Supreme Court of Ohio Clerk of Court - Filed February 23, 2022 - Case No. 2021-1210

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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RESPONSE OF RESPONDENT GOVERNOR MIKE DEWINE
TO COURT'S SHOW CAUSE ORDER

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Relators,	:	
v.	:	Original Action Pursuant to Ohio Const., Art. XI
Ohio Redistricting Commission, *et al.*,	:	[Apportionment Case Pursuant to S. Ct. Prac. R. 1403]
	:	
Respondents.	:	

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IN THE
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INTRODUCTION

> "***We have an obligation to follow the constitution, we have an obligation to follow the court order and we have an obligation to produce a map.*** . . ."
>
> [Statement of Governor Mike DeWine, 2/17/22 Commission Meeting.[1]]

Governor DeWine is in full compliance with this Court's January 12 and February 7, 2022 Orders remanding this matter for the "***Commission***" to exercise its constitutionally delegated task of formulating a general assembly district plan in accordance with Article XI. As evidenced by the quote above, and as acknowledged in Petitioners' respective submissions, the Governor has consistently urged the Commission to "produce a map" and to do so notwithstanding disagreement with the Court's prior orders. The bottom line is that through his leadership and office, the Governor has sought throughout the entire redistricting process to secure a plan passing constitutional scrutiny. We submit this is undisputed and made clear throughout the extensive record before the Court.

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Yet, the Governor is but one of seven ***independent*** members of a ***separate*** constitutional body. Art. XI, Sec. 1(A). He lacks the legal power or capacity to dictate or compel a specific action, let alone result. While Article III, Section 5 of the Constitution vests the supreme executive power in the Governor, he enjoys no such status on, or power over, the Commission, let alone its members. He ***cannot*** direct the Commission or unilaterally act on its behalf, as is the case with each of its constituent members. He

[1] *See* http://ohiochannel.org/video/ohio-redistricting-commission-2-17-2022-part-2 [21:02].

does not control the purse strings for the Commission. In the first instance, the General Assembly is charged with "making the appropriations it determines [are] necessary for the commission to perform its duties. Art. XI, Sec. 1(D). And here, because of disagreements between Republican and Democrat members, ***the legislator-appointed co-chairpersons of the Commission constitutionally each control one-half of the apportioned funds***. Art. XI, Sec. 1(B)(2)(b). The other members do not control these funds. The Governor similarly ***does not possess*** the ability to oust or replace the Commission's members or even employ the Commission's staff, be they "map makers" or otherwise. Art. XI, Sec. 1(B)(2)(a).

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The constitutional reality is that a minimum of four votes, from those members specifically designated by Ohio voters, is necessary for the Commission to exercise its exclusive power and adopt a new plan. Art. XI, Sec. 8. This Court's Orders, thus, are purposefully specific in remanding this matter to the "***Commission***" for further action, as opposed to the individual Respondent members, because the Commission necessarily is the only party that can lawfully establish a new redistricting plan comporting with Article XI.

The Governor has faithfully and fully discharged his duties. Therefore, factually no grounds exist from which a contempt citation may issue. Fundamental legal principles also preclude any contempt citation. First, a party may not be held in contempt for failing to comply with an order issued to ***another party*** where ***the responding party lacks the ability to control*** or compel the ordered party, as is the case here. *See infra at 9.* Second, where ***performance is impossible*** either factually or legally, no contempt citation may issue. *See infra at 11.*

Finally, the threat of contempt runs afoul of Ohio's constitutional separation of powers and the express language of Article XI. Ohio voters, in adopting Article XI, clearly delineated the respective roles of this Court and the Commission on the subject of a redistricting plan. The Court is empowered to review and determine the constitutionality of a redistricting plan. But it is expressly prohibited from ordering "the commission to adopt a particular general assembly district plan or to draw a particular district." Article XI, Sec. 9(D)(2). It likewise is prohibited "***in any circumstance***" from ordering the "implementation or enforcement of any general assembly district plan that ***has not been approved*** by the commission." Article XI, Sec. 9(D)(1) (emphasis added). If the Court declares a plan invalid, its power is limited to ordering "the commission to adopt a new general assembly district plan ***in accordance with [Article XI]***[.]" That necessarily means the Commission must then take up the task once again of preparing a redistricting plan—the manner and timing of which rests exclusively with the Commission subject to this Court's review of a subsequently-issued plan.

