This Court specifically recognized the importance of the doctrine in *City of Toledo v. State*, 2018-Ohio 2358. Petitioners have repeatedly tried to distinguish *Toledo* but they are unable to do so because this Court made its stance clear with respect to a court’s inability to hold a legislator in contempt for engaging in a legislative function:

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.”**

*Id.* at ¶ 27 (citations omitted) (emphasis added). This Court went on to hold in *Toledo* that a 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. *Id.* at ¶ 27-29.

Further, Justice Frankfurter’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594-95, 72 S.Ct. 863, 886-889, 62 Ohio Law Abs. 417, 96 L.Ed. 1153 (1952) highlights the importance of separation of powers as it relates to our country’s system of governance, and is instructive

Legislative action may indeed often be cumbersome, time-consuming, and apparently inefficient. But as Mr. Justice Brandeis stated in his dissent in *Myers v. United States*, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L.Ed. 160:

“The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”

We therefore cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis. The answer must depend on the allocation of powers under the Constitution.

...

The Framers, however, did not make the judiciary the overseer of our government. \* \* \* Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution. The attitude with which this Court must approach its duty when confronted with such issues is precisely the opposite of that normally manifested by the general public. So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits...

...

The path of duty for this Court, it bears repetition, lies in the opposite direction. Due regard for the implications of the distribution of powers in our Constitution and for the nature of the judicial process as the ultimate authority in interpreting the Constitution, has not only confined the Court within the narrow domain of appropriate adjudication. It has also led to “a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.” A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution. It ought to be, but apparently is not a matter of common understanding that clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them.

*Id.* (internal citations omitted).

Here, the Separation of Powers Doctrine serves to restrain this Court from forcing a group of independent, co-equal officeholders to yield to this Court’s direction and will in formulating the composition of Ohio’s electoral maps. By proceeding with a hearing on Petitioners’ Motions, this Court would be stepping into the role of policy maker and manager over the affairs of the Commission. Nothing in Ohio’s Constitution empowers the Justices to do so. It would be improper for this Court to use its contempt power to break a legislative impasse, but that is, in essence, what Petitioners are asking this Court to do.

Having co-equal branches of government comes with the risk that there will be times which its branches do not agree. That is what has happened here. A four Justice majority of this Court has found reasons to disagree with the policy and political decisions the Commission's members have made. The Constitutional remedy for that is for the Court to reject the map and send the Commission back to try again. Art. XI, § 9(D)(3). The remedy is not for this Court to order the Commission to take certain specific steps or take an "adopt a map or else" approach. Doing so would elevate this Court above the other branches and infringe on the Article XI duties of the Commission. It is clear in the law and has been established throughout this litigation that this Court's function provided for by the Ohio Constitution is to review a district plan adopted by the Commission for constitutionality. In fact, voters made it clear that Article XI prohibits the relief sought by Petitioners: "[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. *Id.* at § 9(D)(1) & (2).

Ohio's voters vested the Commission with exclusive authority for map drafting, and in every instance, this Court is bound to return that responsibility to the Commission's discretion. *See Voinovich v. Ferguson*, 63 Ohio St. 3d 198, 204 (1992). As such, "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). For this Court to hold otherwise and grant Petitioners' request for relief would create a dangerous precedent giving political forces and their supporters free rein to use the courts as a vehicle to harm political opponents that they

disagree with for engaging in legislative functions, and to use this Court to enact laws they agree with. Such a result is untenable under the Separation of Powers Doctrine. Consequently, Petitioners' Motions must be denied without a hearing.

**ii. Legislative immunity prohibits a finding for contempt.**

Legislative immunity strictly prohibits this Court from finding Secretary LaRose in Contempt for engaging in a legislative function. "Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity,'" including the Commission members' decisions pertaining to their votes for General Assembly plans. *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998). In fact, this Court expressly recognized that in *Hicksville v. Blakeslee*, 103 Ohio St. 508, 517 (1921) explaining "[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." It is simply not this Court's role to inquire into the legislators' motives in enacting legislation or hold them in contempt for what it believes their motive to be. *See Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) ("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 upon a jury's speculation as to motives."); *State ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 502 (1941) ("[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.").

The OOC Petitioners claim that immunity does not apply because the Commission is not a legislative body, but they are mistaken. *OOC Motion*, at p. 15. Reapportionment of the legislature

is a legislative function. *LWV I*, 2022-Ohio-65 at ¶ 76. Further, the cases Petitioners cite are inapposite to the instant matter and none demonstrate that legislative immunity can be disregarded by this Court when a legislator engages in a legislative function. For instance, OOC Petitioners cite *Spallone v. United States*, 493 U.S. 265, 278, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990), which actually bolsters Secretary LaRose’s defense as this Court reversed a lower court’s imposition of sanctions on individual council members. *OOC Motion*, p. 16. The Bennett and League Petitioners attempt to rely upon *Hicksville v. Blakeslee*, which is quoted above and supports immunity. In *Hicksville*, this Court made clear that legislative immunity is broadly applied and it afforded protection for municipal legislators. *Id.* at 518-19. Further, in contradiction to Petitioners’ claims, this Court rejected the argument that 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.

