IN THE SUPREME COURT OF OHIO

THE OHIO ORGANIZING COLLABORATIVE, *et al.*, *Petitioners*, *v.* OHIO REDISTRICTING COMMISSION, *et al.*, *Respondents*.	:	Case No. 2021-1210 **APPORTIONMENT CASE** Filed pursuant to S.Ct.Prac.R. 14.03(A) and Section 9 of Article XI of the Ohio Constitution to challenge a plan of apportionment promulgated pursuant to Article XI.

MOTION OF PETITIONERS THE OHIO ORGANIZING COLLABORATIVE, ET AL. FOR AN ORDER DIRECTING RESPONDENTS TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CONTEMPT

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INTRODUCTION

On May 5, 2022, the Ohio Redistricting Commission voted 4-3 to readopt the February 24, 2022 General Assembly district plan, which this Court had declared to invalid and unconstitutional. The Commission's conduct was a power grab with the highest possible stakes: thwarting the expressed will of the people of Ohio about how they wish to be represented and openly defying this Court's power to say what the law is.

The Commission and its individual members have brazenly and repeatedly violated this Court's orders, thereby causing delay and prompting federal court intervention. The Commission has no justification for its lawless conduct and does not offer any. Its "Notice of Resubmission" gives no explanation. It merely attaches a statement from the Secretary of State, leaving the Court to draw inferences about the Commission's motives or rationale. But it is not hard to understand what the Commission is doing here. It is trying to run out the clock so that it can take advantage of a federal ruling that would impose an unconstitutional plan on Ohio if the State cannot produce a lawful plan by May 28. Because the Commission's maneuver publicly flouts Ohio law to obtain an unlawful benefit for the partisan majority, it is the epitome of contempt.

Petitioners respectfully ask this Court to order the Commission, and four of its individual members who voted to readopt the unconstitutional February 24, 2022 plan—Governor Mike DeWine, Secretary Frank LaRose, Senator Rob McColley, and Representative Jeff LaRe—to show cause by 9:00 a.m. on May 13, 2022, why they should not be held in contempt. Upon a finding of contempt, this Court should order remedies and sanctions designed to end this constitutional merry-go-round. Specifically, this Court should order each of these four Commissioners to pay a fine of $10,000 per day until they enact a constitutional plan. The Court should order the Commission and each Commissioner to meet in person every day until the Commission adopts a constitutional plan. The Court should order the Commission and each

Commissioner to appear personally before this Court on a weekly basis to provide a status update. And as part of its contempt power, this Court should order a plan for use in the 2022 election unless the Commission enacts a constitutional plan by May 19, 2022.

BACKGROUND

On April 14, this Court ordered the Commission to reconvene and enact a constitutional plan by May 6. The Commission refused that order. It did not convene for 20 days, wasting almost all of the time allocated to it under this Court's ruling. It did not bring back the independent mapmakers who were only hours or, at most, a day or two away from completing a plan that was "on track to being constitutionally compliant." *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-1235, ¶ 74 ("*League IV*"). Other experts completed the independent mapmakers' work and submitted an amended version of their plan to the Commission, but the Commission rejected the constitutionally compliant plan in favor of a plan that this Court has already invalidated.

I. The Commission's Prior Pattern of Contemptuous Conduct

On February 17, 2022, after twice failing to produce a constitutional plan, the Commission failed even to enact a new plan and declared an "impasse," in contravention of this Court's order to produce a new plan. *League of Women Voters of Ohio v. State Redistricting Comm'n*, 2022-Ohio-789, ¶ 9 ("*League III*"). On February 18, this Court ordered the Commission to show why it should not be held in contempt. *Id.* at ¶ 10. Possibly spurred by this Court's order, on February 24, the Commission adopted another General Assembly district plan. *Id.* at ¶ 16. The Court ordered petitioners to file any objections by February 28. *Id.* at ¶ 20.

