

**IN THE SUPREME COURT OF OHIO**

League of Women Voters of Ohio, *et al.*,

Petitioners,

v.

Ohio Redistricting Commission, *et al.*,

Respondents.

Case No. 2021-1193

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Bria Bennett, *et al.*,

Petitioners,

v.

Ohio Redistricting Commission, *et al.*,

Respondents.

Case No. 2021-1198

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Ohio Organizing Collaborative, *et al.*,

Petitioners,

v.

Ohio Redistricting Commission, *et al.*,

Respondents.

Case No. 2021-1210

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**RESPONDENTS MCCOLLEY AND LARE'S RESPONSE TO BENNETT AND OOC  
PETITIONERS' MOTIONS FOR AN ORDER DIRECTING RESPONDENTS TO  
SHOW CAUSE AND LWVO PETITIONERS' SECOND MOTION FOR AN ORDER  
DIRECTING RESPONDENTS TO SHOW CAUSE**

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## INTRODUCTION

Petitioners mistake an electoral crisis as contempt. Nothing could be farther from the truth. The Ohio Redistricting Commission (the “Commission”) and its members, including Respondents Senator Robert McColley and Representative Jeffrey LaRe (“Respondents”), do not thumb their nose at this Court. Five times now, the Commission has reconvened and tried to ascertain what this Court meant in its previous orders; but hitting a moving target is no small feat. And now, based on uncontroverted evidence, only one plan can be used in Ohio or else there will be no election at all.

As explained in detail herein and in Respondents McColley and LaRe’s Response to Petitioners’ Objections filed on May 9, the resubmittal of the plan adopted by the Commission on February 24, 2022 (the “Third Plan”) was *not* an act of defiance, but an act of necessity under the electoral emergency facing the Secretary of State and Ohio voters.

## FACTUAL BACKGROUND

On April 14, 2022, the Court invalidated the plan adopted by the Commission on March 28, 2022 (the “Fourth Plan”) and ordered “the [C]ommission 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) as we have explained those provisions in each of our four decisions in these cases.” *League of Women Voters of Ohio v. Ohio Redistricting Commission*, Slip Opinion No. 2022-Ohio-1235, ¶ 68 (“*LWV IV*” or “April 14 Order”). The Court further ordered that the plan be filed with the Secretary of State by 9:00 a.m. on Friday, May 6, 2022, and filed with the court by noon on that same date. *Id.* at ¶ 69.

Ohio’s primary election for, among other offices, United States Senator, Governor, Secretary of State, and Auditor was held on May 3, 2022. Pursuant to the April 14 Order, the

Commission reconvened and met on May 4<sup>1</sup> and May 5. On May 5, the Third Plan was resubmitted to the Secretary of State and the Court based on the guidance provided by Secretary of State Frank LaRose detailing why it is too late in the election administration process to utilize wholly new district lines for the 2022 general election.<sup>2</sup>

On Friday, May 6, Bennett Petitioners filed their Objections to the Resubmission of the Third Plan, which was joined by the League of Women Voters of Ohio (“LWVO”) and the Ohio Organizing Collaborative (“OOC”) Petitioners. Respondents timely filed their responses before 9:00 a.m. on May 9. On May 10, Bennett Petitioners filed their Motion for an Order Directing Respondents to Show Cause, Motion to Schedule Contempt Hearing, and Motion for Attorneys’ Fees. OOC and LWVO Petitioners also filed their Motions for an Order Directing Respondents to Show Cause on May 10. Respondents Senator Robert McColley and Representative Jeffrey LaRe jointly respond to all three motions.<sup>3</sup>

### **ARGUMENT**

Ohio courts “may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice.” Ohio R.C. § 2705.01. This requires proof of three elements by clear and convincing evidence: (1) “a prior order of the court”;

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<sup>1</sup> Senator McColley and Representative LaRe were appointed shortly before the commission met.

<sup>2</sup> In the interest of brevity, Respondents will not burden the Court with rehashing Secretary of State LaRose’s Statement to the Commission and the facts therein. For a more robust description of the state and federal requirements for Ohio’s 2022 elections, see Respondents Senator McColley and Representative LaRe’s Response to Petitioners’ Objections, filed with this Court on May 9, 2022, and incorporated herein by reference.