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It is axiomatic that the Court cannot indirectly command by means of a contempt citation what it cannot accomplish directly. *New Orleans Water Works Co. v. New Orleans*, 164 U.S. 471, 481, 17 S.Ct. 161, 41 L.Ed. 518 (1896). Under the settled separation-of-powers doctrine, the Court cannot invade the exclusive province of the Commission by ordering the submission of a new redistricting plan on a specific timeline, be it by a threat of contempt or otherwise, just as this Court has held (as recently as 2018) that it cannot constitutionally compel the legislature to issue legislation given Ohio's separation-of-powers doctrine. *See Toledo v. State,* 154 Ohio St.3d 41,

2018-Ohio-2358, 110 N.E.3d 1257, ¶ 27. This Court's constitutional powers are only re-engaged once the Commission issues a new plan.

PERTINENT FACTS

A. Governor DeWine Consistently Urged His Commission Colleagues To Collaboratively Work Together And Adopt District Maps In Accordance With The Ohio Constitution.

We submit the salient points are undisputed.

As but one of seven members of the Commission, Governor DeWine has no ability to unilaterally direct or dictate the Commission's actions or decisions. His only unique responsibility under Article XI(C) is to convene the first meeting of the Commission, which he did in August 2021. Beyond that, however, the Governor has no greater ability to control the Commission's map-drawing activities than any other member. Rather, as with the State's historical re-districting efforts, control of those efforts is significantly in the hands of the legislator-appointed Commission members.

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This legislative control is, in significant part, ingrained in the 2015 Constitutional amendment that created the Commission. For example, under Article XI(A) of the Constitution, the legislative leaders of both the Ohio House and Senate are charged with appointing the Co-Chairs of the Commission. Further, in the absence of bi-partisan agreement, Article XI(B)(2)(b) delegates to each legislator-appointed Co-Chair control of the Commission's monies—the authority to "expend one-half of the funds that have been appropriated to the commission." As such, the legislator-selected Commission members control the funding; select and retain the experts who prepare the proposed maps; and under the rules of the Commission (just recently revised), controlled when meetings—subsequent to the initial meeting—would be held.

Consistent with the funding structure and appointment of Co-Chairs under Article XI of the Ohio Constitution, Governor DeWine and the other executive branch members of the Commission rely upon the expert map-makers employed by the legislator-appointed Commission members.

Despite these inherent limitations, Governor DeWine consistently and repeatedly championed a collaborative effort by the Commission to draw and, ultimately approve, a map that complies with the Ohio Constitution. To that end, and leading up to the Commission's initial vote on September 15, 2021, Governor DeWine undertook deliberations with other Commission members, seeking bi-partisan agreement on a ten-year plan pursuant to Article XI, Section 8(C). He continued attempting to facilitate and foster proposed revisions to the parties' respective maps that, he hoped, would lead to a bi-partisan plan that satisfied the constitutional requirements until early evening on September 15, when it became apparent that his efforts at bi-partisan agreement would not be successful.

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When his efforts at collaboration ultimately did not bear fruit, Governor DeWine publicly expressed his deep disappointment with the Commission's inability to work together:

> I am deeply disappointed at where we are tonight. I'm very, very sorry that we are where we are. I know, I know, this committee could have produced a more clearly constitutional bill. ... The parties are not that far apart. I won't go into the details, but they're not. They think they are, but they're not. Tonight, it has become clear to me that there is not going to be a compromise. ... What I do, what I am sure in my heart is that this committee could have come up with a bill that was much more clearly, clearly, constitutional. I'm sorry we did not do that.

Governor DeWine made this statement during the Commission's September 15, 2021 Meeting. Video of Governor DeWine's statement is available at https://www.ohiochannel.org/video/ohio-redistricting-commission-9-15-2021, and can be found at 32:20 to 36:09.

B. Governor DeWine Urges The Commission And Staff To Undertake Diligent Efforts To Comply With The First And Second Supreme Court Decisions.

1. Governor DeWine Works Toward And Urges Compliance With The First Supreme Court Decision.

After this Court issued its first decision on January 12, 2022 (the "First Supreme Court Decision"), Governor DeWine made a push for consideration and adoption of a plan that, to the greatest extent possible, satisfied the Court's ruling and the Ohio Constitution. Although, under then-existing Commission rules, Governor DeWine lacked the ability to unilaterally call a meeting of the Commission, he urged the calling of a meeting as soon as possible.

