IN THE
SUPREME COURT OF OHIO

League Of Women Voters Of Ohio, *et al.*, :
Relators, :
v. :
Ohio Redistricting Commission, *et al.*, :
Respondents. :

Case No. 2021-1193

Original Action Pursuant to Ohio Const.,Art. XI

[Apportionment Case Pursuant to S. Ct. Prac. R. 1403]

Bria Bennett, *et al.*, :
Relators, :
v. :
Ohio Redistricting Commission, *et al.*, :
Respondents. :

Case No. 2021-1198

Original Action Pursuant to Ohio Const., Art. XI

[Apportionment Case Pursuant to S. Ct. Prac. R. 1403]

The Ohio Organizing Collaborative, *et al.*, :
Relators, :
v. :
Ohio Redistricting Commission, *et al.*, :
Respondents. :

Case No. 2021-1210

Original Action Pursuant to Ohio Const.,Art. XI

[Apportionment Case Pursuant to S. Ct. Prac. R. 1403]

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COMBINED RESPONSE OF RESPONDENT GOVERNOR MIKE DEWINE TO (A) PETITIONERS' MOTION FOR AN ORDER REQUIRING RESPONDENTS TO EXPLAIN THEIR FAILURE TO COMPLY WITH THE COURT'S MAY 25, 2022 ORDER; (B) PETITIONERS' MOTION TO ENFORCE THE COURT'S MAY 25, 2022 ORDER AND REQUIRE RESPONDENTS TO EXPLAIN THEIR FAILURE TO COMPLY WITH SUCH ORDER; AND (C) OOC PETITIONERS' JOINDER AND MOTION FOR AN ORDER DIRECTING RESPONDENTS TO APPEAR IN PERSON FOR A HEARING

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Ohio Redistricting Commission, *et al.*,	:	[Apportionment Case Pursuant
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INTRODUCTION

Petitioners' June 7 and 8 Motions are only the latest in a series of their unconstitutional demands—all of which have been ***repeatedly*** rejected by this Court. Yet, Petitioners remain undeterred and insist on advancing positions lacking any basis under the law as they unreasonably and vexatiously multiple these proceedings to no apparent end—at least not one permitted under the Ohio Constitution.

To be sure, Petitioners changed the label on their instant motions from a "Motion for Contempt" to Motions "For an Order Requiring Respondents To Explain Their Failure to Comply With the Court's May 25, 2022 Order," "to Appear For A Hearing" in person, or to "Enforce the Court's . . . Order" *and* "Require [the Commission] To Explain" its actions. But this change is only semantics. Labels aside, Petitioners advance the same flawed arguments and demand the same unconstitutional remedy already rejected by this Court.

As Governor DeWine noted in his responsive filed before this Court barely a month ago, "Petitioners have now had six (6) chances [between them] to prove through their briefs that this Court has the authority to hold Commission members in contempt merely for exercising their independent discretion in drafting apportionment maps." With the latest motions, that number of chances is now up to nine. But even so, the same defects persist. The law does not permit what Petitioners demand. And it is noteworthy that Petitioners (still) do not point to a single case wherein any court has ever held a legislator in contempt for acting on a matter within the scope of her constitutionally-defined discretion. Not in Ohio. Not in the redistricting context. Not in any context. For all intents and purposes, Petitioners have even given up all pretense

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of even trying to cobble together legal authority to support their position. Omitted from their memorandum is any supporting law, and thus they are forced to substitute rhetoric for the authority that does not exist.

No good faith exists to justify yet another request for the same relief this Court has rejected three times in the last three months alone. The only form of show cause order that may properly issue is one compelling Petitioners to show cause why they should not be sanctioned for filing serial motions that not only are completely lacking in legal support, but seek relief not permitted under this Court's precedent and basic constitutional law. *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n, (LWV IV)*, __ Ohio St.3d __, 2022-Ohio-1235, 2022 WL 1113988, ¶ 118 (Fischer, J., dissenting) ("Members of this court have had to spend substantial time reviewing" Petitioners' then pending and previous "baseless and unnecessary motions.").

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LEGAL ANALYSIS

A. Petitioners Re-File Their Already-Rejected Show Cause Motions Under Another Name.

"In November 2015, Ohio voters overwhelmingly approved an amendment to the Ohio Constitution" vesting the Redistricting Commission with sole discretion over legislative apportionment. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV I)*, __ Ohio St.3d __, 2022-Ohio-65, 2022 WL 110261, ¶ 4. Yet from the Commission's first exercise of that authority, Petitioners have insisted that it may wield its discretion only according to Petitioners' preferences.