Without waiting for the petitioners' objections, on February 26, Secretary LaRose issued a directive to all county boards of elections instructing them to program the House and Senate maps into their systems. *League III* at ¶ 190. In his directive, Secretary LaRose acknowledged

that "decisions in ongoing litigation may render some or all of this Directive moot" and "[i]n that event, my Office will issue additional instruction." *Id.*

On March 16, 2022, this Court invalidated the February 24 plan after finding that the Commission's process was "one-sided" and "flawed." *League III* at ¶ 30–31. In its order, this Court found that "the map-drawing process … has been controlled by the Republican Party" and ordered that "the commission," as opposed to partisan mapmakers, "draft and adopt an entirely new … plan." *Id.* at ¶ 44. The Court clarified that "[t]he commission should retain an independent map drawer—who answers to all Commission members, not only to the Republican legislative leaders—to draft a plan through a transparent process." *Id.* ¶ 30.

In its fourth iteration, the Commission adopted a "historic" bipartisan process, hiring two independent mapmakers, Dr. Douglas Johnson and Dr. Michael McDonald, one selected by each political party, to produce a plan. *League IV* at ¶ 39. The mapmakers produced a draft map and said they needed only "a couple more hours" to finish the process. But Republican Commissioners scuttled the process in the 11th hour, abruptly moving to adopt a map "materially identical" to previously invalidated February 24 plan, in contravention of this Court's order to produce an "entirely new" plan. *Id.* at ¶¶ 19, 50. Unrebutted testimony in the related federal case established that the map produced by the independent mapmakers was substantially compliant with the Ohio Constitution, and that the necessary technical adjustments to reach full compliance would take "[n]o more than one day" to complete. *Gonidakis v. LaRose*, No. 2:22-cv-773, Doc. 150, at 74 (S.D. Ohio). In that federal lawsuit, Dr. Jonathan Rodden submitted a version of the independent mapmakers' plan that made these technical corrections and was fully compliant with Article XI's line-drawing provisions. *Id.*, Docs. 177, 177-1.

On April 14, this Court invalidated the Commission's fourth map for violating the Ohio Constitution and ordered the Commission to draw a new map. *League IV* at ¶ 44. This Court observed that "Despite our admonition in *League II*," the Commission used "an invalidated plan and tweak[ed] it a bit." *Id.* at ¶ 42. Thus, "[a]s before, the Commission did not adopt a plan using a process that Article XI and this court's prior decisions require." *Id.* The Court "express[ed] the view that the commission should use the independent map drawers' work thus far as a starting point for the next plan." *Id.* at ¶ 77.

II. Federal Court Intervention

On February 18, 2022, a group of Ohio Republican voters and activists sued the Commission and the Secretary of State, complaining that they lacked any legislative districts that would allow them to organize, campaign, and ultimately vote for offices as they had in past election cycles. *Gonidakis*, No. 2:22-cv-773, Doc. 1 (S.D. Ohio). On March 30, the three-judge district court overseeing the case held a preliminary injunction hearing and suggested that April 20 would be the "drop-dead" date for Ohio to adopt a plan. *Id.*, Doc. 150 at 79, 83, 84, 108–113, 230, 234, 237, 239, 242.

On April 20, the federal court "stay[ed] [its] hand" but ruled that May 28 was "the last possible day ... for Ohio's election officials to feasibly implement a federally imposed map in time for the August 2 primary." *Gonidakis*, No. 2:22-cv-773, Doc. 196 at 4–5 (S.D. Ohio). The court ruled that if the State "does not reach a resolution before May 28," the court "will order" the primary election to be held August 2, 2022. *Id.* at 4. Additionally, by May 28, "if the State remains unable to implement its own valid map that satisfies federal law, then we must implement Map 3 [the February 24 plan]." *Id.* The court found that "[u]nder current state law, April 20 is the last day that Ohio can implement a map other than Map 3 to ensure a primary does take place on August 2," but that "Ohio can adopt Map 3 as late as May 28 and still meet

the August 2 deadline." *Id.* at 17. The court recognized that "[b]efore May 28, the General Assembly may set a new primary date or shorten the time it takes to conduct an election." *Id.* at 58. In recognition of the Commission's and this Court's ongoing proceedings, the district court "defer[red] ordering Map 3 as long as possible—a final pause in hope that Ohio finally approves a map that complies with federal and state law." *Id.* at 4.