<sup>3</sup> As a preliminary matter, Petitioners’ Memoranda in Support of their Motions read more like reply briefs to Respondents’ Responses to Petitioners’ Objections. *See LWV IV*, 2022-Ohio-1235, at ¶ 80 (“Petitioners shall not file a reply or any motion for leave to file a reply. The clerk of the court shall refuse to accept any filings under this paragraph that are untimely or prohibited.”). For example, Bennett Petitioners’ footnote 10 takes up half a page and is solely aimed at critiquing Respondents’ case distinctions in their Response to Petitioners’ Objections. *See* Bennett Petitioners’ Mem. in Supp. of Mot. for an Order Directing Resp’ts to Show Cause p 28. Instead of clogging up the Court with additional motions practice, Respondents McColley and LaRe respectfully request the Court disregard or sua sponte strike the portions of Petitioners’ Memoranda that are beyond the scope of their contempt motions. Alternatively, Respondents refer the Court to Respondents Senator McColley and Representative LaRe’s Response to Petitioners’ Objections, filed with this Court on May 9, 2022.

(2) “proper notice to the alleged contemnor”; and (3) “failure to abide by the court order.” See *Brown v. Exec. 200, Inc.*, 64 Ohio St.2d 250, 253, 416 N.E.2d 610, 613 (1980). “[A] court order cannot be enforced in contempt unless the order was ‘clear and definite, unambiguous, and not subject to dual interpretations.’” *Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 23 (quoting *State ex rel. Cincinnati Enquirer v. Hunter*, 138 Ohio St.3d 51, 2013-Ohio-5614, 3 N.E.3d 179, ¶ 25). “Once the movant establishes this prima facie case of contempt, the burden shifts to the contemnor to prove his inability to comply with the court order . . . . The inability that excuses compliance cannot be self-imposed, fraudulent, or due to an intentional evasion of the order.” *In re A.A.J.*, 2015 Ohio-222, 36 N.E.3d 791, ¶ 12 (12th Dist.).

An order directing the Commission and/or Respondents Senator McColley and Representative LaRe to show cause is unwarranted because (1) the Commission complied with the Court’s April 14, 2022 Order; (2) the April 14 Order does not direct Senator McColley or Representative LaRe to act in their individual capacities; (3) the 2022 election calendar made it impossible to submit anything other than the Third Plan; and (4) this Court’s previous orders were ambiguous and subject to multiple interpretations, and are thus unenforceable. Additionally, Article XI of the Ohio Constitution prohibits the relief Petitioners seek and Ohio R.C. §2323.51 has no application here.

#### **I. The Commission complied with the Court’s April 14, 2022 Order.**

The April 14 Order required the Commission to meet and adopt a new general assembly district plan to be submitted to the Secretary of State by 9:00 a.m. on May 6, 2022—three days after Ohio’s statutorily and constitutionally required primary election was held on May 3, 2022. *LWV IV*, 2022-Ohio-1235, ¶¶ 78–79. The Commission met on May 4 and May 5, and timely resubmitted the Third Plan. Notably, the Commission did not resubmit the Fourth Plan in response

to the April 14 Order. The resubmission was timely, and the Section 8(C)(2) Statement was properly provided at the time that the Third Plan was *adopted*.<sup>4</sup> The Commission complied with the Court's April 14 Order.

**II. The April 14 Order does not direct Senator McColley or Representative LaRe to act in their individual capacities.**

The April 14 Order, and all prior merits orders in this case, requires *the Commission* to convene and take certain action. *LWV IV*, 2022-Ohio-1235, at ¶ 78. That is consistent with this Court's previous opinion, which held that the Commission is the only necessary party in this matter. *League of Women Voters of Ohio v. Ohio Redistricting Commission*, Slip Opinion No. 2022-Ohio-65, ¶ 61 ("*LWV P*"). Accordingly, neither Senator McColley nor Representative LaRe failed to comply with any order directed to them.

Furthermore, as previously set forth in prior responses, the actions of the members of the Commission when convened are legislative and thus subject to legislative immunity. *See Wilson v. Kasich*, 134 Ohio St. 3d 221, 228, 2012-Ohio-5367, 915 N.E.2d 814, ¶ 20. Contempt sanctions, especially fines advocated for by OCC Petitioners, are inappropriate against the Commission and its members when performing their official duties.