OOC Petitioners were earliest to the event. After encouraging this Court to adopt "a strict proportionality test that cannot easily be found in the text of Ohio's Constitution," *Gonidakis v. LaRose*, No. 2:22-CV-0773, 2022 WL 1175617, at *27 (S.D. Ohio Apr. 20,

2022), they first moved for an order to show cause as to why the Commission should not be held in contempt on February 18, 2022 – just a day after the Commission's February 17 meeting resulted in no adopted plan. Bennett Petitioners reiterated this request in their February 28, 2022 objections to the plan the Commission adopted on February 24. While this Court struck down the February 24 plan in *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LWV III)*, ––– Ohio St.3d ––––, 2022-Ohio-789, 2022 WL 803033, it denied petitioners' request for additional relief. *Id.* at ¶ 44.

Petitioners were more in lock-step with their second round of motions. On March 29, 2022 (again on the day immediately after the Commission adopted a plan not to their liking), Bennett Petitioners filed a 20-page "renewed motion" for a show cause order and combined motion to schedule a contempt hearing, and League of Women Voters Petitioners filed a 25-page motion to the same effect. OOC Petitioners filed a "joinder" in support of the Bennett Petitioners' motion the same day. Again, though the Court struck the Commission's approved map, it denied Petitioners' requests "to do more than simply invalidate" the plan and direct the Commission to try again. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n, (LWV IV)*, __ Ohio St.3d __, 2022-Ohio-1235, 2022 WL 1113988, ¶ 63-64.

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This time, the Court did so more forcefully. Refusing to "bend" the limitations of Article XI to Petitioners' whims, this Court denied all "requests for additional or alternative relief." *Id.* at ¶ 63-65. 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, nor would it "declare that the independent map drawers' plan

is presumptively constitutional" when such plan had never been approved by the Commission. *Id.* at ¶ 65, 72. Under Article XI Section 9's plain terms, it "lack[ed] the constitutional authority to grant [either form] relief." *Id.* Nor would it issue "an order directing respondents to show cause why they should not be held in contempt."[1] *Id.* at ¶ 63, 32 n.6.

Too impatient to permit the Commission the full time this Court afforded it for redrafting in *LWV IV*, League of Women Voters Petitioners filed their next motion for a show cause hearing on April 25, 2022 – less than two weeks after this Court's April 14 rebuke of the same request, and twelve (12) days before the May 6 deadline to submit new maps. But before the Court could act on that April 25 motion, the third wave arrived.

League of Women Voters Petitioners filed a "second motion for an order directing responds to show cause" (which was, in fact, their third motion altogether) on May 10, 2022, as did the Bennett and OOC Petitioners, all in response to the Commission's May 6 adoption of "Map 3." Map 3, of course, being the same map that Secretary of State Frank LaRose, as the State's Chief Elections Officer, informed the Commission was "the only viable option to effectively administer a primary election on August 2, 2022,"[2] and the same the *Gonidakis* court ordered to be implemented for this year's elections alone, in the event that no constitutional alternative had been selected by May 28. *See* 2022 WL 1175617, at *30.

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[1] *See also 04/14/2022 Case Announcements #4*, 2022-Ohio-1244 (order denying motions requesting show cause orders 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)).

[2] [*See* LaRose Statement 5/5/22 (emphasis omitted).]

In this third round of show cause motions, Petitioners threw what was evidently everything they had at the Commission, including: comparisons to inapposite mandamus cases wherein legislative actors lacked the discretion vested in the Commission's members here; references to corporate law having no relevance to a case involving a coequal branch's exercise of constitutionally provided-for legislative authority; a rehashing of arguments rejected by the *Gonidakis* court (and in several instances, a misrepresentation of the evidence and admissions Petitioners put before it); and even a challenge to this Court's repeated holding that the Commission is a legislative body, engaged in a legislative task, for which its members are entitled to the presumption of good faith.[3]

None of it had merit, as readily established in Governor DeWine's opposition papers. Thus, for the third time, the Court sustained objections to the adopted plan, and for the third time, it rejected "Petitioners' requests for additional relief" – *i.e.*, orders initiating show cause and contempt proceedings. *See League of Women Voters v. Ohio Redistricting Comm. (LWV V)* (per curiam), __ Ohio St.3d __, 2022-Ohio-1727, 2022 WL 1665325, ¶ 5, 9.[4]

Justice Kennedy's concurrence to the Court's May 25 order made clear what is apparent under the law and in this Court's opinions. "*This court lacks the power to declare the commission to be in contempt*," she first explained. *Case Announcements #4*, 2022-Ohio-1750 at ¶ 5 (Kennedy, J., concurring) (emphasis in original).