III. The Commission Waits Nearly Three Weeks to Meet and Readopts the Unconstitutional February 24 Plan

A. The Commission Fails to Schedule a Timely Meeting

Following this Court's April 14 ruling, which ordered the Commission to "convene … draft, and adopt a new map" that was to be filed with the Secretary of State by 9:00 a.m. on May 6, *League IV* at ¶ 68, the Commission had just under a week to produce a compliant plan prior to the April 20 date identified by the federal court. House Minority Leader Allison Russo and Senator Vernon Sykes reportedly sought to reconvene the Commission prior to April 20, writing to the Commission, "Senator Sykes has made repeated calls to our commission co-chairman. Unfortunately, over the holiday weekend, these calls went unanswered."[1] The Commission could have adopted a new plan in time to meet the April 20 date, but it did nothing between April 14 and April 20. Two full weeks after this Court's decision, on April 28, Speaker Cupp set a date for the Commission's first meeting the following week, on May 4 at 2:00 p.m.—less than 48 hours before this Court's deadline.[2]

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[1] Davidson, J.D., *Ohio Redistricting Commission Democrats want process started again*, Highlight County Press, https://highlandcountypress.com/Content/In-The-News/In-The-News/Article/Ohio-Redistricting-Commission-Democrats-want-process-started-again/2/20/78545 (visited May 10, 2022).

[2] Skolnick, David, *Secretary of State Frank LaRose questions new maps' approval chance*, The Vindicator, https://www.vindy.com/news/local-news/2022/04/secretary-of-state-frank-larose-questions-new-maps-approval-chance/ (visited May 10, 2022).

B. The Commission Meets for the First Time on May 4 and Declines to Engage Independent Mapmakers

On May 4, the Commission met for the first time since the Court had invalidated its last plan on April 14. Senator Huffman and Speaker Cupp appointed Senator Rob McColley and Representative Jeff LaRe, respectively, to join the Commission in their steads. The meeting lasted 77 minutes, and the Commission spent 30 of those minutes on billing and funding disputes, leaving 47 minutes to address the task of drawing a map.

On a party line (5-2) basis, the Commission voted down a motion to rehire independent mapmakers Dr. Johnson and Dr. McDonald. Republican Commissioners gave several different explanations, although Governor DeWine admitted, "we have an obligation to come up with a map." (05/04/22 Hrg. Tr. 00:48:11–00:53:34)[3] Senator McColley, who replaced Senator Huffman on the Commission, argued that partisan mapmakers, rather than independent experts Johnson and McDonald, are the "most qualified in the entire country" to draw maps. (*Id.* at 00:31:25–00:32:56) He also argued that the independent mapmakers had put partisanship "on such a pedestal" and had subordinated compactness and community splits. (*Id.* at 1:04:27–1:11:17) He did not respond to Leader Russo's comment that the independent map had a better compactness score and the same splits as the February 24 plan (*id.* 1:04:27–1:14:30), a fact also reflected in this Court's opinion. *See League IV* at ¶ 54 (finding that "petitioners have offered unrebutted evidence that the third revised plan is less compact than the independent map drawers' plan").

Governor DeWine, while acknowledging that "we have an obligation to come up with a map," said that the independent mapmakers were not avoiding partisan favoritism because "the court was requiring them to favor the Democrats every single time." (05/04/22 Hrg. Tr.

[3] https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-4-2022-296/transcript-1641.pdf.

00:48:11–00:53:34) Auditor Faber stated that he did not look at the details of the independent maps, and argued that the Ohio rules were too "complex" for the independent mapmakers to follow. (*Id.* at 01:04:27–01:11:17)

In voting down the motion, Secretary LaRose, who later submitted a supplementary statement to the Commission, argued that he "can't see any way that we can pass a new map" because passage of a constitutional map would not be "viable" to administer in time for the August 2, 2022 election. (05/04/22 Hrg. Tr. 00:33:53–00:42:14; 05/05/22 Statement to Commission by Secretary LaRose[4]) He said that if a map were passed "tomorrow," the Ohio Supreme Court would allow one week for petitioners to object and three weeks to consider those arguments. (05/04/22 Hrg. Tr. 00:33:53–00:42:14) That would take them to "just within a week and a half… to send out military ballots." (*Id.*) Secretary LaRose said the February 24 plan did not pose those challenges because he had previously ordered the plan to be programmed into county board of elections systems on February 26. (*Id.* at 00:46:02–00:46:53) When the plan was invalidated, Secretary LaRose never ordered its removal from county systems. (*Id.*)