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On January 18, 2022, the Commission met. At that meeting, Governor DeWine reiterated the need for all Commission members, map-drawers, and staff to focus on producing a map that complied with the Ohio Constitution and the Court's initial ruling:

> I would interpret what the court is saying is that each individual commission member should instruct their respective staff members to abide by the court's ruling and address the court's ruling regarding section six of the Ohio Constitution. So anybody who is drawing a map, anybody who works with any with any [sic] of the members of this commission should be instructed by the individual commission members to do that.

Video of the Commission's January 18, 2022 meeting is available at https://www.ohiochannel.org/video/ohio-redistricting-commission-1-18-2022. The quoted

excerpt is included as part of the Governor's statement found at 2:40 to 8:24 of the video recording.

Following the January 18, 2022 meeting, Governor DeWine continued to push the Commission to come up with and approve a plan that, he hoped, would comply with the Court's ruling. At another Commission meeting on January 20, 2022, for example, Governor DeWine reiterated to Mr. Glassburn, one of the mapmakers selected by the legislator-appointed minority members of the Commission, that the Governor's "instructions" were to "*get as close to these numbers [derived from the First Supreme Court Decision] as we can*. But we also know that we cannot violate the other sections [of the Ohio constitution]." Video of this meeting is available https://www.ohiochannel.org/video/ohio-redistricting-commission-1-20-2022. Governor DeWine's questioning of Mr. Glassburn is found at 55:13 to 1:00:40 of the video.

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2. Following The Second Supreme Court Decision, Governor DeWine Urges His Colleagues To Immediately Craft And Vote On A New Map, And Resists Efforts To Declare An Impasse.

After the second Supreme Court Decision was issued on February 7, 2022 (the "Second Supreme Court Decision"), Governor DeWine believed and strongly advocated that the Commission should continue to work on crafting a new map that, to the greatest extent possible, complied with both Supreme Court decisions and the Ohio Constitution.

To that end, and despite acknowledging the inherent difficulty in attempting to satisfy all potentially-applicable criteria, Governor DeWine made clear his belief that the Commission needed to ***keep trying*** to comply with the Court's ruling. Thus, in a statement issued on February 14, 2022 at Governor DeWine's direction, his press secretary, Dan Tierney, told the media:

> The Governor believes that the Commission must attempt to comply with the Ohio Constitution and most recent court order regarding a new map. ... The biggest hurdle remains that Ohio's political geography does not match the proportionality of recent statewide votes. That being said, the Governor believes the Commission should attempt to comply with the recent order.

https://twitter.com/JoshRultNews/status/1493320313354039311?t=e1hTAgQ8Q_hHIgq-9ti6yg&s=19

The Governor expressed publicly, as well as privately, to members of the Commission, his opposition to declaring an impasse and temporarily halting efforts to formulate a new plan. Yet, no new map was drawn before the Commission announced, at its February 17, 2022 meeting, that an impasse had been reached. At that meeting, Governor DeWine publicly stated:

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> We have an obligation to follow the Ohio Constitution. We have an obligation to follow the court order. Whether we like it or not, whether we agree with it or not. And three, we have an obligation to produce a map. … We have passed a map and the Supreme Court has said, what they said it was not adequate. We passed the second map and the Supreme Court said the same thing again, but added different language. If we leave here without getting a map. We are giving the court absolutely nothing to react to. No one said this is easy. But I believe that we can. If giving the map makers specific instructions, we can come up with a map that fits better with the Constitution as well as the court order. I think that's our obligation. We have an obligation to follow the constitution, we have an obligation to follow the court order and we have an obligation to produce a map. …

That statement exactly summarizes what Governor DeWine has consistently emphasized since the Court issued the Second Supreme Court Decision. The Governor's full statement at the February 17, 2022 meeting can be found at 1:49:40 to 1:54:15 of the video recording available at https://www.ohiochannel.org/video/ohio-redistricting-commission-2-17-2022.

LAW AND ANALYSIS

A. An Individual Commission Member Is Not Liable or Culpable For The Acts Or Omissions Of The Commission Or Its Other Members.

Within the constitutional framework, the Governor is not the principal of the Commission, has no legal power or control over the actions of the Commission or its members, and thus, he is not liable or culpable for the acts or omissions of the Commission or its members. *See Shillitani v. United States*, 384 U.S. 364, 371, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) (one must possess the power to purge the contempt at all times, otherwise the individual cannot be held in contempt); *Newman v. Graddick,* 740 F.2d 1513, 1528 (11th Cir. 1984) (defendant state Attorney General could not be held in contempt for failing to "prompt the Governor, the Legislature or the Parole Board" to remedy violations of a court order when the Attorney General had no right to control the actions of those officials).