Accordingly, legislative immunity applies and protects Secretary LaRose, and Petitioners’ Motions fail.

**iii. Secretary LaRose cannot be held individually liable for acts of the Commission.**

Petitioners have made the meritless assertion that Secretary LaRose can be held individually liable for acts of the Commission before, they make the same assertion again, and still without support. The Bennett Petitioners only cite cases in which individual members of a corporate board or non-parties were held in contempt. *See* Petitioners’ Motion For An Order Directing Respondents To Show Cause, Motion To Schedule Contempt Hearing, And Motion For Attorneys’ Fees filed on May 10, 2022 at pp. 32-33. The Commission is a constitutionally defined legislative body and Secretary LaRose is a mandatory member of the Commission, which are very different circumstances than those in the cases cited by Petitioners. Further, the circumstances here



call for consideration of legislative immunity and application of the Separation of Powers Doctrine, which protect Secretary LaRose from a finding of contempt and individual liability. Secretary LaRose also has not and cannot exert individual control over the actions of the Commission. The Commission only acts with regard to adopting maps by majority vote. Art. XI, Sec. 8 1(B)(1). This Court's own orders apply to the Commission and have not mandated conduct by any one member of the Commission. *See, e.g., Orders issued 4/14/22.*

Accordingly, Secretary LaRose is not subject to a finding of contempt or individual liability, and Petitioners' assertions to the contrary fail.

**iv. The impossibility defense applies.**

Impossibility of performance is a viable defense when a governmental agency cannot fully comply with a court order. *State ex rel. Johns v. Board of County Comm'rs*, 29 Ohio St. 2d 6, 8, 278 N.E.2d 19 (1972). "Impossibility of performance occurs when an unforeseen event arises that renders a party's performance of an obligation impossible. The performance of the obligation must have been rendered impossible without any fault of the party asserting the defense. Further, a party is excused from performing under a court order if performance would require the commission of an unlawful act. *See Ass'n of Cleveland Fire Fighters, Local 93 of the Int'l Ass'n of Fire Fighters v. City of Cleveland*, 8th Dist. Cuyahoga No. 94361, 2010-Ohio-5597, ¶ 13.

As established by Secretary LaRose and agreed by Petitioners, Ohio has passed the point where it can implement a newly adopted General Assembly map for 2022 elections. *See supra, e.g., Gonidakis*, p. 2 ("[T]he so-called 'drop dead' date of 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"). Even if the Commission could have adopted a new plan on May 6, 2022 that enjoyed the support of

every Commission member, it still would be impossible to implement it for this year's primary and general elections. Ohio law, as it exists now, did not allow for the implementation of a new map on May 6 in conjunction with the primary election date of August 2—a date that Secretary LaRose has no authority to change. *See Gonidakis* at \*26. To adopt such a plan would cause the inability to comply with Ohio's statutory deadlines for elections. *See Exhibit 1* (Secretary LaRose's Statement). Thus, the Commission identified the Third Plan/Map 3 as the only viable stop-gap option for the 2022 election cycle. The Federal Court in the *Gonidakis* Case also found that to be the best option. *Gonidakis* at \*8.

**v. Petitioners are not entitled to an award of attorneys' fees.**

In accordance with the foregoing, there is no basis to find that Secretary LaRose acted in bad faith or engaged in frivolous conduct pursuant to R.C. 2323.51; thus, Petitioners' request for attorneys' fees should be denied.

**IV. CONCLUSION**

The Commission has a constitutional obligation to adopt a new General Assembly district plan. But of the Commission members, Secretary LaRose uniquely has the legal obligation to administer primary elections *this year* for all 99 House and one-half of the 33 Senate districts or else partisan candidates for those offices cannot advance to the general election in November. Those primary elections did not occur on May 3 and now they must occur on August 2. The agreed-upon "drop dead" date of April 20 came and went without a new map being adopted by the Commission and approved by this Court. Therefore, the Commission resubmitting the Third Plan/Map 3 as a stop-gap measure to hold legislative elections in 2022 is not contemptuous and, at this point in time, it is the only prudent thing to do to preserve Ohioans' right to vote for their representatives to the General Assembly.

For the foregoing reasons, and those established in the prior filings on behalf of Secretary LaRose, Petitioners' Motions to Show Cause should be denied.