Senator McColley stated that changing the election deadlines would require emergency legislation, and that "based upon previous conversations that we've had in our own caucus," he opined that there would not be votes for the change. (05/04/22 Hrg. Tr. 01:04:27–01:11:17)

C. The Commission Declines to Adopt the Corrected Independent Plan and Instead Readopts the Unconstitutional February 24 Plan

On May 5, 2022, the Commission met for 80 minutes. Leader Russo moved to adopt the Corrected Independent Map Drawers' Plan (the "Corrected Independent Plan"), which was a

[4] https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-5-2022-316/statement-to-commission-by-secretary-larose-2022-5-05.pdf.

version of the independent mapmakers' plan with modifications by Dr. Rodden to remedy minor technical issues. The Corrected Independent Plan had been submitted to the federal court in *Gonidakis* on April 8 and was filed with this Court in *Bennett v. Ohio Redistricting Comm.*, No. 2021-1198, on April 12.

On a 5-2 party line basis, the Commission voted down Leader Russo's motion. In opposing, Senator McColley argued that the map violated the Ground Rules set by the Commission because it included districts drawn by Chris Glassburn, a consultant working with the Democratic Commissioners, and because Dr. Rodden made adjustments "outside the purview of this commission." (05/05/22 Hrg. Tr. 00:03:43-00:06:10)[5] Auditor Faber argued that the adjustments made by Dr. Rodden were not "fair" because of Dr. Rodden's role as an expert witness in this litigation. (*Id.* at 00:08:44–00:10:05) Neither Auditor Faber nor Senator McColley had voted to re-engage the independent mapmakers or engage new independent mapmakers. Neither offered any amendments to the plan.

Senator McColley claimed that independent mapmakers' plan violated the Ohio Constitution, but when asked specifically which constitutional violations he had identified, McColley demurred. In fact, no Commissioner identified any violations. Secretary LaRose insisted that he did not "share [the] optimism that the map is divinely inspired or perfectly void of any kind of constitutional violations." (05/05/22 Hrg. Tr. 00:27:52–00:28:52) Auditor Faber, despite receiving the map weeks earlier, said he "ha[d] no idea" about any constitutional violations because he had not "had a chance to review it in detail." (*Id.* at 00:08:44–00:10:05) Although Auditor Faber claimed that "a number of us had amendments," no Commissioners

[5] https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-may-5-2022-316/transcript-1642.pdf.

introduced any amendments. (*Id.*) Leader Russo asked the Commission, "If you are not happy with these maps, why no amendments have been offered to change this map…," to which no Commissioner responded. (*Id.* at 00:12:18–00:13:43) Secretary LaRose reiterated that because of the election administration deadlines, the February 24 plan is "what we have to work with." (*Id.* 00:16:53–00:22:39)

After rejecting the Corrected Independent Plan, the Commission also rejected a motion to consult with the Commission's attorney about whether the passage of the February 24 plan would subject the Commission to further charges of contempt. (05/05/22 Hrg. Tr. 00:30:00) Instead, Senator McColley moved to readopt the February 24 plan for use in the 2022 elections. Leader Russo opposed the motion because "the federal court has not overturned a state court decision" nor "given us a loophole to simply ignore a court order." (05/05/22 Hrg. Tr. 00:26:30–00:27:49) She also observed that the Commission does not have the authority to adopt a plan for only two years. (*Id.*)

After less than five minutes of discussion, the Commission approved the motion to readopt the February 24 plan for the 2022 election. Governor DeWine, Secretary LaRose, Senator McColley, and Representative LaRe voted in favor of the motion; Senator Sykes, Leader Russo, and Auditor Faber opposed. The Commission did not discuss or issue a statement explaining the constitutionality of the plan as required by Ohio Constitution, Article XI, Section 8(C)(2). The Commission did not explain its legal basis for enacting a plan for only one election, or state when or how it would enact a General Assembly district plan for the 2024 election. Petitioners filed a joinder to the Bennett petitioners' objections and resubmitted their own objections on May 6, 2022. Respondents filed their responses on May 9, 2022.