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3 [*See* Bennett 5/10/22 Mtn. at 27-35; OOC 5/10/22 Mtn. at 10-19; LWV 5/10/22 Mtn. at 15-27.].

4 *See also 05/25/2022 Case Announcements #4*, 2022-Ohio-1750 (order 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' motions to show cause go far beyond what Article XI empowers this court to do in its exercise of judicial authority." *Id.* at ¶ 8. And as a result, "hold[ing] the commission in contempt" pending "the adoption of a plan that meets this court's approval" would run afoul of this Court's decision in *City of Toledo v. State*, 154 Ohio St. 3d 41, 2018-Ohio-2358, 10 N.E.3d 1257, ¶ 27, prohibiting use of the contempt power to "assert[] control over" such purely legislative functions. *Id.*[5]

Justice Kennedy likewise specified that "[*t*]*his court has no contempt powers over the individual members of the commission*." *Id.* at ¶ 10 (emphasis in original). Again, *Toledo* compelled this conclusion. Court orders are enforceable through contempt only when they are "clear," "unambiguous, and not subject to dual interpretations." *Id.* at ¶ 12 (quoting *Toledo*, 2018-Ohio-2358 at ¶ 23). "*League IV*'s order for the commission to be reconstituted and adopt an entirely new General Assembly-district plan was directed only at the commission." *Id.* at ¶ 13. Nothing in it "clearly and definitely address[ed] the individual members of the commission" at all. *Id.*; *see also LWV IV*, 2022-Ohio-1235 at ¶ 78 ("We further order the commission to be reconstituted, to convene, and to draft and adopt an entirely new General Assembly–district plan"). What's more, "petitioners ha[d] not cited a case in which this court has held that individual members of a state legislative body can be held in contempt for the body's failure to comply with a court order." *Id.*

Also "problematic" for Justice Kennedy was the fact that "no single member of the commission ha[d] the power to bind the commission or act (much less adopt a district plan) on behalf of the commission." *Id.* at ¶ 13. Contempt sanctions are

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[5] *See also Case Announcements #4*, 2022-Ohio-1750 at ¶ 21-23 (Fischer, J., concurring) (admonishing Petitioners for "attempt[ing] to accomplish indirectly what legislative immunity forbids them from doing directly: imposing sanctions against individual legislative officers for their legislative actions").

permissible only when the contemnor has ability to secure his "free[dom] if he agrees to do as ordered." *State ex rel. Johnson v. Cty. Ct. of Perry Cty.*, 25 Ohio St. 3d 53, 55, 495 N.E.2d 16 (1986). Since the Commission could act only by majority vote, however, its "individual members d[id] not *carry the keys* of their prison in their *own pockets*" because none could individually adopt a plan that would pass constitutional muster. *Case Announcements #4*, 2022-Ohio-1750 at ¶ 14 (Kennedy, J., concurring) (emphasis in original).

Now, roughly three weeks after denying contempt relief in *LWV V*, the fourth show-cause wave is upon the Court. Although purposely titled to avoid use of the terms "show cause" and "contempt," Petitioners' requests are unchanged:

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- Bennett Petitioners' "Motion to Enforce the Court's May 25, 2022 Order and Require Respondents to Explain their Failure To Comply" with said order "respectfully request[s] that this Court . . . order Respondents to show cause at a hearing as to why they did not comply with Court's order";

- League of Women Voters Petitioners' "Motion For an Order Requiring Respondents To Explain Their Failure to Comply With the Court's May 25, 2022 Order" asks that the Court order the Commission "to file an explanation" and "appear in person" to provide the same during a hearing; and

- OOC Petitioners' "Joinder and Motion for An Order Directing Respondents to Appear for a Hearing" is "writ[ten] separately" only "to emphasize and to move this Court to order" an "*in person*" hearing.[6]

Justice Kennedy's thorough concurrence notwithstanding, not a single one of these show-cause motions by another name responds to the hornbook law Governor DeWine has submitted to this Court on each occasion it has declined to initiate

[6] [*See* Bennett 6/7/22 Mtn. at 3; LWV 6/8/22 Mtn. at 5; OOC 6/8/22 Mtn. at 1 (emphasis in original).]

contempt proceedings.[7] Petitioners lack any authority for their position and thus resort to rhetoric and pejoratives, neither of which establishes a good faith basis for this fourth wave of filings.