Respectfully submitted,

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# EXHIBIT 1

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**Statement to the Ohio Redistricting Commission  
by Ohio Secretary of State Frank LaRose  
Regarding Logistical Realities of Administering  
a 2022 General Assembly Primary Election**

As of today, a primary election date for the offices of State Representative, State Senator, and political party State Central Committee member has not been established.

The Ohio General Assembly has the sole authority in the Ohio Revised Code (3501.40) to set the time, place, and manner of a public election conducted in the State of Ohio. The only other government entity that can supersede that authority is a federal court of law.

A three-judge panel assigned to consider the Ohio General Assembly redistricting case *Gonidakis, et al. v. LaRose*, Case No. 2:22-CV-773 (S.D. Ohio), has ordered that if the State does not adopt a lawful district plan and set a primary election date before May 28, "... we will order the primary be moved to August 2 and Map 3 be used for only the 2022 election cycle. After that, Ohio will have to pass a new map that complies with federal and state law."

As of this date, the Ohio General Assembly has not set a primary election date for the above-mentioned contests. Any action doing so would require an emergency clause to make the election date and its associated deadlines effective immediately. The 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 legislation for this purpose; therefore, the only remaining option to conduct a primary election to which Ohio voters are entitled is the prescribed action by the federal district court.

My office 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 (November 8, 2022).

August 2, 2022 is also the latest date by which Ohio can conduct a primary election without overlapping or altering the scheduled timeline to successfully administer a General Election. This is also recognized by the three-judge panel in *Gonidakis, et al. v. LaRose* and uncontested by any of the parties involved in that litigation.

Under Ohio law, elections are conducted over at least a 90-day period. Eighty-nine days now stand between this date and August 2, 2022, putting Ohio within the traditional statutory window for administering its next election.

The federal panel majority in *Gonidakis, et al. v. LaRose* stated clearly that for any new district plan to be utilized for an August 2, 2022 primary election – and to have the benefit of a full, 90-day election administration period – the Commission would need to adopt it by April 20, 2022. Their opinion is based on testimony from my staff that the 88 county boards of election would collectively need at least two weeks to reprogram their computer systems to new House and Senate districts before the full, 90-day primary election period would begin, which would also do the least amount of damage to current Ohio election law.

To administer an August 2 primary election, the boards must meet a series of statutory and administrative deadlines to have the first ballots, known as Uniformed and Overseas Citizens



Absentee Voting Act (“UOCAVA”) ballots, prepared no later than June 17, 2022 (46 days before the election). To achieve this, elections officials must meet the following statutory requirements:

- 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.
- Determine the validity or invalidity of the declaration of candidacy and petition. R.C. 3513.05.
- Receive write-in candidates declarations of intent for partisan offices no later than **72 days before** the primary election. R.C. 3513.041.
- Hold protests against write-in candidates no later than **67 days before** the primary election. R.C. 3513.041.
- The Secretary of State must certify to boards of elections the form of official ballots no later than **70 days before** the primary election. R.C. 3513.05.
- Board of elections of the most populous county in a multi-county district must certify names of all candidates to the other county boards of elections in the district no later than **70 days before** primary election. R.C. 3513.05.

Boards of elections need at least two weeks to reprogram voter registration and tabulation systems to accommodate a new map, which as of this date takes us to at least May 19. At that point, the boards would already be in violation of state law unless the General Assembly changes the statutory deadlines. Additionally, my office would not instruct the boards to deprogram Map 3 before May 28, risking that the new map could be invalidated with no immediate options to administer a primary election. This administrative delay also reduces or nearly eliminates the required process election officials must complete to conduct testing on all voting equipment, proof ballots, test ballots, recruit poll workers, and order absentee and Election Day ballots.

In summary:

- The last date a new map could have been ordered and implemented without altering current statutory deadlines that precede an August 2, 2022 primary election was April 20, 2022.
- The General Assembly has not set a new primary date, and its leaders have publicly stated they do not have the votes to pass emergency legislation to do so.
- All but two of Ohio’s 88 county boards of elections have fully programmed the third General Assembly district plan adopted by the Ohio Redistricting Commission.
- A majority of the federal panel considering *Gonidakis, et al. v. LaRose* recognized that Map 3 has “administrative advantages” of implementation that no other map produced by the Commission to date presents, including a largely completed candidate certification process that also would not require the revisiting of filing deadlines and residency provisions.

**Therefore, Map 3 is the only viable option to effectively administer a primary election on August 2, 2022.** If on May 28, 2022, the federal court orders that Ohio use Map 3 and sets the primary election date on August 2, 2022, my office will issue a directive to the boards of elections implementing that order and providing detailed instructions on the administration of a successful primary election.