ARGUMENT

I. This Court Has Authority to Hold the Commission and Individual Commissioners in Contempt

This Court "possesses both inherent and statutory authority to compel compliance with its lawfully issued orders." *State ex rel. Bitter v. Missig*, 72 Ohio St.3d 249, 252, 648 N.E.2d 1355 (1995); *see Cramer v. Petrie*, 70 Ohio St.3d 131, 133-34, 637 N.E.2d 882 (1994); *State ex rel. Johnson v. Perry County Court*, 25 Ohio St.3d 53, 54, 495 N.E.2d 16 (1986); Ohio Rev. Code § 2705.02(A). More than a century ago, this Court explained, "Such [contempt] powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. * * * Without such power no other [power] could be exercised." *Hale v. State*, 55 Ohio St. 210, 213, 45 N.E. 199 (1896); *City of Cleveland v. Bright*, 2020-Ohio-5180, 162 N.E.3d 153, ¶ 17 (8th Dist.) (same). Thus, "[t]he purpose of civil contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice." *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55, 58, 271 N.E.2d 815, 817 (1971).

Certain respondents have argued that this Court's orders are directed to the "Commission," not them, and thus they cannot be held in contempt. The Court should reject that argument. The Commissioners are parties to this litigation and a majority of the individual Commissioners are causing the Commission to violate this Court's orders and the Ohio Constitution. Thus, to ensure judicial authority and to secure compliance with the administration of justice, courts may hold those responsible for defying it in contempt. *See Forsythe v. Winans*, 44 Ohio St. 277 (1886); *Wilson v. United States*, 221 U.S. 361, 376 (1911); *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 955 (9th Cir. 2014). Even non-parties

who interfere with the administration of justice may be held in contempt. *See* Ohio Rev. Code § 2705.01.

Civil contempt is warranted when clear and convincing evidence shows: "(1) a prior order of the court, (2) proper notice to the alleged contemnor, and (3) a failure to abide by the court order." *Judd v. Meszaros*, 10th Dist. Franklin, No. 10AP-1189, 2011-Ohio-4983, ¶ 41; *State ex rel. Doner v. Zehringer*, 134 Ohio St.3d 326, 2012-Ohio-5637, 982 N.E.2d 664, ¶ 3 (applying "clear and convincing evidence" standard for civil contempt). "Once the movant establishes this prima facie case of contempt, the burden then 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-2222, 36 N.E.3d 791, ¶ 13 (12th Dist.). This Court "is in the best position to interpret its own mandate and determine whether [the Commission] has complied with that mandate." *State ex rel. Cincinnati Enquirer v. Hunter*, 138 Ohio St.3d 51, 2013-Ohio-5614, 3 N.E.3d 179, ¶ 29 (citing *State ex rel. Jelinek v. Schneider*, 127 Ohio St.3d 332, 2010-Ohio-5986, 939 N.E.2d 847, ¶ 14).

II. The Commission and a Majority of Its Members Violated and Continue to Violate This Court's April 14 Order

Four of the Commissioners violated and continue to violate clear and unambiguous orders from this Court. In *League IV*, this Court ordered: "We sustain petitioners' objections to the third revised plan under Article XI, Sections 6(A) and 6(B) of the Ohio Constitution and invalidate the third revised plan in its entirety. We further order the Commission to be reconstituted, to convene, and to draft and adopt an entirely new General Assembly–district plan that meets the requirements of the Ohio Constitution, including Article XI, Sections 6(A) and 6(B) as we have explained those provisions in each of our four decisions in these cases." *League IV* at ¶ 78.

Four Commissioners violated this order by causing the Commission to delay until the last minute and then readopt an unconstitutional plan. The Commission did not "draft and adopt an entirely new General Assembly–district plan," much less one that "meets the requirements of the Ohio Constitution." *League IV* at ¶ 78. Instead, it readopted the previously invalidated February 24 plan that this Court already held violated the Ohio Constitution. Nor did the Commission even attempt to draft and adopt a new plan. It did nothing.

No evidence shows that the Commission was "unable" to comply with the Court's order. While individual Commissioners have suggested that it is not possible to meet all of the requirements of the Ohio Constitution, they are incorrect and their suggestions are based on refusal to recognize the validity of this Court's rulings. There are multiple plans on the record and before the Commission that comply with Section 6 as well as the line-drawing requirements of the Ohio Constitution. The independent mapmakers produced a plan that, as this Court observed, was "on track to being constitutionally compliant." *League IV* at ¶ 74. Dr. Rodden later made minor modifications to fix technical issues in that plan. Leader Russo and Senator Sykes presented the fully compliant plan to the Commission on May 5.