B. Petitioners Have Not Now, Nor In Any Previous Filing, Overcome Any Of The Immovable Constitutional Impediments To The Relief Sought Here.

1. The Commission's Actions Are Protected By Legislative Immunity, Among Other Doctrines—*They May Not Be Interrogated*.

This latest round of meritless contempt requests should be summarily denied just like the ones before it. To start, Petitioners' motions run directly afoul of the legislative immunity doctrine. Reapportionment is a legislative task. *LWV I*, 2022-Ohio-65 at ¶ 76. "That legislative officers are not liable personally for their legislative acts is ***so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be found where the doctrine has been questioned and***

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7 *See* Response of Respondent Governor Mike DeWine to Court's Show Cause Order, filed on ***February 23***, 2022, in Case Nos. 2021-1193; 2021-1198; and 2021-1210; Response of Respondent Governor Mike DeWine to Petitioners' Objection to the Ohio Redistricting Commission's February 24, 2022 Revised Plan, filed on ***March 3***, 2022, in Case Nos. 2021-1193; 2021-1198; and 2021-1210; Combined Response of Respondent Governor Mike DeWine to (A) Petitioners' Renewed Motion for an Order Directing Respondents to Show Cause and Motion to Schedule Contempt Hearing; and (B) Petitioners' Objections to General Assembly District Plan Adopted on March 28, 2022, filed on ***April 4***, 2022 in Case Nos. 2021-1193; 2021-1198; and 2021-1210; and Response of Respondent Governor Mike DeWine to Petitioners' Motion for an Order Directing Respondents to Show Cause for Why They Should Not Be Held In Contempt of the Court's April 14, 2022 Order, filed on ***May 5***, 2022 in Case No. 2021-1193; Combined Response of Respondent Governor Mike DeWine to (A) Petitioners' Objection to the Ohio Redistricting Commission's May 6, 2022 Resubmission of the Invalidated February 24, 2022 Plan (B) Petitioners' Objections to the Already-Invalidated February 24, 2022 Plan, Re-Adopted on May 5, 2022, and Request for Immediate Relief; and (C) Petitioners the Ohio Organizing Collaborative, et al. Joinder in Objections to the Already-Invalidated February 24, 2022 Plan, Re-Adopted on May 5, 2022 Filed by Petitioners Bria Bennett, et al. in Case No. 2021-1198, filed on ***May 9***, 2022 in Case Nos. 2021-1193; 2021-1198; and 2021-1210; Combined Response of Respondent Governor Mike DeWine to (A) Petitioners' Second Motion for An Order Directing Respondents to Show Cause For Why They Should Not be Held in Contempt of The Court's April 14, 2022 Order; (B) Petitioners Motion for an Order Directing the Respondents to Show Cause, Motion to Schedule a Contempt Hearing, and Motion for Attorneys' Fees; and (C) Motion of Petitioners the Ohio Organizing Collaborative, et al., For an Order Directing Respondents to Show Cause as to Why They Should Not be Held in Contempt, filed on ***May 12***, 2022, in Case Nos. 2021-1193; 2021-1198; and 2021-1210.

judicially declared." *Kniskern v. Amstutz*, 144 Ohio App. 3d 495, 496-97, 760 N.E.2d 876 (8th Dist. 2001) (quoting *Hicksville v. Blakeslee*, 103 Ohio St. 508, 517–518, 134 N.E. 445 (1921) (italic emphasis in original; bold emphasis added)). "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 legislative plan. *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998) (emphasis added).[8]

Most importantly, immunity prohibits not only imposition of personal liability against the Commission, but any "judicial interference" that may "inhibit[]" its "exercise of legislative discretion." *Id.* at 52; *see also Spallone v. United States*, 493 U.S. 265, 279, 110 S.Ct. 625, 634, 107 L.Ed.2d 644 (1990) ("any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"). Such impermissible interference includes inquiry into legislative motive or intent, which would not, as a matter of law, serve as a basis for condemning any legislative act or omission in any event. "It 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). Thus, this Court "***will not examine*** into the motives, whether expressed or unexpressed, which may have induced the exercise of this power." *Id.* (emphasis added); *see also Barenblatt v. United States*,

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[8] *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.").