LWVO Petitioners critique Respondents for only citing to Ohio case law involving municipal lawmakers in response to prior contempt motions. LWVO Petitioners' Mem. in Supp. of Mot. for an Order Directing Resp'ts to Show Cause p 25. However, there are few cases that interpret Ohio's Speech and Debate Clause. *See Ohio Constitution, Article II, Section 12*.<sup>5</sup> Those

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<sup>4</sup> Petitioners emphasize that the Commission did not draft a new Section 8(C)(2) Statement for the Third Plan. *See Bennett Petitioners' Mem. in Supp. of Mot. for an Order Directing Resp'ts to Show Cause* p 19. However, the Commission was not required to draft a new statement because the Third Plan's 8(C)(2) Statement was filed with the Court at the time the Third Plan was *adopted*, on February 25, 2022 and is a part of the official record of this case. The Commission merely resubmitted the Third Plan to the Secretary of State and the Court.

<sup>5</sup> Of the few cases that interpret Ohio's Speech and Debate Clause, several compare the Ohio Clause to its federal counterpart. *See Costanzo v. Gaul*, 62 Ohio St.2d 106, 403 N.E.2d 979 (1980) (per curiam) (noting the similarity of the speech and debate provisions of the Ohio and federal constitutions); *Kniskern v. Amstutz*, 144 Ohio App. 3d 495,

few that do recognize legislative immunity for legislative functions. *See Kniskern v. Amstutz*, 144 Ohio App. 3d 495, 496, 760 N.E.2d 876, 877 (8th Dist. 2001) (“If legislative immunity were to be conditioned upon favorable review of legislation in the courts, the doctrine would be rendered nearly meaningless and both the legislature and the judiciary would become increasingly politicized.”); *Dublin v. State*, 138 Ohio App.3d 753, 742 N.E.2d 232 (10th Dist. 2000). The Commission is engaged in legislative activity and these cases are therefore appropriate.

### **III. The 2022 election calendar made it impossible to submit anything other than the Third Plan.**

Petitioners ask the Court to hold the Commission in contempt for failing to carry out an impossible task. But it is well-established that Ohio courts cannot hold a party in contempt where performance of an obligation ordered by the court would be impossible. *See State ex rel. DeWine v. Washington C.H.*, 2014-Ohio-3557, 18 N.E.3d 448, 455, ¶ 29 (12th Dist. 2014) (citing *Gauthier v. Gauthier*, 12th Dist. Warren No. CA2011-05-048, 2012-Ohio-3046, 2012 WL 2524374, ¶ 33) (“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. A party who raises the defense of impossibility of performance has the burden of proving it.”). And the performance Petitioners seek to compel through this Court’s contempt power is indeed impossible.

The Ohio Constitution requires that primary elections be held for all state and local elective offices, including senators and representatives of Ohio’s general assembly. Ohio Constitution,

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496, 760 N.E.2d 876, 877 (8th Dist. 2001) (same); *Dublin v. State*, 138 Ohio App.3d 753, 742 N.E.2d 232 (10th Dist. 2000) (same). Under federal law, legislators are entitled to absolute immunity when performing their legislative activities. *See Bogan v. Scott-Harris*, 523 U.S. 44,54 (1998) (“Absolute legislative immunity attaches to all actions taken ‘in the sphere of legitimate legislative activity.’” (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951))); *Bradley v. Mallory*, 871 F.2d 1087 (6th Cir. 1989) (unpublished) (“State legislators are entitled to absolute immunity from liability for actions taken in their legislative capacities.” (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951))). Those principles should apply here.