Respondents have had access to the corrected version of the independent mapmakers' plan for a full month because the Bennett petitioners submitted the plan and notice of correction to the federal court on April 6, 2022, and April 8, 2022, respectively. *See Gonidakis*, No. 2:22-cv-773, Docs. 177, 177-1 (S.D. Ohio). Respondents have never identified any specific constitutional defects with the independent mapmakers' plan. They simply disagree with this Court's ruling and refuse to follow it because, in Governor DeWine's words, "the court was requiring them to favor the Democrats every single time." (05/04/22 Hrg. Tr. 00:48:11–00:53:34) But disagreement with a court decision is not a justification for defying it.

Secretary LaRose asserted during the May 4 and 5 hearings that he could not implement anything other than the February 24 plan in time for an August 2 primary date for the 2022 election. His assertion is inconsistent with his earlier assurances that he could implement the February 24 plan in time for a May 3 primary date. *League III* at ¶ 190 ("On February 26, 2022, respondent Secretary of State Frank LaRose issued a directive to all county boards of elections, instructing them on how to prepare for the May 3, 2022 primary election using the second revised plan."). May 3 is 68 days after February 24; therefore, the conclusion follows that Secretary LaRose and the boards of election *can* implement a plan within 68 days of adoption by the Commission. Using Secretary LaRose's prior 68-day commitment as the standard, Ohio and its boards of election *could* implement a new plan in time for an August 2 primary so long the Commission adopts the new plan by May 26 (May 26 + 68 days = August 2) and the General Assembly adjusts election-related deadlines.

In any event, and more importantly, Secretary LaRose's assertions about what *he* and the *boards of election* can or cannot do are not relevant to the *Commission's* duties. The Commission's obligation was to draft and enact a new plan that complies with the Ohio Constitution. Whether the Secretary of State implements the new plan for 2022, or some other plan, is a separate question. The federal court left that question unresolved when it said, "Ohio's elected leaders might still approve a lawful map or change Ohio election laws and deadlines, and our choice of remedy is designed to give them still another chance to do so." *Gonidakis*, No. 2:22-cv-773, Doc. 196 at 3 (S.D. Ohio). Four of seven Commissioners willfully obstructed the administration of Ohio law, thereby depriving the State of its "chance" to enact a lawful plan. *Id.* No one could assess whether implementing a lawful plan for 2022 was possible if the Commission refused to enact a lawful plan.

The duty of the Commission is to convene, draft, and adopt a constitutionally compliant General Assembly district plan. *See* Ohio Constitution, Article XI, Sections 1, 8, 9. It must carry out these duties whether or not any of its members sincerely believe that the Secretary of State now needs more than 68 days to implement a new plan. *See id.* After the Commission enacts a constitutional plan, the federal court can revisit whether to order the implementation of the constitutional plan or, instead, the unconstitutional February 24 plan. The federal court contemplated just such a process; if it did not, it would have simply ordered the implementation of the February 24 plan instead of setting a May 28 deadline for the State to act. In any event, even if it were not possible to implement a new plan for 2022, the Commission still had the legal obligation to enact a constitutionally compliant plan by May 6. It breached that obligation by enacting a plan that this Court has already invalidated. And the Commission's own self-imposed refusal to enact a plan does not excuse compliance with that obligation. *In re A.A.J.*, 2015-Ohio-2222, 36 N.E.3d 791, ¶ 13 (12th Dist.).

III. Neither the Commission nor a Majority of its Members Have a Legally or Factually Valid Reason for their Ongoing Contempt

A. The Commission and Majority of Commissioners That Readopted an Unconstitutional Plan Cannot Claim Impossibility as a Defense

Any argument that it was impossible to implement any plan other than the February 24 plan for the 2022 election must fail. As discussed above, implementation of a plan is not the constitutional duty, responsibility, or concern of the Commission or the Commissioners. Again, the Commission's constitutional duty is to "to convene, and to draft and adopt an entirely new General Assembly–district plan." *League IV* at ¶ 78; *see also* Ohio Constitution, Article XI, Section 9(B) ("In the event that . . . any general assembly district plan made by the Ohio redistricting commission . . . is determined to be invalid . . . the commission shall be reconstituted . . . , convene, and ascertain and determine a general assembly district plan in

conformity with such provisions of this constitution as are then valid."). The Commission's duty is to adopt a constitutional plan, not to manage election deadlines.