360 U.S. 109, 132–33 (1959) ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.").

"[I]nducing judicial inquiry into the conduct of legislative bodies" as Petitioners would have it, "has as frequently been declined by the courts, as not only indecorous, ***but as subversive of the independence of the legislature as a co-ordinate branch of the government. There is no authority for it in the constitution and laws of this state, and it is opposed to the practice and polity of our system of government***." *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 366 (1886) (emphasis added). Legislative privilege "would be of little value if [Commission members] could be subjected to the cost and inconvenience and distractions of a trial [like hearing] upon . . . the hazard of a judgment against them based upon [the Petitioners'] speculation as to [their] motives." *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

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Allegations that a legislative act or omission is the result of bad faith – or in Petitioners' words, "willful defiance," or an "'l'etat, c'est moi' approach to government"[9] – does not somehow make judicial inquiry into the Commission's deliberations any more appropriate. *See Hicksville*, 103 Ohio St. at 518-19 (legislative immunity may not be denied where legislator enacts unconstitutional law in purported bad faith). "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed." *Tenney*, 341 U.S. at 377. But legislative immunity has never turned on whether courts take a "favorable review" of the legislation at hand, because such a standard would render the protection "nearly meaningless" and

[9] [*See* LWV 6/8/22 Mtn. at 5; OCC 6/8/22 Mtn. at 1.]

"increas[e] politiciz[ation]" between the General Assembly and the judiciary. *Kniskern*, 144 Ohio App. 3d at 497. 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. "Courts are not the place for such controversies." *Tenney*, 341 U.S. at 377. They "may intervene only after a legislative enactment has been passed" for a reason. *Toledo*, 154 Ohio St. 3d 41, 2018-Ohio-2358,10 N.E.3d 1257, at ¶ 29.

OOC Petitioners' implication that, without an in person show-cause hearing, the Commission somehow evades "public scrutiny" is also wrong. As Justice O'Connor observed, "the power rests at all times with the people" – for example to petition for a new constitutional redistricting amendment altogether. *LWV V*, 2022-Ohio-1727 at ¶ 21 (O'Connor, J., concurring). Legislator motive is therefore no more open to question in the redistricting context than it is in any other setting. "For the wisdom or unwisdom of what they have done, within the limits of the powers conferred, they are answerable to the electors of the state, and no one else." *State ex rel. Gallagher v. Campbell*, 48 Ohio St. 435, 442 (1891).

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Accordingly, "[t]he 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: (1) holding a show-cause hearing; (2) inquiring into the Commission members' judgment or legislative process whatsoever; or (3) finding of contempt even if the Court had authority to issue one. *Tenney*, U.S. at 377; *Bigelow*, 138 Ohio St. at 502.

2. The Separation Of Powers Doctrine Precludes The Court From Exercising The Contempt Power Over The Commission Under *Toledo*.

Petitioners' renewed requests also contravene Ohio's separation of powers. Legislative tasks require a lawmaking body to exercise "judgment, wisdom, and discretion of a high order," [and] "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).

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The Commission's constitutional discretion cannot be usurped by the judiciary through litigation. *See* Art XI, Sec. 9(D)(1) ("No court shall order the commission to adopt a particular general assembly district plan or to draw a particular district."). The only remedy this Court can order, in fact, in the event that a proposed map is improper, is remand back to the Commission. *Id.* at Sec. 9(D)(3). Never, "***in any circumstance***" can this or any other court order implementation of a plan "that has not been approved by the commission," acting in its discretion, "in the matter prescribed by this article." *Id.* at Sec. 9(D)(2) (emphasis added).

"[M]aintaining respect for the enumerated powers granted expressly to the commission precludes this court from interfering with the exercise of those powers or attempting to supervise the commission's work through the threat of contempt." *See 05/25/2022 Case Announcements #4*, 2022-Ohio-1750 at ¶ 8. (Kennedy, J., concurring). This Court's decision in *Toledo*, 154 Ohio St. 3d 41, 2018-Ohio-2358,10 N.E.3d 1257, at ¶ 27, could not be clearer in this regard: "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.'"

Leveraging of the Court's contempt powers to manipulate the apportionment process violates this "fundamental feature of our system of constitutional government," posing a threat "to the preservation of all the rights, civil and political, of the individual." *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 63 Ohio St. 442, 451 (1900), on reh'g, 64 Ohio St. 67 (1901). As this Court unanimously held in *Toledo*, the judiciary cannot use the contempt power to "assert[] control over" the performance of "purely legislative" duties, even if those duties include knowingly enacting an unconstitutional law – ***and even if enactment of that legislation has the effect of violating a court order***. *See* 2018-Ohio-2358 at ¶ 1, 27-29 (trial court cannot enjoin the General Assembly from enforcing statutes reducing funding to "cities that were not acting in compliance with [General Assembly] statutes that had previously been declared unconstitutional").