Article V, Section 7. Carefully interrelated provisions of the Revised Code set the timeline for the many actions required to prepare for, conduct, and certify the results of Ohio's primary and general elections. While the Commission exercises legislative authority, it does not have legislative authority to eliminate these constitutional and statutory requirements, nor to change any impending election dates set by the Revised Code. *See LWW IV*, Slip Opinion No. 2022-Ohio-1235, at ¶ 69. Secretary LaRose and the state's eighty-eight county boards of elections are responsible for implementing and carrying out elections under any plan adopted by the Commission, and the Secretary explained in a statement submitted for the Commission's May 5, 2022 meeting why the Third Plan is the only plan that can be implemented in time for an August 2, 2022 primary election date. *See* Secretary LaRose's Statement to the Commission<sup>6</sup>, *see also LWW IV*, at ¶¶ 151-55 (DeWine, J., dissenting). Secretary LaRose also comprehensively explained that adopting and implementing any plan other than the Third Plan would be impossible in his May 9 filing, which Respondents McColley and LaRe incorporate by reference herein. *See* Secretary LaRose's Response to All Petitioners' Objections, Case No. 2021-1193 (May 9, 2022). Therefore, Respondents McColley and LaRe were left to either (a) support the adoption of an entirely new map that the state's chief elections officer repeatedly testified could not be implemented in time, and therefore *violate* Article V, Section 7 of the Ohio Constitution by failing to hold a primary election; or (b) support the resubmission of a map that the Court already reviewed in order to conduct the latest primary date of August 2, 2022, and therefore *comply* with Article V, Section 7, which the Secretary of State and Boards of Elections said could only be done with one particular

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<sup>6</sup> Secretary LaRose's Statement is publicly available at <https://redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-5-2022-316/statement-to-commission-by-secretary-larose-2022-5-05.pdf>. The Secretary's position was also supported by an April 18, 2022 Press Release of the Ohio Association of Elected Officials, publicly available at <https://redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-5-2022-316/oaeo-election-officials-press-for-august-2-primary-2022-4-18.pdf>.

map—the Third Plan. Respondents were faced with an impossible choice that made exact compliance with the Court’s April 14 Order impossible.

**IV. This Court’s previous orders were ambiguous and subject to multiple interpretations.**

Even if Petitioners made a prima facie showing of contempt, which they do not, this Court’s prior orders were unclear, ambiguous, and subject to multiple interpretations. Therefore, they are unenforceable as to the Commission and its members, who have acted in good faith to comply with both the Ohio Constitution and the Court’s orders throughout this case.

“A court order cannot be enforced in contempt unless the order was ‘clear and definite, unambiguous, and not subject to dual interpretations.’ . . . A litigant cannot be punished for violating a court order that is indefinite or uncertain in its meaning.” *Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2356, 110 N.E.2d 1257, ¶ 23 (internal quotation omitted).

The April 14 Order required the Commission to adopt a new district plan “that meets the requirements of the Ohio Constitution, including Article XI Sections 6(A) and 6(B) *as we have explained those provisions in each of our four decisions in these cases.*” *LWV IV*, at ¶ 78. The Commission has attempted to comply with the Court’s varying opinions in this case, whether it be the introduction of a “partisan symmetry” requirement within Article XI, the shifting goal posts for what “partisan symmetry” even means, and the definition of “competitive” districts.

In its decision invalidating the original general assembly district plan, the Ohio Supreme Court held that the plan was unconstitutional for failing to “closely correspond” to the Ohio statewide voter preference of 54% Republican to 46% Democrat. *LWV I*, Slip Opinion No. 2022-Ohio-65, at ¶ 88. In response, the Commission enacted the first remedial plan with a 57 to 42% ratio with the goal of closely corresponding to the Court’s 54 to 46% ratio. *See League of Women Voters of Ohio v. Ohio Redistricting Commission*, Slip Opinion No. 2022-Ohio-342, ¶ 97

(Kennedy and DeWine, JJ., dissenting) (“*LWV II*”). The Court shortly thereafter invalidated that first remedial plan; apparently “closely correspond” meant “exactly.” *Id.* at ¶¶ 63–64. Now required to draw an exact 54-46% plan, the Commission did so and met the Ohio Supreme Court’s newly crafted criteria and enacted a second revised plan by adding five (5) more democratic leaning state House districts and two (2) more democratic leaning state Senate districts, representing a perfect statewide proportionality of 54 to 46%. *League of Women Voters of Ohio v. Ohio Redistricting Commission*, Slip Opinion No. 2022-Ohio-789, ¶ 84 (Kennedy and DeWine, JJ., dissenting) (“*LWV III*”). Yet, the Court invalidated that plan as well by creating another newly crafted formula that assessed individual districts, instead of the plan as a whole. *Id.* at ¶ 85.