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Multiple black-letter rules of law make this clear. First, a court cannot use the threat of contempt to require a party to overstep his lawful authority or to act outside the framework of the Constitution. *See New York State Ass'n for Retarded Children v. Carey,* 631 F.2d 162, 166 (2d Cir.1980). Second, a party must not be required to "coerce" others whose actions he does not control to avoid a contempt citation. *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 899 F.2d 143, 147 (2d Cir. 1990). As one court aptly explained:

> Were the law otherwise, one of two results could follow. A third person might assert his right not to accede, and the contemnor, in order to avoid contempt sanctions, would then have to exercise unlawful authority to satisfy the conditions imposed by the contempt order. Or a third person might, in order to spare the contemnor the heavy burden of contempt penalties, accede to the contemnor's demand even though he was not legally obliged to accede. Neither result is tolerable. A contempt order

should not use the contemnor as a "hostage" to put pressure on third parties interested in his release.

Id. at 147.

The conclusion is the same under basic principles of agency law. Put simply, the Governor cannot be held liable for the Commission's or its members' actions or inactions under any form of agency concept. It is a settled proposition of law that "[p]rincipals, not agents, are subject to vicarious liability." *Restatement (Third) of Agency*, § 7.03 cmt. *b*. "While the acts of an agent may be considered to be acts of the principal, ***acts of the principal are never imputed to the agent***." *Stein v. Rio Parismina Lodge*, 695 N.E.2d 518, 525 (Ill. App. 1998) (holding trial court could not consider claims against agent based on the principal's conduct) (emphasis added). *Accord: Washington v. B.E.I. Real Est.*, 2d Dist. Montgomery No. 12742, 1992 WL 19320, *3-4 (Feb. 5, 1992) (Grady, J., concurring) (noting that an agent is not liable for his principal's torts).[2] As one court explained, "[t]o hold otherwise ... creates a theory of 'respondeat inferior,' which is not recognized in the law." *United Magazines Co. v. Murdoch Magazines Distrib., Inc.*, 353 F. Supp. 2d 433, 441 (S.D.N.Y. 2004) (applying agency law to statutory tort claim, court held agents could not be found liable for their principal's conduct).

The Governor is not the principal for the Commission and is not liable for its actions (or inaction). Similarly, the Governor is not a principal or co-agent of other

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[2] *See also Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 534 (5th Cir. 1997) (court refused to adopt "an unprecedented rule of vicarious liability [that] would impose individual liability upon subordinates for the acts and omissions of superiors, over whom they have neither control nor authority, thereby creating a new liability theory of *respondeat inferior*"); *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 578 (S.D. Tex. 2001) (holding corporate officer was not liable for corporation's alleged tortious conduct in the absence of evidence that officer played any role in the decision-making at issue); *Loeb v. U.S. Dep't of Interior*, 793 F. Supp. 431, 437 (E.D.N.Y. 1992) (holding an agent cannot be held responsible for the torts of its principal in which the agent was not involved and did not control).

members of the Commission, and thus, he has no responsibility or liability for their actions or inaction. They are each independent constitutional designees.

B. <u>The Impossibility Of Performance Excuses Any Personal Liability.</u>

The impossibility of performance also bars a finding of liability here. The Governor, alone, cannot personally perform that which only the Commission can. *See, e.g., State ex rel. DeWine v. Washington C.H.*, 12 Dist. Fayette No. 2013–12–030, 2014-Ohio-3557, ¶¶ 29-38 (accepting city's impossibility of performance defense to the contempt charge, even though it participated in negotiating consent decree, where it was clear that the city could not make the necessary wastewater improvements over the 3-year timeline in consent decree); *see also Johnson v. Robinson*, 987 F.2d 1043 (4th Cir. 1993) (Defendants could not be held in contempt because they possessed no control over whether they would receive the requisite funding for all repair projects).

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Such "impossibility" exists here, both factually and legally, on multiple levels, ranging from the Governor's inability to unilaterally raise funds and engage staff to his inability to unilaterally issue a new redistricting map. The Governor's impossibility of performance necessarily compels denial of any contempt citation.

C. <u>The Separation-of-Powers Doctrine Precludes One Branch Of Government From Asserting Control Over, Or Dictating The Performance Of, Duties Vested In Another Branch of Government.</u>

Separation of Powers is yet another doctrine whose application here precludes a contempt finding against the Governor. As this Court has already written, Ohio's Constitution establishes the Redistricting Commission as a separate branch of government. For this response, it matters not whether the Commission falls within the legislative or executive branch or somewhere else on the spectrum of independent

constitutional actors. What is dispositive, as determined by Ohio voters, is that the Commission is constitutionally independent from the judiciary. Its function is not purely ministerial. Instead, the tasks constitutionally assigned to the seven members comprising the Commission necessarily require the exercise of discretion, judgment, and deliberation.