Even if the Court were to accept Secretary LaRose's representations that April 20 is a practical deadline for implementing a new map, it was not impossible for the Commission to adopt a constitutional map by that date. Instead of repeatedly adopting maps that are "materially identical" to unconstitutional plans, the Commission could have taken its task to draft and adopt a constitutional map seriously in the first four iterations of the map-drawing process. *League IV* at ¶ 50. In fact, the Commission easily could have adopted a plan in the six days between this Court's April 14 order and April 20. But it deliberately chose not to. It did not even attempt to convene during that time or two weeks after. Any "impossibility" that the Commission finds itself confronting is of its own making, and "[t]he 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-2222, 36 N.E.3d 791, ¶ 13 (12th Dist.)

B. Legislative Immunity Does Not Attach and Would Not Shield Respondents from Contempt

Commissioners may once again rely on assertions that principles of legislative immunity shield them from contempt sanctions. These arguments do not hold. Not only is legislative immunity inapplicable, even if it were, it would offer no protections against civil contempt proceedings, especially in light of the egregious facts present here.

First, this Court should not equate the Commission with a legislative body. The Commission is an agency created by the Ohio Constitution for the limited purpose of drawing General Assembly districts consistent with the affirmative commands of Article XI and congressional districts consistent with Article XIX. The Commission is not required to have state legislators serve on it and must include three members of Ohio's Executive Branch (the

governor, state auditor, and the secretary of state). *See* Ohio Constitution, Article XI, Section 1(A). It is constitutionally limited both in terms of its operating procedures and substance of the district plans that it enacts. Furthermore, the Commission is currently convened under Section 9 of Article XI under order of this Court, which further circumscribes the Commission's current purpose and function. Simply put, the Commission is currently engaged in a remedial process under the direction and supervision of this Court and thus its members do not enjoy the benefit of immunity afforded to elected legislators who exercise legislative discretion. This Court's orders under Article XI were not optional or discretionary.

Second, legislative immunity, even if applicable, cannot shield the Commissioners from this Court's inherent contempt powers. "If courts are to be maintained and if they are to function properly in carrying out their constitutional and statutory duties, the defiance of court authority … cannot be tolerated." *State v. Loc. Union 5760, United Steelworkers of Am.*, 172 Ohio St. 75, 89–90, 173 N.E.2d 331 (1961). This is because "Courts must vigorously protect the dignity of their judgments, orders, and process. All those who would by misconduct obstruct the administration of justice must be on notice that they do so at their peril." *Id.* The contempt power, thus, necessarily reaches state officials because cannot be "reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto v. Finney*, 437 U.S. 678, 690, 98 S. Ct. 2565, 2573, 57 L. Ed. 2d 522 (1978).

Consistent with these principles, both this Court and the U.S. Supreme Court have allowed contempt to reach parties that would otherwise enjoy immunity. For example, in *State ex rel. Cincinnati Enquirer v. Hunter*, this Court upheld a finding of contempt against a Magistrate Judge who violated a valid writ of prohibition. *See generally* 138 Ohio St.3d 51, 2013-Ohio-5614, 3 N.E.3d 179. Further, the U.S. Supreme Court found that Eleventh Amendment sovereign

immunity did not preclude a court imposing civil contempt sanctions. *Hutto*, 437 U.S. at 690-92. Perhaps most importantly, the U.S. Supreme Court has explicitly found that legislative immunity does not "control the question whether local legislators such as petitioners should be immune from contempt sanctions imposed for failure to vote in favor of a particular legislative bill." *Spallone v. United States*, 493 U.S. 265, 278, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990). Ultimately, the *Spallone* majority reversed the district court's imposition of sanctions on individual council members, but only because this step occurred before the court had sanctioned the city itself. *Id.* at 280. Nonetheless, the Court did not foreclose the possibility that a federal court could use its inherent powers to hold individual city council members in contempt if coercing the city to comply with its orders failed. *Id.* And the operative facts in *Spallone* are easily distinguishable. That case dealt with *federal* court authority over sitting over individual lawmakers. Plus, the Commission, unlike the city council in that case, is not a legislative body, and it exists exclusively for the purpose of affirmatively enacting a valid district plan.