The confusion surrounding these opinions is amplified by the Court’s changing definition of “competitive” districts. In *LWV I*, the Court required the first remedial map to attempt to meet the 54-46% “statewide proportion of Republican-leaning districts to Democratic-leaning districts.” *LWV I*, Slip Opinion No. 2022-Ohio-65, at ¶ 86. When the Commission did so in the Second Plan, the Court determined for the first time that labeling 50-51% Democratic-leaning districts as competitive was “absurd on its face.” *LWV II*, Slip Opinion No. 2022-Ohio-342, at ¶ 61. The Commission then enacted the Third Plan, which “reduced from 12 to five the number of seats favoring Democrats by less than 51 percent.” *LWV III*, Slip Opinion No. 2022-Ohio-789, at ¶ 87 (Kennedy and DeWine, JJ., dissenting). Yet again, the Court invalidated the plan after somehow (unknowingly) reading Article XI in a way that “even districts in which Democrats have a 2 percent advantage do not count as districts that “favor” [the Democratic] party.” *Id.* at ¶ 88 (quoting the majority opinion at ¶ 41).

Even the independent map drawers hired by the Commission fundamentally disagreed on how to comply with the Court’s Orders and the Ohio Constitution. *See, e.g.*, 3/24/22 Workroom



Recording<sup>7</sup>, 9:44:00–9:55:00. The confusion over “partisan symmetry” standards is not the fault of Respondents; neither is the statutorily-set May 3 primary date. *See LWW IV*, at ¶ 69 (recognizing the Court does not have authority for setting the primary election date). The Court knew when it entered its April 14 Order of the impending May 3 primary date—a date the Court cannot change. The Court chose to overrule the chief elections officer of the state and set a redraw deadline of May 6. Nevertheless, the Commission convened and took reasonable steps to comply with the April 14 Order and the Court’s prior orders over the course of this litigation, all while knowing that the Ohio Constitution mandates that a primary election be held, and under these circumstances it must be held no later than August 2, 2022.

**V. Article XI prohibits the relief Petitioners seek.**

Article XI of the Ohio Constitution provides a limited grant of exclusive, original jurisdiction to this Court to determine the validity of general assembly district plans. *See* Ohio Constitution, Article XI, Section 9. The limitations on remedies the Court may impose in Section 9(D) reflect the intent of the people of Ohio that this Court have a limited role in what has always been a legislative process. *See* Article XI, Section 9(D)(1) (“No court shall order, in any circumstance, the implementation or enforcement of any general assembly district plan that has not been approved by the commission in the manner prescribed by this article.”); Section 9(D)(2) (“No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district.”). In fact, the requirement that the Commission reconvene upon the invalidation of a general assembly district plan, and the timing for when the Commission must act, derives from the Ohio Constitution, not the Court. *See* Ohio Constitution, Article XI, Section

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<sup>7</sup> <https://ohiochannel.org/video/ohio-redistricting-commission-workroom-3-24-2022-820am-1050pm>.

9(B)<sup>8</sup>; *see also LWW II*, Slip Opinion No. 2022-Ohio-342, at ¶ 76 (Kennedy and DeWine, JJ., dissenting) (“Therefore, the work of the commission is controlled by the Ohio Constitution, not by judicial fiat. The arbitrary timeline set by the majority usurps the right of the people to have a voice in the redistricting process that is guaranteed by Article XI, Section 1(C).”).

Accordingly, this Court cannot move the primary date, impose its own plan, or impose any plan that has not been approved by the Commission. The Court cannot circumvent these express constitutional provisions through a contempt motion, regardless of how many times Petitioners demand the Court do so. The Court has consistently recognized these constitutional limitations under Article XI, Section 9 in its prior opinions. *LWW I*, Slip Opinion No. 2022-Ohio-65, at ¶¶ 65-75; *LWW II*, Slip Opinion No. 2022-Ohio-342, at ¶¶ 66-68; *LWW III*, Slip Opinion No. 2022-Ohio-789, at ¶¶ 44-46; *03/24/2022 Case Announcements #2*, 2022-Ohio-957 (denying Respondents Sykes and Russo’s Motion to Move the Primary Election); *03/24/2022 Case Announcements #2*, 2022-Ohio-957 (Fischer, J. concurring) (noting the Motion to Move the Primary Election was borderline unethical in light of *LWW II* and R.C. § 3501.01(E)(1)); *LWW IV*, Slip Opinion No. 2022-Ohio-65, at ¶ 64 (determining it “lack[ed] the constitutional authority to grant the relief.”). Yet Petitioners continue to argue that the Court has authority beyond the text of the Ohio Constitution. *See, e.g.* Bennett Petitioners’ Mem. in Supp. of Mot. for an Order Directing Resp’ts to Show Cause pp 21–22 (arguing the Court has authority to move the primary election). The Court should continue to adhere to its precedent.