The Redistricting Commission is entitled to the same autonomy and independence constitutionally afforded other branches of government in the discharge of their duties. Instructive, given the particulars of this case, is this Court's recent decision in *Toledo v. State,* 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, at ¶¶ 24-29*,* wherein it held a trial court abused its discretion when it enjoined the state from enacting new statutes as punishment for ***contempt of court***. *Toledo* recounts and applies the key propositions of law emphasizing the separation of powers between the judiciary and the legislative branch—legal principles well established under Ohio jurisprudence and repeated throughout literally decades of this Court's decisions.

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Of import here, the *Toledo* Court noted that "[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***." *Id.* at ¶ 27. *See also State ex rel. Slemmer v. Brown*, 34 Ohio App.2d 27, 28, 295 N.E.2d 434 (10th Dist.1973) ("The judiciary has no right or power to command the General Assembly to adopt joint resolutions"). "Such court action is not only excessive judicial interference in legislative matters, but is also judicial action upon a non-justiciable issue." *Maisons Lafayette, Inc. v. Luken*, 1st Dist. Hamilton No. NOS. C-77698, C-7769, 1978 WL 216569, *3 (Nov. 1, 1978). Equally true, "this court has no authority to consider or determine the question of the validity or

constitutionality of a proposed constitutional amendment prior to its adoption by the people." *State ex rel. Slemmer*, 34 Ohio App.2d at 28-29.

The instant case is no different. This Court has ruled on the propriety of the proposed plans. As a result, the task of formulating a new plan was necessarily remanded back to the only branch of government constitutionally permitted to formulate a new plan: the Commission. This Court's judicial scrutiny over the next version of the redistricting plan will not be invoked until at least four members of the Commission approve a new plan because, under the express language of Article XI and just as in the legislative context, "the judicial function does not begin until after the legislative process is completed." *Toledo,* 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, at ¶ 27.

Until that occurs, the Court cannot compel the passage of a plan on a specific time frame without running afoul of separation of powers and the constitutional limitation found in Article XI, Sec. 9(D)(1) prohibiting this Court from "***in any circumstance***" ordering the "implementation or enforcement of any general assembly district plan that ***has not been approved*** by the Commission.

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D. Alternatively, Contempt Power May Not Be Exercised To Punish The Redistricting Commission For Allegedly Failing To Perform Its Constitutional Function.

Finally, the underlying premise for the power of contempt is that it is "necessary to the exercise of ***judicial functions***." *Denovchek v. Trumbull Cty. Bd. of Commrs.*, 36 Ohio St.3d 14, 15, 520 N.E.2d 1362 (1988) (emphasis added). "[T]he primary interest involved in a contempt proceeding is the authority and ***proper functioning of the court***." *Id.* at 16 (emphasis added).

Courts do not, by contrast, have an interest in ensuring the "authority and proper functioning" of the Commission's constitutionally defined powers – especially where such processes are not yet completed. *See New Orleans Water Works Co. v. New Orleans*, 164 U.S. 471, 481, 17 S.Ct. 161, 41 L.Ed. 518 (1896) ("a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character"); *see also Toledo*, 154 Ohio St.3d 41, 2018-Ohio-2358, 110 N.E.3d 1257, at ¶ 28 (citing *New Orleans Water Works*, *supra*, favorably). "The same exemption from judicial interference applies to all legislative bodies, so far as their legislative discretion extends." *McChord v. Cincinnati*, N.O. & T.P. Ry. Co., 183 U.S. 483, 496–97, 22 S.Ct. 165, 46 L.Ed. 289.

While the parties disagree as to the result, the Court has performed its judicial function. It considered and ruled on the propriety of the redistricting plan. The next step is not a "judicial function"—it is a power specifically granted to a separate constitutional body—and thus not addressable by contempt.

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CONCLUSION

For these reasons, the Governor, as but one member of a seven member commission, constitutionally possesses control in only one respect: over his own actions. ***The evidence is clear that the Governor has affirmatively acted for the specific purpose of causing the Commission to issue a redistricting plan compliant with the Constitution and this Court's decisions***. He lacks power beyond that, and cannot be personally held accountable for the Commission as a whole. No contempt citation may issue.

Respectfully submitted,

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