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In rejecting Petitioners' repeated demands for show cause proceedings to date, this Court has demonstrated that it will not venture to achieve indirectly – through contempt orders – what the constitution prohibits it from doing directly, namely, dictating the apportionment process. *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"); *accord*: *Toledo*, 2018-Ohio-2358 at ¶ 27 (the judiciary may not use contempt power to "assert[] control over" legislative functions).

Put succinctly, "[t]his court had no authority to tell the commission whom to hire or how to work; it follows that the court cannot hold the commission in contempt." *Case*

Announcements #4, 2022-Ohio-1750 at ¶ 9 (Kennedy, J., concurring). The same is necessarily true in terms of the timing of a map, for "[t]he judiciary may not impede the General Assembly's plenary power to enact laws." *Toledo*, 154 Ohio St. 3d 41, 2018-Ohio-2358,10 N.E.3d 1257, at ¶ 29; *see also LWV V*, 2022-Ohio-1727 at ¶ 42 (Kennedy, J. dissenting) ("The majority concludes by setting another artificial, arbitrary deadline for a new district plan that it has no power to set while again retaining jurisdiction that it has no power to retain."); *see id.* at ¶ 42 (Fischer, J., dissenting) ("Today's majority opinion continues the pattern of first reviewing a General Assembly–district plan without the constitutional authority to do so and then, also without the constitutional authority to do so, ordering the commission to act in a certain way and on a specific schedule.). This Court "cannot tell the legislature what the law *should be* or dictate how the General Assembly should carry out its constitutional responsibilities," and the same goes for the Commission. *State ex rel. Jones v. Ohio State House of Representatives*, __ Ohio St. 3d __, 2022-Ohio-1909, __ N.E.3d ___, ¶ 10.

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3. The Court May Not Initiate Contempt Proceedings In Violation Of Governor DeWine's Due Process Rights.

Finally, 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); *Johnson*, 25 Ohio St. 3d at 55 ("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 constitutionally impermissible.[10]

Here, just as he lacks the means to independently adopt a constitutional plan, Governor DeWine lacks the authority to independently convene a Commission meeting as does any other individual commissioner. *See* Ohio Const. Art. XI Sec. 1(C) ("At the first meeting of the commission, which the governor shall convene only in a year ending in the numeral one, except as provided in Sections 8 and 9 of this article and in Sections 1 and 3 of Article XIX of this constitution, the commission shall set a schedule for the adoption of procedural rules for the operation of the commission."). Rather, the Commission must act by majority vote, *see* Art. XI Sec. 1(B)(1), as Co-Chair Sykes and Minority Leader Russo necessarily recognized by virtue of having sent letters to Co-Chair LaRe requesting such a meeting.

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Justice Kennedy's observation was thus correct: "no single member of the commission has the power to bind the commission or act (much less adopt a district plan) on behalf of the commission." *See 05/25/2022 Case Announcements #4*, 2022-Ohio-1750 at ¶ 13 (Kennedy, J., concurring). "Therefore, the individual members do not *carry the keys* of their prison in their *own pockets* with respect to the proposed purge conditions," i.e., reconvening the Commission and adopting a constitutional

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[10] *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"). Nor should "[a] contempt order use the [Governor] as a 'hostage' to put pressure on third parties" like the other Commission members "interested in his release" to force them to act as Petitioners dictate. *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 899 F.2d 143, 147–48 (2d Cir. 1990).

apportionment plan. *Id.* at ¶ 14 (emphasis in original).[11] For this additional reason, Petitioners' requests for contempt proceedings by another name violate Governor DeWine's due process rights and must be denied.

CONCLUSION

Petitioners' Motions must be denied.

Respectfully submitted,

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[11] Because the Court's May 25 Order in *LWV V*, 2022-Ohio-1727 at ¶ 5-6, like the *LWV IV* order before it, similarly "d[id] not clearly and definitely address the individual members of the commission," and Petitioners still "have not cited a case in which this court has held that individual members of a state legislative body can be held in contempt for the body's failure to comply with a court order," Governor DeWine submits that these failings also render Petitioners' fourth round of requests for contempt constitutionally deficient. *See 05/25/2022 Case Announcements #4*, 2022-Ohio-1750 at ¶ 13 (Kennedy, J., concurring).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the Court's electronic filing system on June 17, 2022, and served via email upon the following:

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