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<sup>8</sup> “*In the event that any section of this constitution relating to redistricting, any general assembly district plan made by the Ohio redistricting commission, or any district is determined to be invalid by an unappealed final order of a court of competent jurisdiction then, notwithstanding any other provisions of this constitution, the commission shall be reconstituted as provided in Section 1 of this article, convene, and ascertain and determine a general assembly district plan in conformity with such provisions of this constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next time for redistricting under this article in conformity with such provisions of this constitution as are then valid.* Ohio Constitution, Article XI, Section 9(B) (emphasis added).

Nevertheless, the Petitioners want this Court to violate the Constitution to give them what they want. The Commission and its members have tried to construct a constitutional plan, but have been unable to do so under the Court’s ever-changing precedent and time constraints. The Court wants the Commission to achieve perfect proportionality from scratch within an expedited timeframe—a feat that two independent map drawers could not complete. And Petitioners want the Court to ignore the express provisions of the Ohio Constitution and implement an unverified plan that the Commission voted down.<sup>9</sup> The Commission’s attempts to resolve an electoral crisis, all in time to conduct a constitutionally required primary election, cannot be and is not contempt.

Furthermore, Article XI sets out a prescribed process to get to maps. It is the role of the Commission, which consists of seven separately elected officials answerable to the voters, to make the determination of what plan to implement. That is the legislative function that may not be restrained or influenced by this Court. And, as this Court and others have recognized, it is a political act with political implications one way or the other. *See LWV III*, Slip Opinion No. 2022-Ohio-789, at ¶ 71 (Kennedy and DeWine, JJ., dissenting) (noting the Commission “is composed of partisan elected officials”). This Court’s role is circumscribed as well – once the legislative action is complete, this Court is to determine one question, and one question only. Does that action meet the requirements of the Constitution. If it does, the plan moves forward; if it does not, in the words of the Constitution, “the commission shall be reconvened,” and the process continues. As Chief Justice O’Connor recognized at oral argument, there is no time limit on how long the process

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<sup>9</sup> Bennett Petitioners claim that the plan offered by Representative Russo on May 5 was “unrebutted” and “in full compliance with Article XI.” *See* Bennett Petitioners’ Mem. in Supp. of Mot. for an Order Directing Resp’ts to Show Cause p 11. However, Respondents have had no discovery or ability to assess and question Mr. Glassburn about the plan, which was submitted to the Commission’s online portal on May 4. (*See id.* at 13). Moreover, Respondents are merely intervenor-defendants as to a Voting Rights Act claim in the *Gonidakis* litigation, and unlike Bennett Petitioners, have not affirmatively filed anything relating to the merits of the main litigation. *See generally Gonidakis v. LaRose*, Case No. 2:22-cv-00773 (S.D. Ohio).

continues. And no alternative route to exit the process other than the adoption, by a majority vote of the Commission, of a plan that ultimately meets this Court's constitutional review.

The language and process dictated by Article XI do not change just because the process has gone on a long time and an election must be held. The logical and common-sense approach – indeed the only approach consistent with the language of Article XI – is to go ahead and conduct the election while the constitutionally-prescribed process continues.

By their motions seeking contempt, Petitioners seek to short-circuit that process. They ask that this Court move beyond its role as contemplated by Article XI of the Constitution and fundamental principles of separation of powers. To go well beyond that one question as to whether the plan as drawn meets the requirements of the Constitution. The motions seek to have this Court step into and manage the affairs of the Commission by holding individual elected officials in contempt because of a vote taken in the Commission. *E.g.*, LWVO Petitioners' Mem. in Supp. of Mot. for an Order Directing Resp'ts to Show Cause p 24 ("The resubmission of the Third Plan was passed with a one-vote margin. Therefore, any single Commissioner could have prevented the passage of the Third Plan"). To conclude that the Commission's actions amount to some sort of frivolous conduct. Bennett Petitioners' Mem. in Supp. of Mot. for an Order Directing Resp'ts to Show Cause p 35. To require that each of four Commissioners – all elected officials, all of whom face elections this year – pay a \$10,000 a day fine until they have reached agreement on a plan that ultimately meets this Court's constitutional review. OOC Petitioners' Mem. in Supp. of Mot. for an Order Directing Resp'ts to Show Cause p 19.