C. Separation of Powers Animate Rather than Constrain this Court's Contempt Powers

Separation of powers principles do not preclude contempt. The Ohio Constitution specifically contemplates a judicial supervisory role in redistricting, which empowers the Court to "order" the Commission to take actions in pursuit of a constitutional General Assembly district plan. *See* Ohio Const. Art. XI, Section 9(B). Therefore, Article XI does not place redistricting within the Commission's "exclusive control" as would be required to insulate it from judicial review under the separation of powers doctrine. *Cf. City of Toledo v. State*, 154 Ohio St. 3d 41, 10 N.E.3d 1257, ¶ 27. In *City of Toledo*, this Court held that a court could not, as punishment for contempt, enjoin the enforcement of a new statute that had not yet been ruled to violate the Constitution. 154 Ohio St.3d 41, 46, 110 N.E.3d 1257. But here, even assuming the February 24

plan is analogous to legislation, this Court has already declared that plan at issue is unconstitutional. This willful and flagrant defiance of this Court's order to adopt a constitutional map is therefore well suited for contempt. As *Toledo* recognized, "[i]f a valid restrictive order has been issued, a court has the statutory and inherent power to entertain contempt proceedings and punish disobedience of that order." *Id.* (quoting *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St.3d 56, 61, 556 N.E.2d 157 (1990)).

IV. The Court Should Order Remedies and Sanctions Designed to End the Defiance of the Commission and a Majority of its Members

"[C]ivil contempt sanctions are designed for remedial or coercive purposes and are often employed to compel obedience to a court order." *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 555, 740 N.E.2d 265 (2001). Accordingly, a civil contempt sanction will afford the contemnor an "opportunity to purge" the contempt. *Docks Venture, L.L.C. v. Dashing Pac. Grp., Ltd.*, 141 Ohio St.3d 107, 2014-Ohio-4254, 22 N.E.3d 1035, ¶¶ 15-16; *Bright*, 2020-Ohio-5180, ¶ 21.

Fines that accumulate daily until the contemnor complies with a court order are common sanctions for civil contempt. *See Cincinnati v. Cincinnati Dist. Council 51*, 35 Ohio St.2d 197, 214, 299 N.E.2d 686 (1973), fn. 1 ("It is well settled that separate fines may be assessed for each day in which a court's order is violated."); *State ex rel. McDougald v. Greene*, 158 Ohio St.3d 533, 2020-Ohio-287, 145 N.E.3d 296, ¶ 2 ("If the document is not provided by that date, then Greene will be subject to an additional sanction of $100 per day until such time as he complies with this court's order."); *City of Cleveland v. Bryce Peters Fin. Corp.*, 8th Dist. Cuyahoga No. 98006, 2013-Ohio-3613, ¶ 50 ("As a result of Bryce Peters' repeated failure to appear, the trial court had no alternative but to find it in civil contempt and begin assessing a daily contempt fine of $1,000 per property in an effort to compel its attendance.").

This Court should order the four individual Commissioners who voted to readopt the unconstitutional February 24 plan—Governor DeWine, Secretary LaRose, Senator McColley, and Representative LaRe—each to pay a fine of $10,000 per day until they enact a constitutional plan. Additionally, the Court should order the Commission and each Commissioner to meet in person every day until the Commission adopts a constitutional plan. The Court should order the Commission and each Commissioner to appear personally before this Court on a weekly basis to provide a status update. And as part of its contempt power, this Court should order a plan for use in the 2022 election unless the Commission enacts a constitutional plan by May 19, 2022, as discussed and for the reasons stated in the objections that petitioners joined on May 6, 2022.

CONCLUSION

This Court should order the Commission, and four of its individual members—Governor DeWine, Secretary LaRose, Senator McColley, and Representative LaRe—to show cause by 9:00 a.m. on May 13, 2022, why they should not be held in contempt. Upon a finding of contempt, this Court should order sanctions designed to remedy this ongoing refusal to comply with the Ohio Constitution and this Court's directives.

Dated: May 10, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, M. Patrick Yingling, hereby certify that, on May 10, 2022, I caused a true and correct copy of the foregoing Motion for an Order Directing Respondents to Show Cause why They Should not be Held in Contempt to be served by email upon the counsel listed below:

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