None of Petitioners' requested relief is what Article XI of the Constitution contemplates. If the people of Ohio had wanted this Court to step in, put its hand on the scale, and directly

influence the political process of drawing maps, Article XI would have been written entirely differently.

Moreover, none of Petitioners' requested relief is permitted under principles of separation of powers. "The separation-of-powers doctrine . . . precludes the judiciary from asserting control over 'the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control.'" *Toledo v. State*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, ¶ 27; *Mississippi v. Johnson*, 71 U.S. 475, 500 (1867) (No other co-equal branch "can be constrained in its actions by the judicial department").

Having co-equal branches of government comes with the risk that there will be times when those separate branches do not agree. That has happened here. Redistricting is a political process that has been, in the wisdom of the people of this state, delegated to elected officials who face the voters. A majority of the 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. The remedy is not for the Court to order the Commission to take certain steps or take an "adopt a map or else" approach. Doing so would elevate the Court above the other branches, infringe on the Article XI duties of the Commission, and violate fundamental principles of separation of power.

#### **VI. Ohio Revised Code §2323.51 has no application here.**

The Bennett Petitioners Motion also seeks attorneys' fees for what they claim to be frivolous conduct or bad faith under R.C. § 2323.51 ("Frivolous conduct in civil actions"). The argument has no basis under Ohio law. Petitioners make no effort to explain how the conduct of Respondents McColley and LaRe can possibly amount to "the assertion of a claim, defense, or other position in connection with a civil action" which "is not warranted under existing law" or

“obviously serves merely to harass or maliciously injure another party to the civil action.” R.C. § 2323.51(A)(2). The only filings Respondents McColley and LaRe have made are their response to the objections to the plan resubmitted by the Commission on May 5, 2022 and Notices of Substitution of Parties. Because each of the arguments in those filings were supported by controlling Ohio law, there can be no basis for finding frivolous conduct.

Moreover, R.C. § 2323.51 applies only to “civil actions.” That term is well understood in Ohio jurisprudence. “[T]he term ‘civil action,’ as used in our statutes embraces those actions which, prior to the adoption of the Code of Civil Procedure in 1853 abolishing the distinction between actions at law and suits in equity, were denoted as actions at law or suits in equity.” *In re Wyckoff's Estate*, 166 Ohio St. 354, 357, 142 N.E.2d 660, 663 (1957). “[O]ther court proceedings of a civil nature come, generally at least, within the classification of special proceedings.” *Id.* (emphasis added).

A redistricting challenge pursuant to Article XI, Section 9 of the Ohio Constitution quite plainly was not an action at law or a suit in equity prior to 1853. Thus, this Court has described such a proceeding not as a civil action, but as a “special proceeding.” *E.g., Wilson v. Kasich*, 134 Ohio St.3d 221, 2012-Ohio-5367, ¶ 43 (“Relators primarily rely on the two alternative apportionment plans of their expert, Professor McDonald, to meet their heavy burden of proof in this *special proceeding*”) (emphasis added). R.C. § 2323.51 has no application to this special proceeding.

Even if the Court finds R.C. § 2323.51 applicable, as Bennett Petitioners admit, any request for an award of attorneys’ fees is premature. *See* Bennett Petitioners’ Mem. in Supp. of Mot. for an Order Directing Resp’ts to Show Cause p 35 (citing the procedural requirements of R.C. 2323.51(B)(2)). Additionally, as explained herein, the Commission and Respondents have acted

in good faith, and any relief that effectively compels Commission members to vote a certain way is prohibited by the Ohio Constitution in any circumstance. *See* Article XI, Section 9(D)(1) and (D)(2).

### **CONCLUSION**

For the reasons stated above, Petitioners' Motions should be denied.

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Respectfully submitted this the 12th day of May, 2022.

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